

D.R. NO. 2003-13

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

In the Matter of

NEW JERSEY STATE JUDICIARY,

Public Employer,

-and-

Docket Nos. RO-2001-60
RO-2003-43

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, LOCAL 1034,

Petitioner.

SYNOPSIS

The Director of Representation found that certain free-lance interpreters (FLIs) employed by the New Jersey State Judiciary Administrative Office of the Courts (AOC) are public employees, not independent contractors, and sufficiently regularly employed so as to be eligible for representation. The Director further found that the appropriate unit for FLI inclusion was an existing non-supervisory, non-case related professional unit of Judiciary employees including full-time staff interpreters currently represented by the Communication Workers of America. The Director, therefore, dismissed CWA's petition for a stand-alone unit of FLIs and directed a mail ballot election be conducted among FLIs to determine whether they wish to be represented by CWA in its existing non-supervisory, non-case related professional unit.

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Appearances:

For the Public Employer
Apruzzese, McDermott, Mastro & Murphy, attorneys
(Frederick T. Danser, III, of counsel)

For the Petitioner
Weissman and Mintz, attorneys
(Steven P. Weissman, of counsel)

DECISION AND DIRECTION OF ELECTION

On February 8, 2001, Communications Workers of America, AFL-CIO, Local 1034 (Local 1034) filed a representation petition (RO-2001-60) with the Public Employment Relations Commission (Commission). In that petition, Local 1034 seeks to represent a unit of approximately 300 court interpreters it contends are employed by the Judiciary's Administrative Office of the Courts (AOC or Judiciary). On October 29, 2002, a second representation petition and amended petition, RO-2003-43, was filed by CWA seeking to add all regularly employed FLIs to an existing unit represented by CWA. That matter is discussed more fully below.

The Judiciary opposes the petition. It contends the petitioned-for court interpreters generally referred to as free-lance interpreters (FLIs), are not employees but independent contractors and are, therefore, not eligible for representational rights under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq. (Act). The Judiciary contends, alternatively, that a substantial number of FLIs, if found to be employees, are not sufficiently regularly employed and are casual employees, ineligible for representation under the Act. The Judiciary also contends that if FLIs are considered employees and any are found to be sufficiently regularly employed as to warrant representation, the proposed unit in RO-2001-60 is inappropriate; the FLIs should be added to an existing unit of professional, non-case related employees which includes approximately thirty-six full time court interpreters currently represented by the Communications Workers of America (CWA).^{1/}

Local 1034 asserts that the petitioned-for court interpreters are not independent contractors and even if they were, independent contractors are not per se excluded from the definition of public employee under the Act. It also contends that FLIs'

^{1/} The Judiciary recommends that if the FLIs are included in the bargaining unit at all, they must (1) perform per diem work for the Judiciary for at least one year; (2) work at least an average of 25 hours per month for an entire year; (3) work at least 9 months of the year; and, (4) agree to work when contacted by the Judiciary at least 75 percent of the time.

working conditions are identical to those discussed in Chief Judge of the Cir. Ct. of Cook Cty. and Chicago Newspaper Guild, Local 34071, No. S-RC-01-077 (Illinois Labor Relations Board, 2001)^{2/} in which per diem court interpreters were found to be public employees, not independent contractors. Local 1034 does, however, concede that the regularly employed petitioned-for court interpreters may be placed in either a stand-alone unit or the existing professional, non-case related unit currently represented by CWA.

We have conducted an administrative investigation of this matter in accordance with N.J.A.C. 19:11-2.2 and 2.6.^{3/} By letter

^{2/} Local 1034 provided an unpublished, unreported, copy of the administrative law judge's decision in the case. The ALJ's decision was subsequently upheld by the Illinois Labor Relations Board, State Panel and both determinations were reported as Chief Judge of the Circuit Court of Cook County, Employer and Chicago Newspaper Guild, Local #34071, Petitioner, 18 PERI 2016 (IL SLRB 2002) (Chief Judge).

^{3/} An investigatory conference was convened by the assigned staff agent on March 15, 2001. The parties provided information at the conference, responded to a questionnaire we requested, submitted additional information, documents, and argument and attended further settlement and telephone conferences. Following the conference the parties jointly asked us to stay further action on the petition as they sought a voluntary resolution. However, on October 16, 2001, following two more extensions of time, Local 1034 advised that the parties were not able to resolve the matter. On October 19, 2001, the parties were requested to submit position statements and respond to a second questionnaire (the first one having not been responded to by either party) by November 21, 2001. The Judiciary requested an extension of time to submit its position statement to November 30, 2001. Following our review of the parties' submissions, they were requested to address additional,

dated September 18, 2002, I advised the parties I was inclined to find that FLIs are public employees and some appeared to be sufficiently regularly employed so as to be eligible for representation. However, I also found that the petitioned-for unit in RO-2001-60 was too narrowly defined; the appropriate unit for FLI inclusion, as the parties referred to, is the existing professional, non-case related unit currently represented by CWA which includes full time staff interpreters. Since the CWA's contract with the Judiciary was then in the third year of a four year term but the window period defined in N.J.A.C. 19:11-2.8(c)(1) had not yet been reached, I advised the parties I was inclined to dismiss RO-2001-60, but that CWA may file for the appropriate unit during the window period. The parties were given until September 30, 2002 to contest our factual and legal determinations.

Both parties sought extensions of time to file responses. The Judiciary filed its response October 4, 2002 and Local 1034 filed its response October 21, 2002. Thereafter, I engaged in

3/ Footnote Continued From Previous Page

specific questions by February 22, and attend a further settlement conference March 18, 2002. Petitioner requested an extension of time to March 8, 2002 to make its submission. Following the further settlement conference, processing was held in abeyance as the parties again explored a voluntary resolution of the matter. During an April 8, 2002 telephone conference it became clear the matter would not resolve and the parties requested an additional opportunity to supplement their position statements by April 30, 2002. After an additional extension of time, the parties submissions were received by May 14, 2002.

additional settlement discussions with the parties which were valuable, however, did not result in the resolution of the issues in dispute.

The Judiciary's response contests the characterization of certain facts. For example it contends, without reference to any supporting documents, that FLIs are not removed from the "Registry of Free-Lance Interpreters and Interpretation/Translation Agencies" (Registry) for failure to accept assignments and that temporary removal from a county/vicinage rotation may be rescinded and is not disciplinary. The Judiciary contends it is an oversimplification to conclude that it determines the date and time of FLI assignments, that it may assign additional duties and that FLIs may be required to work overtime. The Judiciary contends FLIs are contracted for specific periods of time and are free to leave at the conclusion of the period, thus indicative of control (or lack thereof) over the manner in which they perform their duties. The Judiciary also disputes factual findings regarding FLI discipline and duration of employment and argues that FLIs are not covered by the Code of Conduct for Judicial Employees which it contends imposes restrictions on employees to ensure the integrity and independence of the Judiciary. The Judiciary also noted that its use of agencies to provide translation services was not extensively discussed in my September 18, 2002 letter, and it provided interpretation and/or information regarding an increase in the use of agency interpreters.

Local 1034's response noted that the Judiciary did not dispute that it (the Judiciary) established the following:

1. The protocol to determine which interpreters may be used;
2. The conditions for team interpreting;
3. The rotation of free lance interpreting services;
4. The exceptions to the rotation policy;
5. The rules and methods of compensation;
6. The use of agencies to provide interpreting services;
7. The cancellation policy; and
8. The method of verifying and evaluating interpreting services.

Local 1034 also noted the Judiciary did not dispute that:

1. Once FLIs accept assignments, they must perform the work assigned by the VCIS during the hours established by the courts;
2. FLIs do not have discretion to stop working in the middle of a proceeding;
3. At least one FLI in Clifton faced disciplinary action related to his alleged failure to return for a second day of proceedings;
4. The majority of FLI time is spent performing interpreting services at Judiciary facilities;
5. The Judiciary routinely designates a particular facility in which the proceeding will be conducted;
6. The Guidelines specify how long FLIs must work to be eligible for set rates of pay;
7. Other than turning down work, FLIs do not have discretion over when and how long they work;
8. FLIs are paid according to assignments at rates set by the Judiciary based upon whether they are a master, journey-level, conditionally-approved or eligible-unapproved interpreter; and

9. FLIs and full-time staff interpreters share the same core functions, i.e., interpretation and translation.

Local 1034 did not, however, dispute the determination that the petitioned-for unit in RO-2001-60 was inappropriately narrow and that the petition should be dismissed.

On October 29, 2002, CWA filed a timely representation petition and amendment seeking to have approximately 50 "regularly employed freelance court interpreters added to the existing unit of professional non-case related employees." That matter was docketed as RO-2003-43. The Judiciary was requested to post Notices to Public Employees of the filing and was invited to submit a position statement.

On November 15, 2002, the Judiciary submitted its position statement regarding RO-2003-43 advising that it did not consent to an election for the reasons it stated earlier in RO-2001-60; specifically, that FLIs are not public employees, therefore ineligible for representational rights under the Act. It also provided a list of approximately 285 FLIs^{4/} which it stated are available to provide interpreting and translation services on a per diem basis. On November 19, 2002, the Judiciary

^{4/} We asked the Judiciary to submit a list of all regularly employed FLIs as sought in RO-2003-43. The Judiciary submitted only the list of approximately 285 FLIs which were available to provide services on a per diem basis. Consequently, since we could not ascertain the validity of the showing of interest based upon the list submitted by the Judiciary, we assumed the showing of interest submitted by the CWA to be adequate.

forwarded a copy of its collective negotiations agreement with CWA covering the professional non-case related unit during the term July 1, 2000 - June 30, 2004.

Despite the Judiciary's recharacterization of certain facts, we have not found any substantial or material factual dispute which may more appropriately be resolved at a hearing. N.J.A.C. 19:11-2.6(d). Based upon our investigation, we make the following:

FINDINGS OF FACT

The Judiciary is a public employer and Local 1034 is an employee organization within the meaning of the Act. The Judiciary employs several thousand employees statewide. Six employee organizations currently represent Judiciary employees in negotiations units as follows:

1. Support Staff - Judiciary Council of Affiliated Unions (JCAU). Contract Term: July 1, 2000 - June 30, 2004
2. Support Staff Supervisory - Judiciary Council of Affiliated Unions (JCAU). Contract Term: July 1, 2000 - June 30, 2004
3. Non-Case Related Professionals - Communications Workers of America (CWA). Contract Term: July 1, 2000 - June 30, 2004
4. Court Reporters - Office of Professional Employees International Union (OPEIU). Contract Term: July 1, 1999 - June 30, 2004
5. Case-Related Professionals - Probation Association of New Jersey (PANJ). Contract Term: July 1, 2001 - June 30, 2004
6. Professional Supervisors Unit - Probation Association of New Jersey (PANJ). Contract Term:

July 1, 2000 - June 30, 2004 (contract has been ratified but may not yet have been signed by the parties)

Interpretation and translation services are provided to the Judiciary through the use of full-time staff interpreters, FLIs and interpretation/translation agencies. Interpreters from all three sources perform interpreting services, or, the rendition of language in oral form, for Judiciary personnel. The function of an interpreter is to establish communication between court personnel and non-english speaking individuals having dealings with the Judiciary. Additionally, interpreters may be required to translate. Translation is the rendition of language in written form. Interpreters may be called upon to translate when a document written in one language needs to be explained in another language.

FULL-TIME STAFF INTERPRETERS

The Judiciary employs approximately 36 full-time, spanish-speaking interpreters and one American Sign Language (ASL) staff interpreter working among the 21 vicinages. Staff interpreters hold one of the following job titles: court interpreter 2, court interpreter 3, court services supervisor 1 and court services supervisor 3.

The hiring of staff interpreters is set by the Judiciary's Directive #7-1987 and "Guidelines for Judicial Managers to Follow in Implementing Directives Regarding Appointing and Selecting Staff Who Interpret (and Translate) in the Superior and Municipal Courts." (May 10, 1993 revision) (Staff Guidelines). Effective October 28,

1987, and pursuant to Directive #7-1987, candidates for staff interpreter positions must be approved by the AOC. The minimum requirements for the court interpreter positions are as follows:

Level 1 - Basic/Trainee (Court Interpreter 1): Employees at this level interpret proceedings of limited legal significance or limited linguistic complexity and prepare translations of forms, letters and other court-related documents.

Level 2 - Journey (Court Interpreter 2 and Court Interpreter 3): Employees at this level interpret legal proceedings and translate forms, letters and other court-related documents. [Staff Guidelines]

Before translating documents, incumbents must also pass a translation test administered by the AOC. Level 1 candidates must score 50% or better in each of the parts of the test and have an overall average of 60% on the test administered by the AOC or by the Consortium for State Court Interpreters Certification. Level 1 requirements do not apply to english/spanish interpreters. Additionally, Level 1 court interpreters must complete two interpreting courses and pass the interpreting test after six months and no later than eighteen months from date of appointment.

Level 2 candidates must score 70% or better in each part of the test; or have a score of 70% or better in the consecutive and simultaneous components of the interpreting examination, 60% or better in the sight component, with an over all average for all components of 70% or higher in a test administered by the AOC or by the Consortium for State Court Interpreters Certification; or possess a court interpreter certification from the Administrative Office of the United States Courts.

As to sign language, Level 2 candidates must obtain certification by the National Registry of Interpreters for the Deaf in one of the following areas:

Certificate of Interpretation and/or Certificate of Transliteration

Certificate of Deaf Interpreting

Comprehensive Skills Certificate

Oral Interpreting: Comprehensive

Reverse Skills Certificate

The vicinage, as the appointing authority, may employ anyone who applies for staff interpreter positions pursuant to the ordinary recruitment process, provided the candidate has been approved by the AOC as an interpreter. Once the selection process is complete, the candidate selected is appointed as a full-time staff interpreter in a vicinage. Interpreters in the court interpreter 2 and 3 titles are included in the non-case related professionals unit currently represented by the CWA; and the court services supervisor 1 and 2 titles are included in the professional supervisors unit represented by PANJ.

Once assigned to a vicinage, full-time court interpreters are listed on the State of New Jersey payroll and are paid bi-weekly according to the annual salary as set by the respective collective negotiations agreements. Standard payroll deductions include state and federal income tax withholdings, state disability and unemployment insurance contributions and health insurance contributions.

Full-time staff interpreters are eligible to participate in the State pension plan and similar benefit programs and are eligible for vacation and leave time as provided by state and federal law, Judiciary policy and the respective collective negotiations agreements.

Staff interpreters in a vicinage work under the oversight of an assistant trial court administrator/operations manager. Those vicinages employing two or more staff interpreters also employ a court services supervisor who supervises all court interpreter 2s and/or 3s.

Full-time staff interpreters work regular work days and work weeks, typically consistent with court hours but generally established by the respective collective negotiations agreements. These collective agreements typically provide for overtime compensation.

Staff interpreters work 35 hours per week but on any given day may work in many different locations, or by telephone, in courtrooms, hearing rooms, rooms where mediation or arbitration takes place, offices of court employees (e.g., intake units), or at service windows (e.g., where payments are made for court-imposed obligations such as fines, child support, etc.). Full-time court interpreters may also be called upon to coordinate case preparation, assist the public, provide interpretation training to judges and professional staff, or to translate documents.

There is no uniform method by which daily assignments are made. As a general rule, full-time staff interpreters go to assignments either because they have been scheduled in advance or because there is a same-day request for services. Some vicinages have hierarchies established to help determine which requests should get priority attention. Most vicinages generally provide services on a first-come, first-served basis.

Most vicinages provide tools of the trade, including dictionaries and simultaneous interpreting equipment for their staff interpreters. Most vicinages have supplied personal computers and some are making access to research sites on the Internet available. Equipment needed for telephone interpreting is available in every county using staff interpreters.

The American Sign Language interpreter works from the AOC's main office in Trenton. This full-time interpreter is available to the Superior Court statewide and accepts assignments primarily on a first-come, first-served basis in all 21 counties. This employee sets her own schedule based on requests from the vicinages.

The professional performance of all interpreters must be consistent with the Code of Professional Conduct for Interpreters, Transliterations, and Translators adopted by the Supreme Court.

FREE LANCE INTERPRETERS
FLI GUIDELINES

In March 1995 and 1999, the AOC promulgated and revised "Guidelines for Contracting Free-Lance Interpreters in the Superior Court" (FLI Guidelines). The FLI Guidelines Policy Statement notes:

The hiring of staff interpreters is prescribed by directive. Directive #7-1987 and "Guidelines for Judicial Managers to Follow in Implementing Directives Regarding Appointing and Selecting Staff Who Interpret (and Translate) in the Superior and Municipal Courts" (May 10, 1993 revision) control hiring in Superior Court.

The "Guidelines for contracting Free-lance Interpreters in the Superior Court" were developed as a policy to parallel the one for staff interpreters. It guides managers in the Superior Court, Tax Court, and any support arm of those courts when contracting free-lance interpreters. They have been approved by the Chief Justice and the Assignment Judges as another vehicle for implementing the Supreme Court's directives referenced above.

By "free-lance interpreters" the following classes of interpreters are included:

1. Self-employed individuals who work on an hourly, half-day, full-day, or other basis upon the request of a representative of a court or a court support service; and
2. Individuals who work through a private corporation commonly known as a "translation agency" or "interpretation agency" which has been contacted by a representative of the court or a court support service. [FLI Guidelines at 1.] (emphasis in original, footnotes omitted).

The FLI Guidelines set-forth six objectives:

These Guidelines have been drafted to help the Judiciary accomplish the following objectives:

1. Provide the most qualified free-lance interpreter available when interpreting services are not available from part- and full-time staff interpreters;
2. Promote uniformity in the way free-lance interpreting services are managed regardless of (a) region of the state or (b) type of court or court support entity needing the service;

3. Make working as an interpreter in the courts as attractive as possible so that the Judiciary can recruit and maintain the number and diversity of both free-lance and staff interpreters needed for efficient and effective operation of the courts and their support services;

4. Use fiscal resources as efficiently and responsibly as possible in order to promote public confidence in the administration of justice;

5. Apportion assignment among free-lance interpreters in a way that meets legal requirements of fairness; and

6. Facilitate efficient and cost-effective coordination of free-lance interpreting services by implementing a system of managing free-lance interpreters that is clear to all. [FLI Guidelines at 2.]

Under the oversight of trial court administrators, the FLI Guidelines require each vicinage to appoint a designee to a committee on services to linguistic minorities (CSLM). The designee is responsible for overseeing the implementation of the Guidelines in the vicinage. Day-to-day administration of free-lance interpreting services in the Superior Courts is handled by vicinage coordinators of interpreting services (VCIS).

VCISs arranging for FLI services consult the "Registry of Free-Lance Interpreters and Interpretation/Translation Agencies" (Registry), which was created by the AOC. The Registry lists approximately 300 FLIs and approximately 60 translation agencies. FLI inclusion in the Registry means:

Each registered interpreter has completed the one-day seminar on the Code of Professional Conduct and has signed an affidavit. The purpose

of the affidavit is to ensure that persons who register (1) agree to abide by the Code of Professional Conduct for Interpreters, Transliterated, and Translators when working on a contractual basis for the courts, (2) understand that their services will be managed under the "Guidelines for Contracting Free-lance Interpreters in the Superior Court and that they accept the conditions of those Guidelines, including the rate structure; and (3) affirm that all information and answers provided are true. [Registry at ii, footnote omitted.]

The FLI Guidelines determine the method, manner and conditions for retaining FLI and agency services. The Guidelines cover the following topics:

1. Interpreters who may be used
2. Team interpreting
3. Rotation of Free-Lance Interpreting Services Among the Interpreters
4. Exceptions to the Rotation Policy
5. Rates
6. Use of Agencies
7. Assignment Information to be Provided to Prospective Interpreters (or Agencies)
8. Cancellation Policy
9. Double Payments
10. Interpreters with Disabilities
11. Verification and Evaluation of Services
12. Payment for services
13. Background Information for Registered Interpreters and Agencies

FLI QUALIFICATIONS

FLI qualifications are set by the AOC pursuant to statutory and regulatory authority. N.J.S.A. 2B:8-1 and R. 1:34-7. Succinctly, FLIs must complete a one-day seminar conducted by the AOC; it is an introduction to the New Jersey Judiciary, the field of court interpreting, and the Code of Professional Conduct for Interpreters, Transliterated, and Translators. FLIs sign

professional service agreements and complete registration forms requesting they be listed in the Registry.

Individuals seeking to interpret a language for which the AOC has a court interpreter screening examination must take the exam and earn a passing score. If successful on the exam, the individual's name is entered in the Registry where he/she is classified at one of four levels for most languages: master, journeyman, conditionally approved, and eligible unapproved.^{5/}

Individuals who wish to work as interpreters of American Sign Language must be certified by the National Registry of Interpreters for the Deaf, pursuant to N.J.S.A. 34:1-69.7 et seq. Classification is based on the type of certification each individual has earned.

Individuals seeking to interpret any language for which the AOC does not have an exam have no additional requirements. They are classified according to three criteria: (1) professional training in translating/interpreting, (2) experience as an interpreter in legal environments and (3) results from tests administered by other entities.

FLIs, unlike full-time court interpreters, provide interpretation services only. They do not coordinate case

^{5/} The FLI Guidelines note, at page 3, n. 4, that the AOC expected to establish a certification program by 1996 which would change the categories to "certified," "conditionally certified" and "uncertified." It is unclear whether the certification program was implemented.

preparation or provide interpretation training to judges and professional staff or generally translate documents (except as needed in the context of in-court or in-hearing translation).

HOW FLIs ARE RETAINED

FLIs' services are retained when court administrators determine a need for linguistic services that cannot be met by english-speaking staff or full-time staff interpreters. The administrator will notify the VCIS who then arranges for the services of an FLI by following the procedures set-forth in the FLI Guidelines. Generally, this involves communicating with the interpreter (by telephone, beeper, fax, or e-mail) to offer a particular assignment or set of assignments and, when an offer is accepted, communicating whatever specific information may be needed as to time, place, date and background information about the assignment.

As a general rule, VCISs are advised by the office or court that needs the service of the date and time the matter has been scheduled. The coordinators then try to match an interpreter with that need. In some cases, coordinators work with offices and courts to change the date and/or time of a matter based on the availability of an FLI.

The VCIS must offer assignments first to persons who are approved (master and journey-level interpreters), if available. They may offer an assignment to a conditionally approved interpreter only when no approved interpreter is available and, under certain

circumstances, when the matter cannot be rescheduled for a time when an approved interpreter is available. Eligible unapproved interpreters may be contacted for assignments only when efforts to arrange for an approved or conditionally approved interpreter have failed. Thereafter, if unable to retain a FLI's services, the VCIS may seek agency services.

FLI assignments are offered on a rotational basis among available interpreters for each language. The FLI Guidelines provide that "[n]o one interpreter or subset of interpreters should be given any kind of preferential treatment in the offering of assignments, except for specific types of cases that should be served by Master Interpreters" (FLI Guidelines at 5). The AOC reserves nine other exceptions to the rotation policy: emergent matters, fiscal constraints, non-responsive interpreters, unprofessional interpreters, inappropriate interpreter/service matches, exclusions, interpreters available evenings only, geographically remote interpreters, combined and continued assignments (FLI Guidelines at 6-9). Newly added names to the Registry are placed at the end of the rotation for respective languages.

FLIs may decline any assignment. The FLIs establish their own work schedules by fitting assignments into their schedules as personal and professional commitments allow. Declining assignments, however, may lead to temporary or permanent removal from the Registry. A few free-lance interpreters have turned down

assignments when contacted by a VCIS and have instead appeared for that assignment through an agency. This is not acceptable since it obliges the VCIS to make duplicate calls and creates the impression that the interpreter is untruthful and manipulating the system. Interpreters who engage in this conduct may be disciplined, including removal from the Registry [FLI Guidelines pp. 21-22]. See also discussion regarding discipline below.

FLI WORK HOURS AND COMPENSATION

FLIs are paid according to assignments. Rates are set by the AOC based on the level of the interpreter (master, journey-level, conditionally approved, eligible unapproved). The FLI Guidelines authorize three basic types of assignments for on-site interpreting: two-hour minimum (any amount of time up to two hours) (\$35-\$110); one-half day (any amount of time between two and four hours) (\$50-\$160); and full-day (any amount of time from four and to eight hours [including one hour for lunch]) (\$70-\$250). In addition, there are provisions for preparation time (i.e., time spent preparing for certain types of cases, such as those involving highly technical terminology) (\$8-\$25 per hour) and "overtime" (i.e., instances where the FLI is needed beyond normal business hours) (\$15-\$50 per hour). The telephone interpreting program has a separate payment schedule that is based on similar criteria.

Hours are not "regular." As indicated above, FLIs are contracted based on need, which is unpredictable and irregular. Hours are "guaranteed" only in the sense that FLIs are guaranteed

payment for whatever period of time was agreed upon for a particular assignment. For example, if the FLI agreed to work for a two-hour-minimum assignment, then the flat rate stipulated in the FLI Guidelines for that period of time and for that FLI classification, is paid, even if the FLI actually works for only ten minutes. The overtime referred to in the FLI Guidelines will apply when an FLI is required to work beyond a full day and is paid additional compensation for the extra time worked. The additional compensation is not, however, calculated at time and one half pursuant to the Fair Labor Standards Act.

The FLI Guidelines at p. 11 advise the VCIS's not to ". . . assume that if an assignment runs long [. . .], the interpreter is required to stay to finish the assignment. It is the interpreter's prerogative to leave" However, no other evidence suggests this is in fact the practice. Given the overtime structure in place and the judicial setting in which FLIs typically operate, I will not presume, absent direct evidence, that FLIs simply leave at the end of the contracted period. In any event, it is clear FLIs cannot leave before the end of the contracted period.

The FLI Guidelines' rate schedule also provides payments for travel in excess of 60 miles, overnight lodging, and additional compensation if a team interpreter is required to work an assignment alone.

Once interpreting services have been provided, whether on-site or by telephone, the interpreter submits a State of New

Jersey Payment Voucher (Vendor Invoice; form PV 5/93), which may be accompanied by the FLI's own personal invoice, to the office that coordinated the interpreter's assignment(s). The Judiciary pays the invoices out of funds allocated to the budget of the vicinage that used the service. There are no payroll deductions and FLIs are issued an IRS Form 1099 at the end of each calendar year.

FLIs are required to complete an Internal Revenue Service (IRS) form W-9. The Judiciary forwards the completed form to the New Jersey Department of Treasury (Treasury Department). FLIs are also required to register with the Treasury Department as vendors. Individuals complete a business registration form and many FLIs register as business entities rather than individuals. Those FLIs registering as a business are paid in the name of the business.

FLI EVALUATIONS AND DISCIPLINE

There are no specific, mandated, or universally imposed procedures for monitoring or evaluating FLIs. The FLI Guidelines recommend the use of a form to verify the provision of services prior to payment. The form has one section for the presiding officer to assess interpreter service on a case-by-case basis as satisfactory, unsatisfactory or mixed. Some vicinages use the form as it appears in the FLI Guidelines, others use a modified version, and still others do not use it.

With few exceptions (e.g., interpreters new to the profession) FLIs are not formally observed or evaluated by professional staff. When problems come to the attention of a VCIS,

the coordinator may, on a case-by-case basis, observe the FLI on duty, meet with the interpreter to evaluate the alleged problems and offer guidance. If matters cannot be resolved informally, complaints may be filed with the AOC's Court Interpreting Section (CIS). The FLI Guidelines provide that VCIS complaints about FLI conduct should be filed with the Court Interpreter Professional Board. Because this Board has not yet been established, complaints are handled by CIS.

Complaints filed with CIS are generally limited to alleged violations of the Code of Professional Conduct for Interpreters, Translators, and Translators. FLI Guidelines at pp. 7-8. Only two or three complaints are filed each year. It is not clear from the record how these complaints are resolved. There does not appear to be a formal schedule of discipline.

The FLI Guidelines provide that FLIs may be temporarily removed from the assignment rotation if they fail to return two or more telephone calls over a period of four or more weeks. They may also be removed for not accepting and filling an assignment after five opportunities within three months. FLI Guidelines at p. 7. Additionally, although the FLI Guidelines provide a cancellation policy for interpreters, cancellation is subject to verification by the VCIS. If the VCIS is not satisfied that the cancellation was for an appropriate reason, the FLI Guidelines warn that "a variety of forms of discipline could eventuate pursuant to established procedures." FLI Guidelines at p. 17.

The FLI Guidelines also note that some interpreters are listed in the Registry individually and as representatives of agencies. The Judiciary warns that FLIs turning down assignments who then appear on behalf of an agency may be disciplined, including being removed from the Registry. FLI Guidelines at pp. 21-22.

Local 1034 provided anecdotal evidence in one county of FLIs being admonished for dress code violations and directed to wear proper attire. In another county, it appears that a complaint was filed against an FLI in 1998. The Clifton municipal court director alleged that an FLI was adversarial and treated her with unnecessary hostility when she addressed him and she admonished him for failing to attend the second day of an interpreting assignment. The CIS sent the FLI a letter, advised him of the charges and provided him with an opportunity to reply. If he did not reply he was advised that his name would be removed from the Registry. The CIS also advised him that if the charges were not substantiated, the complaint would be "closed out." If the charges were substantiated, the CIS would determine whether rehabilitative or disciplinary action would be taken. The FLI submitted his reply, apparently apologized for his conduct, and the complaint was "closed out."

While a complaint is being processed, the FLI may or may not be called for work by the county from which the complaint originated. The most severe action that might be taken by the AOC, as described above, is the permanent removal of the person's name from the Registry. No FLI has been removed from the Registry based on interpreter misconduct.

REGULARITY OF FLI SERVICES

The number of sessions worked by FLIs varies. Some FLIs were paid for as few as 2 hours in the year and some were paid in excess of 193 full days. During certain periods some FLIs may work virtually as much as full-time interpreters; at other times they may work far less. Given the nature of court proceedings, FLIs may be called in for an assignment but their services may be limited in scope and time if, for example, the proceeding in which they were to assist was resolved. The FLI Guidelines' compensation schedule, however, provides that FLIs may be paid for more time than was actually worked.

MISCELLANEOUS TERMS AND CONDITIONS OF FLI SERVICE

FLIs do not receive pension or related benefits including paid vacation, sick or personal leave.

No equipment is specifically required of FLIs but two pieces of equipment are expected. FLIs are ordinarily expected to have their own tools of the trade, such as dictionaries and simultaneous interpreting equipment. In some instances, the courts make simultaneous interpreting equipment available, especially in multi-party proceedings where the average FLI would not have sufficient receivers. FLIs who wish to have first priority in being contacted to deliver telephone interpreting services must have the capacity to receive faxed documents. This may be by means of a traditional fax machine or other suitable method, such as a computer.

ANALYSIS

EMPLOYMENT STATUS

The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., provides,

public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity. N.J.S.A. 34:13A-5.3.

The threshold issue in this case is whether FLIs are public employees within the meaning of the Act or independent contractors, thus ineligible for the rights conferred by the Act.

N.J.S.A. 34:13A-3(d) defines public employee, in relevant part, as ". . . 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 executive and confidential employees." An independent contractor is

[o]ne 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.

See Bahrle v. Exxon Corp., 145 N.J. 144, 157 (1996).

The National Labor Relations Act (NLRA) specifically excludes independent contractors from its coverage. Our Act's definition of employee is broader and does not contain that specific exclusion. See State of New Jersey, E.D. No. 67, 1 NJPER 2 (1975). Importantly, though, the courts of this State have recognized that

our Act was patterned after the NLRA, see Lullo v. Int'l Ass'n of Fire Fighters Loc. 1066, 55 N.J. 409, 424, 262 A.2d 681 (1970), and, therefore, the Commission has considered cases contesting employer status as well as public employee status. See generally, Union Tp., D.R. No. 95-9, 21 NJPER 14 (¶26008 1994), aff'd. P.E.R.C. No. 96-38, 22 NJPER 22 (¶27009 1995).

Where, as in this case, the legislature has not clearly defined the term "employee," the United States Supreme Court has held that courts should use the common law agency test identified in Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed. 2d 811 (1989) to determine whether a person is an employee. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 323, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed. 2d 581 (1992). While other employment status tests have been developed over the years, the Commission, consistent with Reid and Darden, has applied the traditional common law agency test in determining employment status. See Union; State of New Jersey (CNJSCL), D.R. No. 97-5, 24 NJPER 295 (¶29141 1996) (see n. 7), req. for rev. den. P.E.R.C. No. 97-81, 23 NJPER 115 (¶28055 1997).

In Reid, the court applied thirteen factors in its common law agency test to determine employment status. All factors are assessed and weighed but no one factor is decisive. Darden, 490 U.S. at 324, 112 S.Ct. at 1349 citing NLRB v. United Ins. Co. of America, 390 U.S. 254, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968). The test does, however, place greater emphasis on the first factor; the

hiring party's right to control the manner and means by which work is accomplished. See Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993). Consistent with Reid, the Commission considers who controls the hiring, firing, promotions, discipline, evaluations, vacations, hours of work and scheduling of wages, benefits, funding and expenditures. The source of funding for salaries will not by itself determine who is the employer. Union Tp. These elements will be analyzed together with the thirteen Reid factors.

1. THE HIRING PARTY'S RIGHT TO CONTROL THE MANNER AND MEANS BY WHICH THE PRODUCT IS ACCOMPLISHED

An independent contractor controls the manner and means by which work is accomplished. AT&T Co. v. Winback and Conserve Program, Inc., 42 F.3d 1421, 1435 (3d Cir. 1994), cert. denied, 115 S.Ct. 1838 (1995) (general control and direction are insufficient indicia of employment status). Employee status is dependent upon whether the elements of control and dependence, coupled with the absence of any employment protection, predominate over factors that favor an independent contractor status. MacDougall v. Weichert, 144 N.J. 380, 389 (1996).

The "control test" focuses on the right of the employer to control the individual, as well as the series of factors adopted in the Restatement (Second) of Agency. Carpet Remnant Warehouse Inc. v. Dep't of Labor, 125 N.J. 567, 579-80 (1991); Aetna Insurance Co. v. Trans American Trucking Service, Inc., 261 N.J. Super. 316, 327 (App. Div. 1993); New Jersey Property-Liability Insurance Guaranty Ass'n v. State of New Jersey, 195 N.J. Super. 4, 10 (App. Div.

1984), cert. denied, 99 N.J. 188 (1984); Pelliccioni v. Schuyler Packing Co., 140 N.J. Super. 190, 198 (App. Div. 1976); Mikos v. Liberty Coach Co., 48 N.J. Super. 591, 602 (App. Div. 1958).

Under the control test, the distinction between an independent contractor and an employee "turns upon the degree of control exercised by the employer over the means, methods, and details of the operation," Carpet Remnant Warehouse Inc., 125 N.J. at 579 (citations omitted), and is determined by analyzing the employer's right to control. See New Jersey Property-Liability Insurance Guaranty Ass'n, 195 N.J. Super. at 10. All other factors being equal, the right to control an individual's physical conduct may be determinative of whether the person is an employee or an independent contractor. Eisenberg v. Advance Relocation & Storage, 237 F.3d 111, 115 (2nd Cir. 2000).

* * *

Applying the foregoing standards, I find that the Judiciary exercises sufficient control over the means, methods, and details of FLI services to warrant finding FLIs are employees within the meaning of the Act, not independent contractors.

The table of contents for the FLI Guidelines illustrates the point that the Judiciary has reserved to itself all meaningful elements of controlling FLI services. The FLI Guidelines define the parameters for the management of free-lance interpreting services and establish the protocol to determine which interpreters may be used, the conditions for team interpreting, the rotation of

free-lance interpreting services, the exceptions to the rotation policy, the rates and methods of compensation, the use of agencies, the cancellation policy and the method of verifying and evaluating services. The FLI Guidelines also define specific conduct which is subject to discipline and/or removal from the Registry.^{6/} The FLI Guidelines are unilaterally set terms and conditions of engagement established by the Judiciary. The Guidelines establish an FLI system pervasively controlled by the Judiciary such that the only element of control FLIs have is whether to seek to have their name listed in the Registry, and if so, whether to accept assignments if offered.

FLIs perform functions that are an essential part of the Judiciary's everyday operations: interpretation and translation in various proceedings. The Judiciary retains the ultimate authority to assign interpreting work. Once FLIs accept and appear at assignments, they must perform the work assigned by the VCIS during the hours established by the courts. While the compensation schedule accounts for additional time that may be worked, FLIs do not have the discretion to stop working in the middle of a proceeding; that is implicitly reserved to the Judiciary. FLIs perform all of their interpreting assignments before leaving their assigned courthouses and at least one FLI in Clifton faced

^{6/} The Judiciary argues that temporary removal from a county/vicinity rotation may be rescinded and is not disciplinary. The Judiciary's position is not supported by the record.

disciplinary action related to his alleged failure to return for a second day of proceedings. Disciplinary actions against FLIs, including those for dress code violations, non-responsiveness to assignments or violating the cancellation policy also suggest substantial employer control.

FLIs, like the full-time staff interpreters, perform their work without extensive supervision and do exercise discretion of an independent professional manner during their interpreting work. FLIs and full-time staff interpreters interpret the meaning of words and ideas used in various proceedings from target languages to source languages. Thus, they exercise discretion to choose the particular word(s) to convey the speaker's meaning. However, "[u]nder the control test the actual exercise of control is not as determinative as the right of control itself . . . because, in many instances, the expertise of an employee precludes an employer from giving him any effective direction concerning the method he selects in carrying out his duties." Smith v. E.T.L. Enterprises, 155 N.J. Super. 343, 350 (App. Div. 1978).

In this case, interpretation and translation services, while in the process of being rendered, require little supervision over details for its proper prosecution. The FLI performing these services, as a condition of being listed in the Registry, is sufficiently experienced that instructions concerning such details as word usage would be superfluous. The type of discretion provided to interpreters, however, regardless of their status as full-time or

FLI, is minor, within the area of expertise for which they are engaged and is of the type of discretion that does not, by itself, establish independent contractor status. See the ALJ's decision in Chief Judge, citing Michigan Eye Bank, 265 NLRB 1377 (1982); South Carolina Education Association, 240 NLRB 542 (1979). The only meaningful element of control FLIs retain is their ability to reject assignments within the numerical and time limitations set forth in the Guidelines.

Considering all the foregoing factors together, I find that the Judiciary has sufficient control over the manner and means by which FLIs perform interpreting services to construe them as employees. Restatement (Second) of Agency § 220(1) (1958) (Restatement). Thus, I find that FLIs are employees, not independent contractors.

2. THE SKILL REQUIRED

Individuals providing unskilled labor are usually regarded as employees not independent contractors. Restatement (Second) of Agency § 220(2)(d). The education and testing prerequisites to be listed in the FLI Registry require a high level of specialized skill. Many highly skilled individuals are employees. This one factor is not controlling in this case.

3. THE SOURCE OF THE INSTRUMENTALITIES AND TOOLS

Individuals providing their own necessary instrumentalities and tools for their profession are usually considered independent contractors. Restatement § 220(2)(e).

In this case, the Judiciary provides its full-time staff interpreters, in most vicinages, with tools of the trade including dictionaries and simultaneous interpreting equipment. Most vicinages also make personal computers available to staff interpreters and some provide them with access to research sites on the internet. Equipment needed for telephone interpreting has been placed in every county where there are staff interpreters.

The nature of the service FLIs provide does not generally require many tools of the trade. For practical purposes, FLIs may be expected to have appropriate dictionaries. Additionally, FLIs seeking priority to deliver telephone interpreting services must have the capacity to receive faxed documents. Neither of these two minor examples are particularly compelling.

More compelling is the symbiotic relationship between courts and FLIs when it comes to simultaneous interpreting equipment. The courts make simultaneous interpreting equipment available, for example in multi-party proceedings, where the average FLI would not have sufficient receivers (headphones) to provide to all parties involved in the proceeding. Doing so benefits both the FLI and the Judiciary. The Judiciary has the equipment available, but, presumably not a full-time staff interpreter. By making its equipment available for the FLI to use, the Judiciary is able to continue its business and the FLI is able to provide a service it would not otherwise be able to because he/she lacked sufficient equipment.

The types of equipment (e.g., dictionaries) FLIs are expected to provide themselves is de minimis. Fax communication with FLIs is not required; it merely makes FLIs who have that capability more accessible than those who do not. Moreover, FLI use of the Judiciary's simultaneous interpreting equipment on an as-needed basis supports the conclusion that FLIs are more like employees than independent contractors.

4. THE LOCATION OF THE WORK

There is a strong indication of employee status if the work is performed on the premises of the employer. Restatement § 220(2)(e). With the exception of some telephone interpreting services, the majority of FLI time is spent performing interpreting services in Judiciary facilities. Moreover, the Judiciary routinely designates which particular facility (e.g. which vicinage, which courtroom) the proceeding will be conducted. Because FLIs predominantly perform their services on Judiciary premises, this factor supports the conclusion that FLIs are employees.

5. THE DURATION OF THE RELATIONSHIP BETWEEN THE PARTIES

Employment over a considerable period of time indicates that an individual may be an employee rather than an independent contractor. Restatement § 220(2)(f). FLIs have been utilized by the Judiciary pursuant to the current FLI Guidelines since 1995. While we recognize the Judiciary's argument that some FLIs work occasionally (less than 10 days per year) it is also true that a cadre of FLIs are regularly retained. See Regularity of Employment discussion below.

6. WHETHER THE HIRING PARTY HAS THE RIGHT TO ASSIGN ADDITIONAL PROJECTS TO THE HIRED PARTY AND

7. THE EXTENT OF THE HIRED PARTY'S DISCRETION OVER WHEN AND HOW LONG TO WORK

These factors are interrelated. An employer-employee relationship is more likely to exist if the hiring party has the right to assign additional projects to the hired party. Reid, 490 U.S. at 752, 109 S.Ct. 2179.

Pursuant to the FLI Guidelines, FLIs may be expected to work "overtime." If the assignment runs long, FLIs may be expected to work longer than the VCIS anticipated. The FLI Guidelines unilaterally establish the pay rates to account for such circumstances. This factor supports a finding that FLIs are more like employees than independent contractors in that the Judiciary has retained the right to assign additional work to FLIs.

Employee status is also more likely to exist when the hiring party exerts control over when and how long individuals work. See generally, Short v. Central States, Southeast & Southwest Areas Pension Fund, 729 F.2d 567, 574 (8th Cir. 1984). The FLI Guidelines specify how long FLIs are to work to be eligible for set rates of pay. FLIs do not, other than turning down assignments, have meaningful discretion over when and how long they work. I conclude, therefore, that the Judiciary predominantly controls when and how long FLIs work; this suggests employee status.

8. THE METHOD OF PAYMENT

To determine whether an individual is an independent contractor or an employee, the court may look at whether the worker is paid hourly or by salary. Restatement § 220(2)(g). Another factor to consider is who provided the worker with payment for services.

FLIs are paid according to assignments. Rates are set by the Judiciary based on type of interpreter (master, journey-level, conditionally approved, eligible unapproved). The Guidelines authorize three basic types of assignments for on-site interpreting: two-hour minimum (any amount of time up to two hours), one-half day (any amount of time between two and four hours), and full-day (any amount of time from four to eight hours [including one hour for lunch]). In addition, there are provisions for preparation time (i.e., time spent preparing for certain types of cases, such as those involving highly technical terminology) and "overtime" (i.e., instances where the FLI is needed beyond normal business hours). Thus, the Guidelines provide uniform rates of pay based on two criteria: interpreter classification and amount of time. The telephone interpreting program has a separate payment schedule that is based on similar criteria.

There are no payroll deductions and FLIs are issued an IRS Form 1099 at the end of each year.

Based on the foregoing, the hourly basis of pay suggests employee status while the absence of payroll deductions and payment by vendor check suggests independent contractor status. This factor does not definitively support a finding either way.

9. THE HIRED PARTY'S ROLE IN
HIRING AND PAYING ASSISTANTS

Individuals who can hire their own assistants may be considered independent contractors. Reid, 490 U.S. at 752, 109 S.Ct. 2179. The contracts between the Judiciary and FLIs are personal service agreements; thus, the service the Judiciary retains is unique to the individual provider. While there does not appear to be any prohibition in the FLI Guidelines or the Registry to FLIs retaining assistants, the nature of the services provided by FLIs does not readily lend itself to the need for assistants or the ability of an FLI to have an assistant without specific Judiciary approval. Based on the foregoing, I conclude that FLIs are more like employees than independent contractors.

10. WHETHER THE WORK IS PART OF
THE REGULAR BUSINESS OF THE HIRING PARTY
AND

11. WHETHER THE HIRING PARTY IS IN BUSINESS

If the service being contracted for is in the nature of the regular business of the hiring party, employee status may attach. Restatement § 220(2)(h) and (j). The Judiciary is the center of the State's justice system. Communications with parties involved in proceedings within the justice system are integral to the functions of the Judiciary. While the Judiciary is not "in business" in the private sector "for profit" sense of the term, it is regularly engaged in the enterprise of providing forums for the resolution of civil and criminal matters. FLIs provide a communicative service which is necessarily collateral to the main purpose of the Judiciary.

The parties do not contest that interpretative services are integral to the Judiciary's core functions. Accordingly, based on these factors, FLIs are more in the nature of employees than independent contractors.

12. THE PROVISION OF EMPLOYEE BENEFITS

Independent contractors generally do not receive employee benefits. Reid, 490 U.S. at 752, 109 S.Ct. 2179. Judiciary employees, including full-time staff interpreters, are entitled to regular State benefits including health and disability coverage as well as pension, vacation and certain other paid and unpaid leave benefits. FLIs do not receive any of these employee benefits. This factor does not support finding FLIs are employees.

13. TAX TREATMENT OF THE HIRED PARTY

The hired party's taxpayer status as individual versus business entity may suggest employment status. Reid, 490 U.S. at 752, 109 S.Ct. 2179. In Cox v. Master Lock Co., 815 F.Supp. 844, 847 (E.D. Pa. 1993), aff'd 14 F.3d 46 (3d Cir. 1993), the court found no employer control over an independent contractor who had incorporated himself, set his own hours and vacation time, provided his own insurance, paid his own income and social security taxes and received no annual leave or retirement benefits. FLIs maintain an IRS Form 1099 income status with the Judiciary; therefore, this factor supports finding independent contractor status.

* * *

After reviewing all of the evidence and balancing all of the factors of the Reid test, I find that FLIs are employees of the Judiciary, not independent contractors. FLIs and full-time staff interpreters share the same core functions; interpretation and translation. FLIs, like their full-time staff interpreter counterparts, are highly skilled workers. While FLIs may be paid as vendors, issued an IRS Form 1099, and do not receive employee benefits, the Judiciary provides FLIs, like staff interpreters, with simultaneous translation and other equipment and requires that most interpretation and translation services be provided on Judiciary premises. The Judiciary may assign FLIs additional duties and determines the date(s) and time(s) of assignments. The Judiciary is in the business of providing a communicative function which is dependent upon the interpretation and translation services provided, in part, by FLIs. FLIs, as a group, have had a reasonably long relationship with the Judiciary which has been governed by the FLI Guidelines and Registry; these documents set the terms by which FLIs may be registered, given assignments and paid.

The most significant factor, the right to control FLI conduct, strongly supports the conclusion FLIs are employees, not independent contractors. All terms and conditions of FLI services are set by the Judiciary through the FLI Guidelines and Registry. The FLI Guidelines implement a system of managing the day-to-day administration of FLI services. The only meaningful retention of any control is the FLIs individualized ability to reject a

particular assignment. Even that discretion, however, is numerically limited according to the FLI Guidelines.

The Judiciary's reliance on the Commission's Executive Director decision in State of New Jersey, E.D. No. 67, 1 NJPER 1 (1975) (consulting physicians precluded from representation) is misplaced. In that case, the executive director applied a traditional community of interest and regularity of employment test to determine whether consulting physicians were eligible for representation. The Executive Director offered, as dicta, that independent contractors were not per se excluded from the Act's coverage, then went on to exclude consulting physicians from a negotiations unit, finding their manner of work, compensation, benefits, job security and varying schedules were sufficiently different from that of negotiations unit employees. Regardless of its result, that determination never squarely addressed the common law agency test for employment status required in this matter. Similarly, Local 1034's reliance on Chief Judge is equally overstated. Per diem court interpreters in that case had more extensive testing and training requirements, completed W-2s and W-4s, had payroll deductions taken from their bi-weekly paychecks and had a more defined expectation of full-time employment.

In addition to State of New Jersey and Chief Judge, both parties referred to numerous other cases from the Commission, the New Jersey courts and other jurisdictions. I have reviewed all cases cited and note that each supported the parties' respective

positions, to one degree or another. Importantly, however, all cases cited determining employment status were based on a case-by-case consideration of the facts particular to that matter. No one case presented facts precisely the same as those presented in this matter. Accordingly, given the foregoing consideration of the particular facts of this case, extensive recitation of the parties' case law support is not necessary here.

The Judiciary argues that it has no more or less control over FLIs than it has over interpreters retained through translation agencies. The critical difference between FLIs and agency interpreters is that agency interpreters report to and are paid by an intervening private employer. As to the Judiciary's contention regarding the possible application of the Code of Conduct for Judiciary employees on FLIs, that is not a test to determine employment status.

Based on all the foregoing considerations, I find that FLIs are public employees.

REGULARITY OF EMPLOYMENT

The foregoing facts indicate that some FLIs would seem to be sufficiently regularly employed as to be eligible for representation pursuant to Commission criteria for regularity and continuity of employment. See Mt. Olive Bd. of Ed., P.E.R.C. No. 82-66, 8 NJPER 102 (¶13041 1982). Some FLIs are paid for as much as 193 full-time days per year.

THE APPROPRIATE UNIT FOR
COLLECTIVE NEGOTIATIONS

The Judiciary argues that if FLIs are public employees, and if any are sufficiently regularly employed, then the appropriate unit for their representation is the existing CWA unit of non-case related professional employees, which includes the full-time staff interpreters.

The Commission is charged with the responsibility of determining the appropriate unit for negotiations. N.J.S.A. 34:13A-6(d). N.J.S.A. 34:13A-5.3 requires that negotiations units be defined "with due regard for the community of interest among the employees concerned." However, in making unit determinations, we must consider the general statutory intent of promoting stable and harmonious employer-employee relations. The Commission has long favored negotiations units structured along broad-based, functional lines and has been reluctant to approve units organized along narrow lines such as those configured along occupational, departmental or geographic lines. In State of N.J. and Professional Ass'n of N.J. Dept. of Education, P.E.R.C. No. 68, NJPER Supp. 273 (1968 1972), rev'd NJPER Supp. 2d 14 (7 App. Div. 1973), rev'd 64 N.J. 231 (1974) (Professional Ass'n), the Supreme Court endorsed the Commission's broad-based unit approach and directed that a balance be struck between the rights of public employees to negotiate collectively and the public employer's rights not to be burdened with undue proliferation of negotiations units. Thus, the desires of the employees and the parties, while relevant, are not paramount. We consider the totality of circumstances of the particular case,

including the structure and history of existing units and the extent of organization of the employer's employees. Bordentown Reg. Bd. of Ed. and Bordentown Reg. Ed. Ass'n, P.E.R.C. No. 84-126, 10 NJPER 276 (¶15136 1984), aff'd 11 NJPER 337 (¶16122 App. Div. 1985); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 88-124, 10 NJPER 272 (¶15134 1984); Englewood Bd. of Ed., P.E.R.C. No. 82-25, 7 NJPER 516 (¶12229 1981).

Part-time employees that are regularly employed (usually 1/6 of a "full-time" workweek or work year), are appropriate for inclusion with full-time employees. Lakewood Bd. of Ed., P.E.R.C. No. 87-166, 13 NJPER 603 (¶18227 1987) (substitute bus drivers who work at least 1/6 the average hours regular drivers work are appropriate to be added to existing "full-time" unit); Mt. Olive Bd. of Ed. (substitute bus drivers working 1/6 of the hours worked by regular bus drivers were found eligible to vote in unit of full and part-time bus drivers); Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983) (part-time blue-collar workers included in unit with full-time employees); W. Milford Tp. Bd. of Ed., P.E.R.C. No. 56, NJPER Supp. 218 (¶56 1971) (part-time building aides and office personnel may be included in a unit with full-time teachers, nurses and instructional aides subject to a professional option election); State of New Jersey, D.R. No. 87-25, 13 NJPER 326 (¶18136 1987) (part-time faculty employed for at least their second semester in a recurrent position are added to the full-time faculty unit); Lawrence Tp. Bd. of Ed., D.R. No. 82-49, 8 NJPER 278 (¶13125

1982) (Board's part-time educational aides were not casual employees; they otherwise performed the same functions as full-time aides, and, therefore, were properly included in combined unit with full-time aides).

On the facts presented, I find that FLIs share a community of interest with the full-time staff interpreters. They have virtually identical job duties and they all work in Judiciary buildings and assist appointed professional and non-professional employees in performing interpretation and translation services in furtherance of the administration of justice. The fact that certain interpreters are eligible for various benefits while others are not, does not destroy the community of interest among employees performing the same work. It appears that the interpreters common interests outweigh any differences in the number of hours they work or the benefits they receive. Therefore, I find that the appropriate unit for FLI inclusion is the existing professional, non-case related unit currently represented by CWA.

Local 1034's petition (RO-2001-60) proposes to limit the negotiations unit to court interpreters/translators. The Judiciary objects to a separate unit and asserts that, if FLIs are eligible for representation, it should be as part of the existing professional, non-supervisory, non-case related unit currently represented by the CWA. CWA's second petition (RO-2003-43) is consistent with the Judiciary's position.

Having found that the appropriate unit for FLI inclusion is the professional non-case related unit currently represented by the CWA, the petition for a stand-alone unit (RO-2001-60) must be dismissed. As to CWA's timely accretion petition (RO-2003-43) seeking to add regularly assigned FLIs to its existing professional non-case related unit, a secret ballot election is warranted.^{7/}

ORDER AND DIRECTION OF ELECTION

1. Based upon all the foregoing, I direct a mail ballot election be conducted in the petitioned-for unit (FLI Petition II, RO-2003-43) as follows:

Included: All regularly employed free-lance interpreters who work a minimum of 288 hours during a 12-month period to be added to the existing non-supervisory, non-case related professional employees employed by the New Jersey State Judiciary in all trial court operations (from the courtroom to probation to case management) performing administrative duties which are not case related and all professional non-supervisory employees in the Supreme Court Clerk's Office, Appellate Division Clerk's Office, Appellate Court Administrator's Office, Superior Court Clerk's Office, Tax Court Administrator's Office, Administrative Office of the Courts, Disciplinary Review Board, Office of Attorney Ethics, and Lawyers Fund for Client Protection.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, police employees, non-professional employees, casual employees, law clerks, Central Appellate Research employees, all

^{7/} It appears that a professional option election is unnecessary.

employees in other Judiciary negotiations units, and all other employees employed by the New Jersey State Judiciary.

The election shall commence no later than thirty (30) days from the date of this decision and shall be conducted by mail ballot. Those eligible to vote must have been contracted by the Judiciary for interpreter assignments for a minimum of 288 hours^{8/} during calendar year 2002 and are listed in the current edition of the "Registry of Free-Lance Interpreters and Interpretation/Translation Agencies" and continue to be willing to accept assignments as free-lance interpreters for the Judiciary. Ineligible to vote are employees who resigned, were discharged for cause or were removed from the Registry prior to the commencement of the election and who have not been rehired or reinstated before the ballot count.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be

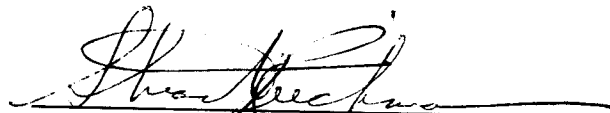
^{8/} The 288 hour benchmark for determining employment regularity was arrived at on the basis of 1/6 of the total number of hours worked by a full-time 35 hour per week employee, exclusive of 13 holidays. See Mt. Olive and other cases cited above.

simultaneously provided to the employee organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

2. CWA's petition in RO-2001-60 is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Stuart Reichman
Director of Representation

DATED: February 14, 2003
Trenton, New Jersey