E.D. NO. 67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
Public Employer,

and

NEW JERSEY CIVIL SERVICE ASSOCIATION-
NEW JERSEY STATE EMPLOYEES ASSOCIATION,
Petitioner,

Docket No. RO-824

and

ASSOCIATION OF CIVIL SERVICE PROFESSIONALS (A.F.S.C.M.E.-I.F.P.T.E.),
Intervenor.

DECISION AND ORDER

Pursuant to a Notice of Hearing on Challenged Ballots dated January 10, 1975, a hearing was held before the undersigned January 27 and February 11, 21, and 25, 1975. At the hearing all parties were provided an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. All parties filed briefs on various aspects of the issues considered and a letter and a reply brief, respectively, were filed by the Association of Civil Service Professionals (A.F.S.C.M.E.-I.F.P.T.E.), hereinafter the Intervenor, and by the New Jersey Civil Service Association - New Jersey State Employees Association, hereinafter the Petitioner. All parties were represented by counsel as indicated below:

William F. Hyland, Attorney General
By Melvin E. Mounts, Jr., Deputy Attorney General
For the State of New Jersey

Fox and Fox, Esqs.
By David I. Fox, Esq.
For the New Jersey Civil Service Association-
New Jersey State Employees Association

Sterns & Greenberg, Esqs.
By Joel H. Sterns, Esq. 1/
For the Association of Civil Service
Professionals (A.F.S.C.M.E.-I.F.P.T.E.)

BACKGROUND

Pursuant to an Agreement for Consent Election (Exhibit C-3), a mail ballot election was conducted among certain employees of the State of New Jersey to determine whether they desired to be represented for the purposes of collective negotiations by the Petitioner, by the Intervenor, or by neither employee organization. The parties agreed, and the Executive Director approved that agreement, that the appropriate collective negotiating unit included "all professional employees employed by the State of New Jersey... /but excluding/ managerial executives, craft employees, policemen, confidential employees, supervisors within the meaning of the New Jersey Employer-Employee Relations Act, and all other employees employed by the State of New Jersey in negotiating units in which prior certifications of representatives have been issued by the Public Employment Relations Commission".

In accordance with the terms of that agreement, ballots were mailed to eligible employees November 14, 1974. As indicated on the Consent Election Agreement, election notices (Exhibit C-4) and on the instructions on the ballot, (Exhibit C-7) ballots had to be received not later than noon, December 9, 1974. The tally of ballots (Exhibit C-2), which was issued that same date and was signed by representatives of all parties, indicates that, of

1/ Richard K. Weinroth, Esq. appeared February 11, 1975.

approximately 7,670 eligible voters, there were 10 void ballots, 2,273 ballots were cast for the Petitioner, 1,974 ballots were cast for the Intervenor, 403 ballots were cast for neither organization, and there were 515 challenged ballots.

Section 19:11-2.6 of the Commission's Rules provides that, "The majority representative shall be determined by a majority of the valid ballots cast in the election". No choice on the ballot received the required vote necessary for a certification to be issued. Depending upon the outcome of this proceeding, two results are possible: a certification of representative could be issued to the Petitioner or a run-off election could be required (N.J.A.C. 19:11-2.5). In order to reach one of these two results, it is necessary to dispose of at least certain of the challenged ballots. (N.J.A.C. 19:11-2.4(i)) It is evident that it is necessary in this proceeding to dispose only of a sufficient number of challenged ballots to render the remaining challenged ballots no longer determinative of the results of the election.

The Agreement for Consent Election provides as follows regarding challenges:

> "If the challenges are determinative of the results of the election, the Executive Director shall investigate the challenges and shall, where appropriate, issue a notice of hearing. The method of investigation of objections and challenges, including the question of whether a hearing should be held in connection therewith, shall be determined by the Executive Director whose decision shall be a final administrative determination unless the Commission shall have granted a request for review."

Therefore, the challenges being determinative, the Executive Director issued a Notice of Hearing and Orders Scheduling

Hearing (Exhibits C-1, C-6 and C-8) and a hearing was held as indicated above.

The 515 challenged ballots include ballots in the following categories:

Not on list	44
No signature	107
Senior Personnel Assistants	17
Consulting Physicians	24
Head Nurses	144
Supervisors of Nursing Services	87
Others including allegedly confidential employees	92
Total	515

(Source: Exhibit C-1)

In order to provide the most expeditious disposition of a sufficient number of challenged ballots to obtain a determinative result of the instant election in a fashion consistent with the full rights of all parties, it has been determined by the undersigned that a resolution of certain challenged ballots could lead to a final resolution of this issue.[2/] Accordingly, a hearing has been concluded with respect to the following categories of challenged ballots: not on list (44), no signature (107), senior personnel assistants (17), consulting physicians (24), and several miscellaneous challenges (3). During the course of this hearing, with several minor exceptions discussed below, the parties either agreed upon the disposition of the ballots in these categories or had a

2/ While it is theoretically possible that this decision could render the remaining challenges moot in the sense that they would no longer be determinative, this result is unlikely. However, the parties - in an effort to bring this matter to a conclusion - have discussed various possibilities including the counting of various additional ballots. A disposition of these ballots plus those to be considered herein could produce a determinative result.

complete opportunity to present evidence, to call witnesses and to cross-examine witnesses, to argue orally, and to file briefs and reply briefs with respect to these categories of employees.

The balance of this decision will be devoted to the above-listed categories of challenged ballots.

CHALLENGES RESOLVED BY STIPULATION

During the course of the hearing, the parties jointly agreed upon the disposition of certain of the challenged ballots. Specifically, the following stipulations were entered into:

1. It was agreed that the ballots of two employees - Daniel Kaufhold and Gallus Quigley - were erroneously challenged, that these individuals are not head nurses and were incorrectly listed as such, that they were in fact eligible voters, and that their ballots should be counted. (Tr. 1-27-75, pp. 8-9). This reduces the number of challenged ballots in the category of "Head Nurse" by two to 142.

2. It was agreed that the ballot of one Ms. Reva L. Richards who signed her return envelope as "Marcellin" should be counted. (Tr. 1-27-75, pp. 8-9).

3. The parties agreed to have the Hearing Officer compare the names of the 17 Senior Personnel Assistants who cast challenged ballots with a list of approximately 500 allegedly confidential employees prepared by the State and they further agreed any of the 17 challenged Senior Personnel Assistants whose names appear on that list would be void. (Tr. 2-11-75, pp. 63-64). After making this comparison, the Hearing Officer determined that 16 of the 17

Senior Personnel Assistants whose ballots were challenged were included on the list of allegedly confidential employees. Therefore, in accordance with the agreement of the parties, these 16 ballots are void and the other ballot, that of Thomas L. Cooper, shall remain in the challenged category. (Tr. 2-21-75, p. 10).

4. With regard to the 44 individuals who returned ballots but whose names did not appear on the eligibility list, the parties agreed that the ballots of the following individuals should be counted:

1. McGrath, Paul
2. Scully, William F.
3. DeBari, Anna
4. Kuzmuk, Barbara Ann
5. Gorka, Joseph
6. Gould, Charles
7. Gould, Gwendolyn
8. Cummings, Warren
9. Sikorski, Walter
10. Lasorsa, Alex
11. Tandy, Marcus

Additionally, the parties agreed to exclude the ballots of the following employees:

1. Pinto, Teresa
2. DeRiso, Mary
3. West, Harry
4. Mrorwicki, Carroll
5. Apffel, James
6. Salisburg, Joyce
7. Lackey, Martha
8. Otte, Deborah
9. Frick, William
10. Prasad, Sheo
11. Paisley, Kenneth
12. Seavey, Steven
13. Kastrzewa, Thomas
14. Gould, Harold
15. Wilson, Thomas
16. Conner, Gerald
17. Sutton, Dean
18. Kuhn, Richard

19. Blewett, William
20. Wimberg, Joanne
21. Seamans, Theodore
22. Steelhorn, Paul
23. Nalbone, Charles J.
24. Most, Anatole T.
25. Wright, William
26. Grau, Matthew

There was no agreement regarding the eligibility of seven employees:[3/]

1. Duffy, Dr. Adriane V.
2. Kern, Barbara
3. Gilbert, Thomas B.
4. Cutler, Virginia
5. Marue, James J.
6. May, Everett G.
7. DeGeorge, Robert

5. Finally, the parties agreed upon the disposition of several of the challenges in the category previously labeled as "No Signature." Of the 107 ballots in the category, 94 were regular in all respects except that no signatures appeared on the outside of the return envelopes. We shall return to this group in the next section. The remaining 13 challenges can be described as follows:

(a) Five ballots were returned in envelopes which contained no identifying marks at all, neither names nor addresses.

(b) One unofficial envelope had nothing whatsoever to do with the election.

(c) One envelope was received which, upon examination, appeared to contain within it the official return envelope, with the label affixed, signed by the voter.

(d) Two envelopes were received which were not

3/ These individuals' ballots will remain challenged at this time.

the official envelopes. One of these had the typewritten name and address of a person on it and the other had a signed or printed name and address of a person on it. Neither contained any other identification. There was no indication as to the employee's eligibility number.

(e) One envelope, again not an official envelope, appeared to contain not a ballot but simply a yellow, lined sheet of paper.

(f) Three envelopes were returned which were the official return envelopes but which had had their return labels removed.

Of these thirteen ballots, the parties agreed, as indicated by their initials on the return envelopes, that the unofficial envelope having nothing whatsoever to do with the election /b/ was void, that the unofficial envelope which appeared to contain not a ballot but simply a yellow, lined sheet of paper /e/ was void, and that the ballot contained within the envelope which, upon examination, appeared to contain within it the official return envelope, with the label affixed, signed by the voter /c/, should be counted.

There was no agreement regarding the remaining 10 challenges in this group and these will be discussed further in a subsequent section of this decision.

In accordance with the agreement of the parties as reported above, the undersigned directs that the ballots of the

individuals named below be counted or not counted as indicated:

BALLOTS TO BE COUNTED

1. Kaufhold, Daniel
2. Quigley, Gallus
3. Richards, Reva L.
4. McGrath, Paul
5. Scully, William F.
6. DeBari, Anna
7. Kuzmuk, Barbara Ann
8. Gorka, Joseph
9. Gould, Charles
10. Gould, Gwendolyn
11. Cummings, Warren
12. Sikorski, Walter
13. Lasorsa, Alex
14. Tandy, Marcus
15. Fagan, Brian P.

BALLOTS NOT TO BE COUNTED

1. Dockerty, William
2. Tepper, Michael
3. Barrowclough, Judith
4. Sedlacek, Syril
5. Gulli, Paul
6. Bradshaw, Gladys
7. Bucher, Colin
8. O'Donnell, John
9. Crowley, Pat
10. McClain, Clare T.
11. Druz, Cecile
12. Cahill, Fred
13. Niatus, Stephen
14. Symons, John
15. Schmidt, Theron
16. Saperstein, Stanley
17. Pinto, Teresa
18. DeRiso, Mary
19. West, Harry
20. Mrorwicki, Carroll
21. Apffel, James
22. Salisburg, Joyce
23. Lackey, Martha
24. Otte, Deborah
25. Frick, William
26. Prasad, Sheo
27. Paisley, Kenneth
28. Seavey, Steven
29. Kastrzewa, Thomas
30. Gould, Harold

31. Wilson, Thomas
32. Conner, Gerald
33. Sutton, Dean
34. Kuhn, Richard
35. Blewett, William
36. Wimberg, Joanne
37. Seamans, Theodore
38. Steelhorn, Paul
39. Nalbone, Charles J.
40. Most, Anatole T.
41. Wright, William
42. Grau, Matthew
43. "No signature" challenge that all the parties agreed to void.
44. "No signature" challenge that all the parties agreed to void.

NO SIGNATURE CATEGORY

This category includes the 94 ballots which were returned in official pre-addressed envelopes plus 10 of the 13 challenges described in subsection 5 of the previous section whose disposition was not agreed upon by the parties.

Before considering the validity of these ballots, it would be useful to discuss certain mechanical and procedural aspects of this election.

A mailing was made by the Public Employment Relations Commission to all eligible voters in accordance with the terms of the Agreement for Consent Election. Each eligible voter was to receive the following: an official ballot with instructions on the reverse side; a small envelope marked "Secret Ballot Envelope" in large, black letters; and a return-addressed envelope. Copies of the ballot with instructions and the return envelope were introduced as exhibits. (Exhibit C-7) The return envelope had affixed to it in the lower left-hand corner a label which contained the following information:

name of eligible voter, address of voter, job classification number, payroll number, and PERC eligibility number. (Tr. 2-11-75, pp. 5-6)

At the time that the ballots were tallied, an employee of PERC raised the pre-addressed, return envelope to permit the observers from each party to view the envelope, providing them with an opportunity to examine the outside of the envelope and the signature. If no party voiced an objection to the eligibility of a voter whose ballot was returned in a signed envelope, a mark was made beside the name of the voter on the eligibility list by a PERC employee in the presence of observers from each employee organization, and the pre-addressed envelope was slit open by another PERC employee who removed the smaller envelope marked "SECRET BALLOT ENVELOPE" and put the smaller envelope in a box. Subsequently, these smaller envelopes were opened, the ballots were unfolded, sorted, and counted. (Tr. 2-21-75, pp. 13-15)

It is the position of the Petitioner that the 94 challenges should be overruled and the ballots counted. The Intervenor contends that the challenges to these ballots should be sustained. The State takes no position on this issue, leaving the decision to PERC to decide in light of its experience and expertise. (Tr. 2-11-75, p. 7) The ballots were challenged by PERC at the time of the election because they were not signed, the procedure followed in other mail ballot elections.

In urging that the ballots in this category - or at least some of them - be counted, the Petitioner suggests three alterna-

tives: (a) count all of the ballots immediately (b) send to those employees who failed to sign the outside of the return envelopes a statement, giving them an opportunity to return the statement within a reasonable time, certifying that they had in fact personally voted the ballot sent to them and notifying them that failure to return the envelope would result in the disqualification of their vote; or (c) permit the parties to call witnesses from among the group to testify as to why they did not sign their return envelopes. This third alternative would require a release of the names of these individuals, something that has not been done to date in this matter.

The Intervenor takes the position that these ballots should be excluded. The employees had an opportunity to vote but failed to follow the instructions. To make any special effort after the election to determine whether they did in fact vote would be discriminatory with respect to employees who failed to return ballots at all or on time and, furthermore, it would or could jeopardize the secrecy of their ballots, lead to coercion or intimidation of these employees, and create a possibility that votes could be changed.

At the outset of this discussion, it is noted that none of the cases cited by the Petitioner or Intervenor is dispositive of this issue. The facts in each case cited are distinguishable from those herein. For the most part, the cases cited have to do with the voter's intention in marking his ballot as he did. This was true of the case cited by the Petitioner in oral argument and relied

upon heavily by him in his brief: International Union of Elec., Radio and Mach. Workers, AFL-CIO v. N.L.R.B., 418 F. 2d 1191 (D.C. Cir. 1969), 71 LRRM 2991. The above matter was remanded to the N.L.R.B. for further proceedings to determine whether an employee who cast a challenged ballot and whose name appeared on that part of the secret ballot envelope which contained his ballot had himself written his name on that part of the envelope and, if he had done so, whether the circumstances were such as "could reasonably be said to negative any improper intent to identify his vote." (71 LRRM at 3001).

The matter at issue herein does not relate to the intentions of the voters in marking their ballots. Presumably, most, if not all, of the ballots in dispute would be found to be clearly and unambiguously marked for one or another of the three choices contained thereon. But that is not the issue.

The issue herein relates to the identity of the voters. This can be most clearly seen by analogizing between on-site and mail ballot elections.[4/]

In an on-site election, the Commission requires all voters to appear in person at the polls in order to be eligible to vote. Each party is permitted to be represented at the polling place(s) by observers. (N.J.A.C. 19:11-2.4(c)) Any party or the election officer may challenge, for good cause, the eligibility of any person to participate in the election. (N.J.A.C. 19:11-2.4(d))[5/]

4/ The Commission's rules provide that all elections shall be by secret ballot. (N.J.A.C. 19:11-2.4(a))

5/ As set forth in the Petitioner's brief, the Commission has been granted sufficient discretion by the Legislature with regard to (Continued)

Because of the number of eligible voters in this unit and the dispersion of these voters, the parties agreed that the instant election would be conducted by mail. All of the elections involving the larger groups of State employees have been mail ballot elections. The only on-site elections of State employees have occurred among State college faculty members where the number of locations is limited.

In a mail ballot election, the voter receives instructions along with his ballot. (Exhibit C-7) Those instructions, a copy of which is attached hereto as Appendix A, provide in part as follows:

> YOUR BALLOT WILL BE VOID AND NOT COUNTED UNLESS YOU FOLLOW THE INSTRUCTIONS AND MAIL YOUR BALLOT IN THE ENVELOPE PROVIDED.
>
> 4. SIGN YOUR NAME (DO NOT PRINT) ON THE OUTSIDE OF THE ENVELOPE IN THE SPACE MARKED "signature" AND INDICATED BY THE ARROW.
>
> 6. AFTER YOUR SIGNATURE IS CHECKED FOR ELIGIBILITY TO VOTE, AN AGENT OF THE COMMISSION WILL REMOVE YOUR SECRET BALLOT FROM THE ENVELOPE CONTAINING YOUR SIGNATURE...
>
> If you have any questions about this election, you may contact the Commission's Executive Director or his agent...P. O. Box 2209, Trenton, N.J. 08625, Telephone No. (609) 292-6780.

As indicated on the instructions, the pre-addressed, return envelope contains a space for the signature of the employee below an identification stub which contains the following certifications:

> I BELIEVE I AM AN ELIGIBLE VOTER IN THIS ELECTION.
>
> I PERSONALLY VOTED THE WITHIN BALLOT.

5/ (Continued) the conduct and supervision of elections so that it may adopt such procedures as it deems necessary to implement the objectives of the statute (American Federation of State, County and Municipal Employees, Local 1959 v. PERC, 114 N.J. Super 963 (App. Div. 1971)).

Not only does the line indicate that "signature" is required but there is an arrow pointing to that line and below the arrow are the words:

> Be sure to sign.
> Do not print.

A copy of the envelope, without the label which was placed over the words "Docket No." and "Eligibility Key No." of the identification stub, is attached hereto as Appendix B.

Returning now to the analogy with on-site elections, the return of a mail ballot with a signature thereon corresponds to the appearance of a person at the polling site. In the on-site election, the observers have the opportunity to challenge the voter for good cause. They have an opportunity to identify the voter. They can determine that the voter is, in fact, an eligible employee.

In a mail ballot election, the observers have the same rights. While the voter does not appear personally, he has signed a certification that he believes himself to be eligible and that he personally voted the ballot contained in the envelope. The observers have the opportunity to examine the signature and to see the certification. They can challenge the ballot if they desire.

If the ballots which were not signed were simply counted, there would be no opportunity for the observers to challenge the authenticity of the ballots. Carrying the analogy with on-site elections one step further, the failure to sign the envelope as instructed is tantamount to failing to appear in person at the polls in an on-site election.

It should be noted that the requirement that the return

envelope be signed was clearly set forth in the instructions and known by all parties. To contend, after the conclusion of the election, that one of PERC's requirements be waived would deprive the election process of certainty. The parties and the voters are entitled to know what requirements and procedures will govern the election process. If these ballots were to be counted at this time, thereby waiving one of the requirements, the voters or the parties could ask that other requirements be similarly waived. For example, a voter or a party might request that a ballot be counted which is received after the deadline for receipt of ballots. As documented below, the courts have upheld the N.L.R.B. in strict adherence to such deadlines, even when the ballots in question have been received prior to the issuance of the tally of ballots.

Based upon the above, the undersigned rejects the suggestion that the ballots of these individuals be counted in spite of the fact that they failed to follow the clearly stated procedures of the Commission.

Alternatively, the Intervenor has suggested that a certification procedure be developed whereby these voters would be given a reasonable time in which to return a certification to the effect that they had returned their ballots without having signed the outside envelopes and that they had personally marked their ballots.

Aside from the practical difficulties associated with such a procedure, including the additional costs, there are several other reasons for rejecting it.

The most compelling of these arguments is the need for finality in the election process. The parties agreed, in executing

the Agreement for Consent Election, to be bound by the Commission's procedures. The instructions to the voters are unambiguous. They provide that failure to follow them will result in the voiding of the ballot. To go back at this point, after the cutoff date for the receipt of ballots as set forth on the election notices and instructions and after the issuance of the tally of ballots, and to ask these employees, in effect, if they now want their ballots to be counted by returning a certification, is fraught with danger. Employees' responses could be dictated by their knowledge of the outcome of the election or by events occurring subsequent to the cut-off date. Those who have cast valid ballots in accordance with the instructions could not have been influenced by such factors.

If a voter has changed his mind since he cast his ballot, he could assist the organization he now favors by declining to return the certification, thereby denying a vote to the organization which he favored at the time of the election.

In the event that any of the parties were to obtain knowledge as to who these employees were, these employees could be subjected to tremendous pressures, coercion or intimidation either to return or to fail to return the certification, depending upon how the organization guessed the individual had voted. While such a result is not a certainty, its mere possibility militates against the adoption of such a procedure.

Equity considerations dictate that all eligible voters should cast their ballots on an equal basis without knowledge of

the outcome of the election or of post-election events.

The Petitioner cited no experience in other jurisdictions where such a procedure is utilized.

Accordingly, it is found that a certification procedure such as that suggested by the Petitioner would not only be inconsistent with the procedures of PERC and, as discussed below, the NLRB, but also would interject elements of disparate treatment for a class of employees and would deprive the election process of the essential quality of finality. Therefore, the proposal is rejected.

The third alternative proposed by the Petitioner is to release the names of the employees in question and to permit the parties to call certain of these employees to testify as to their reasons for failing to sign the outside envelope as instructed.

The undersigned is not impressed with this suggestion. As indicated above, once the names of these voters became known, they could be subjected to extreme pressures from the parties. Their testimony may merely reflect the interests of the organization which they desire to assist at the time their testimony is taken rather than be based upon their reasons, if any, for not signing the return envelopes in November and early December, 1974.

In any event, it is not up to the eligible voters - or rather that miniscule proportion that has failed to follow the Commission's clearly stated procedures - to determine reasonable rules for the conduct of elections. The courts have recognized that this discretion resides in the adminstrative agency.

Additionally, the finality argument is as appropriate in this connection as it was when considering - and rejecting - the certification procedure put forth by the Petitioner.

The Courts of the State have recognized that the New Jersey Employer-Employee Relations Act was patterned after the National Labor Relations Act, as amended, and that experience and adjudications under the latter may be utilized as a guide in resolving disputes arising under our Act. (See Lullo, 55 N.J. 409 at 424 (1970))

Thus, it is instructive to note that judicial decisions have recognized that the Board is empowered to prescribe reasonable rules for the conduct of mail ballot elections. /To name a few, N.L.R.B. v. Groendyke Transport, Inc. (U.S. Court of Appeals, Tenth Circuit), 64 LRRM 2270 (1967), N.L.R.B. v. Burns Detective Agency, 346 F2d 897, 59 LRRM 2423 (1965)./

The Courts, for example, have determined that it was well within the Board's discretion to void a mail ballot returned after the deadline set forth within the Board's instructions and after the other ballots had been tallied. (See N.L.R.B. v. Burns Detective Agency, supra). In another decision, the Seventh Circuit Court of Appeals held that the Board properly refused to count six mail ballots received after the "deadline" set out in the notices of election and instruction sheet even though these ballots were received prior to the time established by the Board for the opening and counting of the ballots. (National Van Lines v. N.L.R.B., U.S. Court of Appeals, Seventh Circuit, 45 LRRM 2376 (1966).

The N.L.R. B. Field Manual dated July 1, 1967 provides

that the Board, when a mail ballot is returned without signature, will send a duplicate kit to the voter if there is sufficient time before the deadline for the receipt of ballots with a letter explaining that failure to sign voids a returned ballot. (11336.4)

This, obviously, can only be done when the ballot is returned to the regional office. In the instant matter, the ballots were held by the Central Post Office in Trenton until they were picked up at noon, December 9, 1974 in the presence of the parties. (Tr. 2-25-75, pp. 74-75)

As noted above, PERC, like the NLRB, has been afforded discretion with regard to the supervision and conduct of elections.

Section 1 of the Agreement for Consent Election, which was signed by all parties, provides in part as follows: "Said election shall be held in accordance with the Act, the Commission's Rules, and the applicable procedures and policies of the Commission, provided that the determination of the Executive Director shall be a final administrative determination upon any question raised by any party hereto relating in any manner to the election..."

The undersigned concludes that the Commission's requirement that the return envelopes be signed in mail ballot elections in order to be considered as valid ballots is a reasonable requirement. Not only does it parallel the practice under the National Labor Relations Act, the copied act, but it provides the parties in mail ballot elections with the same rights and opportunities they are afforded in on-site elections. The instructions to the voters were abundantly clear. These instructions were followed by the overwhelming majority of voters. Finally, there is a need for

finality and certainty to the election process.

Based upon the above, the undersigned finds that the 94 ballots returned in official envelopes but not containing the required signatures are void.

The above discussion also mandates a finding that the five ballots which were returned in unofficial envelopes without signatures (Subsection (a) of previous section) be found to be void. The Attorney for the Petitioner stated at one point that, "But it appears that there is no way of identifying who it was that sent the envelope in, then I might have some serious question as to whether those should be counted at all." (Tr. 2-11-75, p. 27) While the Petitioner did not take this position in its brief - there it is urged that the envelopes be opened to see if they contain information which would identify the voters and render the ballots valid - the undersigned is persuaded that these five ballots should be voided. If they were opened and if they were found to contain information identifying the voter, it is possible that the secrecy of the ballot could be lost. This the Commission has an obligation to protect if it can be reasonably accomplished.

With respect to the three ballots that were returned in official envelopes with signatures but with their labels removed, it is determined that the challenges thereto should remain. It would be theoretically possible to attempt to locate these voters on the eligibility list but, in view of the fact that that list exceeds 400 pages and because a small group of challenges is highly unlikely to remain determinative, the effort would not be justified at this time.

There are two other challenges to be considered in this category: the two which were returned in unofficial envelopes, of which one had a typewritten name and address on it and one had a signed or printed name and address. The challenges to these two ballots will be permitted to stand at this time. These two ballots are unlikely to be determinative.

By way of summary, in this section we have disposed of 104 challenged ballots. Of those, the 94 returned in the pre-addressed envelopes but without signatures and 5 returned in unofficial envelopes which contain no signatures, addresses or other identifying marks have been found to be void. The 5 additional ballots will remain challenged at this time.

CONSULTING PHYSICIANS

The final category of challenges to be resolved at this time relates to the consulting physicians and consulting physician specialists. There are actually six titles in this category: Consulting Physician 1 Visit Per Week, Consulting Physician 2 Visits Per Week, Consulting Physician 3 Visits Per Week, Consulting Physician Specialist 1 Visit Per Week, Consulting Physician Specialist 2 Visits Per Week, and Consulting Physician Specialist 3 Visits Per Week.

The State and the Intervenor take the position that these challenges should be sustained because the individuals are independent contractors, they are not included within the definition of "public employee" as that term is defined in the Act, and they do not share a community of interest with employees in the negotiating unit.

It is the position of the Petitioner that these individuals are not independent contractors, that they are included in the statutory definition of "public employee", that they are included in the language of the consent agreement, and that, although it is not necessary to reach this factor because of the above points, these individuals do share a community of interest with employees in the negotiating unit.

Assuming, arguendo, that the consulting physicians and consulting physician specialists, hereafter referred to as consulting physicians, do meet the conventional tests applied to independent contractors, that fact would not dispose of this issue. The National Labor Relations Act, as amended, specifically excludes any "...individual having the status of an independent contractor..." from the definition of "employee".[6/] Therefore, under the NLRA it is necessary to determine whether an employee has such status in order to determine whether he is included within the definition of the term "employee".

However, the definition of the term "employee" is different in the New Jersey statute. That definition, as applied to public employees, follows:

> This term shall include 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. 7/

6/ Section 2(3), Labor Management Relations Act.
7/ N.J.S.A. 34:13A-3(d)

Thus, it is evident that independent contractors are not, per se, excluded from the definition of public employee in New Jersey.

The next question then, is whether consulting physicians fall within the above-quoted definition of public employee.[8/] A literal reading suggests no basis for exclusion. No party has claimed that they are elected officials, members of boards or commissions, managerial executives, or confidential employees. They are, apparently, holding positions by appointment or employment in the service of a public employer.

The undersigned recognizes, however, that such a literal reading may notdo justice to the intent of the Legislature nor to the overall purposes of the Act which are to establish and promote fair and harmonious employer-employee relations in the public service.[9/] It can be argued that employees such as the consulting physicians who, among other things, work part-time, are not entitled to the rights, protections and obligations of the New Jersey Employer-Employee Relations Act.

The statutory definition need not be read expansively. For example, both the N.L.R.B. and the New York State Public Employment Relations Board have found a basis for excluding certain groups of individuals from the definition of "employee" even

8/ The State has taken the position that, among the reasons for the exclusion of consulting physicians is the fact that they only work part-time and that no part-time employees are included in existing negotiating units of State employees. This decision relates only to the status of consulting physicians and not to part-time employees generally. A determination that consulting physicians either are or are not eligible to vote in this matter will not dispose of the issue of the inclusion or exclusion of part-time employees generally throughout the State.

9/ Wilton, 57 N.J. 404 at 416 (1971).

though the statutory definitions of the term "employee" are broad.

Without passing on the merits of this position, the instant matter can be and is better resolved not on the basis that consulting physicians are not public employees but by an examination of the appropriateness of including them within the negotiating unit herein. The question of the application or coverage of the Act to casual or part-time employees should be decided when that issue is fully and specifically litigated. Suffice it to say that, on the basis of the record herein, it cannot be determined that part-time employees, per se, are excluded from the coverage of the Act.

Not having found consulting physicians to be excluded from the definition of public employee, it must be determined whether or not they should be included in the negotiating unit.

The Agreement for Consent Election provides:

> "...the undersigned parties hereby...AGREE AS FOLLOWS:
>
> 12. THE APPROPRIATE COLLECTIVE NEGOTIATING UNIT. -
>
> Included: All professional employees employed by the State of New Jersey including those on the attached list.
> Excluded: Managerial executives, craft employees, policemen, confidential employees, supervisors within the meaning of the New Jersey Employer-Employee Relations Act, and all other employees employed by the State of New Jersey in negotiating units in which prior certifications of representative have been issued by the Public Employment Relations Commission." 10/

10/ Exhibit C-3.

Consulting physicians are neither specifically included in nor excluded from the appropriate negotiating unit. However, the parties acknowledged their disagreement over the status of these individuals by agreeing that they would vote subject to challenge. (See p. 6 of Notice of Election Attachment, Exhibit C-4 and List attached to Agreement for Consent Election, Exhibit C-3) There is a dispute as to whether consulting physicians should be included in that unit, i.e., whether their inclusion would be appropriate. The Commission is charged by statute with resolving such disputes: "The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the Commission shall not intervene in matters of recognition and unit definition except in the event of a dispute."[11/] Therefore, because challenges are determinative and there is a dispute among the parties as to whether this title is appropriately included in the negotiating unit, the undersigned must decide whether consulting physicians should be included in the negotiating unit.

As noted, the Commission is to give "due regard for the community of interest among the employees concerned" in making this determination. This, of course, does not require that only community of interest factors be considered.

In the broadest sense, a number of factors can be identified which could be indicative of a community of interest: (1) consulting physicians, like the full-time physicians and other

11/ N.J.S.A. 34:13A-5.3

employees in this unit, are professional employees, (2) they work in proximity to full-time physicians, nurses and other professionals included in the unit, (3) they work at the same physical locations - schools for the retarded, mental hospitals, penal and correctional institutions - as do others in the unit, (4) their titles and salaries are listed in the State Compensation Plan, (5) they have some of the same problems as others in the unit, e.g., security for those working at penal institutions, (6) consulting physicians, like full-time physicians, enjoy a high degree of independent decision-making authority with regard to patient care, (7) CS-21 forms are completed in order to get them on the payroll, (8) they receive checks every two weeks as do other employees, and (9) they are members of the Public Employees' Retirement System, receive non-contributory life insurance from the State to the extent of one and one-half times their salary and have the right to purchase insurance for another one and one-half times their salary.

Without discussing each of these factors in detail, it can be readily seen that most of them are so general in their applicability as to apply to all employees of the State of New Jersey from the highest to the lowest paid and regardless of functions, duties and responsibilities and several others apply to all employees - blue-collar, white-collar, craft, policemen, supervisor, confidential employee, managerial executive, etc. - at the institutions where consulting physicians work.

The listed factors simply do not establish the appropriateness of including consulting physician with the other professional

employees of the State of New Jersey nor do these factors establish the inappropriateness of such a unit. It is necessary to consider additional factors. A consideration of these factors leads to the conclusion that their inclusion would be inappropriate.

Significant in this regard is the hours of employment of the consulting physicians. As noted above, some make one visit per week, some make two visits per week, and some make three visits per week. The witness who testified in this area is the Chief Medical Consultant, Department of Institutions and Agencies, who was himself a consulting physician for some 27 years.[12/] He defined a "visit" for a consulting physician as four or five hours per week from portal to portal. The time is measured as the time away from his private practice as opposed to the time spent in the institution.[13/] In contrast, full-time physicians are required to be present in the institution a full 35-hour work week. The witness testified that in some situations, the travel time to the institution might take the consulting physician one or one and one-half hours each way. Thus, the time actually spent working in the institution varies considerably among consulting physicians and in contrast to full-time physicians.[14/]

Additionally, the hours of work are flexible. Scheduling is arranged for the convenience of the consulting physician. If he is unable to appear as scheduled, he may send a substitute or

12/ Dr. Samuel J. Lloyd, Tr. 2-25-75, p. 3.
13/ Tr. 2-25-75, pp. 17, 49.
14/ Tr. 2-25-75, pp. 17, 43, 49.

he may appear another time or another day.[15/]

The method of payment for consulting physicians is different from that of employees included within the unit. The State Compensation Plan lists flat or single daily and annual rates for these employees. (Exhibit PE-2). There is no rate range. There are no increments.

Furthermore, the witness testified that these published rates serve as a maximum and that many consulting physicians receive less than those rates. The rates vary. The actual rate is determined partly by individual negotiation and depends also upon the needs of the institution and of the individual. At least one individual serves as a consulting physician without any compensation.[16/]

Third, the witness testified that all of the consulting physicians have private practices and that their private practices are their top priority.[17/] Some consulting physicians are young and just starting out in private practices, some are older and interested in cutting down on their activities, and some serve because they feel as though they are making a contribution to the State. The witness doubts if any of the consulting physicians receive as much as one-half of their total compensation for serving as consulting physicians.[18/]

Fourth, aside from participation in the pension and life insurance program, which is compulsory, consulting physicians do not enjoy the benefits that other employees receive such as vacation,

15/ Tr. 2-25-75, pp. 5, 6, 13, 36.
16/ Tr. 2-25-75, pp. 7, 28, 41 & 42.
17/ As many as one-half of the full-time physicians may also have private practices but this would not be their primary responsibility. (Tr. 2-25-75, pp. 53, 56)
18/ Tr. 2-25-75, pp. 6, 9, 34, 35.

sick leave, paid holidays, administrative leave, etc. Also, the full-time physicians, unlike consulting physicians, are on call for nights, weekends, and holidays.[19/]

Finally, the nature of their relationship with the State and the various institutions suggests that these consulting physicians are unique. Administratively, there is very little control over the consulting physicians. Minimal control is exercised over them. Requests for their services are generated by the full-time physicians who express a need for a consultation. But the full-time physician retains responsibility for the treatment of the patient and he can accept, modify, or ignore the recommendations of the consulting physician. Also, they do not have a permanent working relationship with the State but serve on an "as needed" basis without a written contract and on an open-ended basis that can be terminated at will by either party.[20/]

The Petitioner cited a recent case decided by the Pennsylvania Commonwealth Court on appeal for the Pennsylvania Labor Relations Board[21/] in support of its contention that consulting physicians should be included in the unit herein. In that case, the Commonwealth Court upheld the finding of the Board that part-time pharmacists should be included in a unit with full-time pharmacists.

19/ Tr. 2-25-75, pp. 9, 10, 43. 54, 71.
20/ Tr. 2-25-75, pp. 5, 6, 16, 41, 63. It is noted in passing that these differences in fringe benefits and in other factors cited herein suggest possible conflicts in negotiations priorities and possible conflicts of interest between these part-time consulting physicians and other members of the unit. The conclusion reached herein makes it unnecessary to develop this point.
21/ Einstein Medical Center v. Labor Board, 88 LRRM 2280 (1975).

A careful reading of the decision, however, indicates factual differences between that case and the instant matter. In Einstein, the Board concluded that the part-time pharmacists perform the same function as do full-time pharmacists. As indicated above, the consulting physicians generally do not perform the same functions as the full-time physicians or other unit members.

Secondly, the Board found in Einstein that the part-time pharmacists receive the same rate of pay as do the full-time pharmacists. Again, in the instant matter, as discussed, the rates of pay for consulting physicians and others in the unit including full-time physicians are different. In fact, consulting physicians do not receive increments and are not on a salary range but rather are paid a flat rate.

Thirdly, the Board found that the part-time pharmacists and full-time pharmacists receive many similar fringe benefits whereas in this matter, the record does not indicate that consulting physicians receive any benefits received by full-time physicians and other unit members except for life insurance and participation in the pension system. It was recognized that the part-time employees work fewer hours and were ineligible for certain benefits in Einstein as in the instant case.

In a recent decision of the New York State Public Employment Relations Board, the Board ruled that part-time review physicians whose normal conditions of employment do not meet the attendance standards of the Civil Service Rules were not included in the Professional, Scientific and Technical Unit established by that

Board as the appropriate unit.[22/] The Civil Service Rule referred to, in pertinent part, requires that such employees be employed on a regularly scheduled work week of at least 3 3/4 hours per day, five days per week.[23/] If PERB's standards were applied in this instant matter, consulting physicians would not be included within the professional unit since they would not meet those attendance standards.

This discussion compels the conclusion that it would not be appropriate to include consulting physicians in the negotiating unit at issue. Their services to the State are ancillary to their private practices which are their primary means of livelihood. In sum, their employment relationship is too ephemeral to carry with it the rights and obligations of the Act.

Accordingly, it is found that the challenges to the ballots of the consulting physicians should be sustained and that they should not be included in the negotiating unit.

ORDER

IT IS HEREBY ORDERED that an amended Tally of Ballots be issued reflecting the disposition of the challenged ballots as decided herein.

BY ORDER OF THE EXECUTIVE DIRECTOR

Jeffrey B. Tener
Executive Director

DATED: Trenton, New Jersey
March 26, 1975

22/ 7 PERB 3077 (1974)
23/ 4 NYCRR § 26.1(b)

APPENDIX A

C M - Void.
2-11-75
F.P.6.

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE OF ELECTION OF REPRESENTATIVE

An election by secret ballot is being conducted under the supervision of the New Jersey Public Employment Relations Commission among the eligible voters to determine the representative, if any, desired by them for the purpose of collective negotiations with the public employer named on the enclosed ballot. Your name appears on the list of those who are eligible to vote in this election

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INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY UNITED STATES MAIL

An OFFICIAL BALLOT and a RETURN-ADDRESSED ENVELOPE ARE ENCLOSED. Consider yourself in the same position as though in a voting booth. YOUR BALLOT WILL BE VOID AND NOT COUNTED UNLESS YOU FOLLOW THE INSTRUCTIONS AND MAIL YOUR BALLOT IN THE ENVELOP PROVIDED.

1. READ THE OFFICIAL BALLOT ON THE REVERSE SIDE OF THIS NOTICE CAREFULLY.
2. MARK AN "X" IN THE SQUARE OF YOUR CHOICE. DO NOT SIGN THE BALLOT.
3. FOLD THE BALLOT, PLACE IT IN THE SECRET BALLOT ENVELOPE AND SEAL IT IN THE STAMPED, RETURN-ADDRESSED ENVELOPE.
4. SIGN YOUR NAME (DO NOT PRINT) ON THE OUTSIDE OF THE ENVELOPE IN THE SPACE MARKED "signature" AND INDICATED BY THE ARROW.
5. DEPOSIT THIS ENVELOPE, WHICH NEEDS NO POSTAGE, IN THE MAIL SO THAT YOUR BALLOT WILL BE RECEIVED NOT LATER THAN

12:00 P.M., DECEMBER 9, 1974

6. AFTER YOUR SIGNATURE IS CHECKED FOR ELIGIBILITY TO VOTE, AN AGENT OF THE COMMISSION WILL REMOVE YOUR SECRET BALLOT FROM THE ENVELOPE CONTAINING YOUR SIGNATURE AND MIX YOUR BALLOT WITH ALL OTHER BALLOTS BEFORE IT IS COUNTED. NO ONE WILL KNOW HOW YOU VOTED.

If you have any questions about this election, you may contact the Commission's Executive Director or his agent at the following address:

New Jersey Public Employment Relations Commission
P. O. Box 2209
Trenton, New Jersey 08625

Telephone No. (609) 292-6780

SEE OTHER SIDE TO VOTE

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

OFFICIAL SECRET BALLOT

FOR CERTAIN EMPLOYEES OF

STATE OF NEW JERSEY

This ballot is to determine the collective negotiating representative, if any, for the unit in which you are employed.

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

NEW JERSEY CIVIL SERVICE ASSOCIATION-NEW JERSEY STATE EMPLOYEES ASSOCIATION	NEITHER	ASSOCIATION OF CIVIL SERVICE PROFESSIONALS (A.F.S.C.M.E.-I.F.P.T.E.)
☐	☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.

If you spoil this ballot return it to the Commission Agent for a new one.