P.E.R.C. NO. 2003-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE JUDICIARY,

Public Employer,

-and-

Docket No. RO-2003-43

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission affirms the Director of Representation's order directing an election among a unit of full-time court interpreters. The Communications Workers of America, AFL-CIO, filed a representation petition to include about 50 regularly employed free-lance interpreters (FLIs) in a unit of certain professional employees of the New Jersey State Judiciary which includes the Judiciary's full-time court interpreters. The Judiciary did not consent to an election because it believes that the FLIs are independent contractors rather than public employees covered by the New Jersey Employer-Employee Relations Act. The Director determined that no factual issues required a hearing and concluded that the petitioned-for FLIs are public employees covered by the Act. The Judiciary requested review. The Commission concludes, given common law agency principles and the Act's purposes, that FLIs are public employees entitled to seek representation under the Act.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Public Employer, Apruzzese, McDermott, Mastro & Murphy, attorneys (Frederick T. Danser, III, of counsel and on the brief; Robert J. Merryman, on the brief)

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

DECISION

The Communications Workers of America, AFL-CIO, represents a negotiations unit of certain professional employees of the New Jersey State Judiciary. That unit includes the Judiciary's full-time court interpreters.

On October 29, 2002, CWA filed a representation petition (RO-2003-43) seeking to add about 50 regularly employed free-lance interpreters (FLIs) to this negotiations unit.[1/] The

1/ CWA had filed an earlier petition (RO-2001-60) seeking to represent a negotiations unit of approximately 300 court interpreters working for the Judiciary. The procedural history concerning that petition is reviewed in D.R. No. 2003-13, 29 NJPER 131 (¶40 2003) in which the Director of

(continued...)

Judiciary did not consent to an election because it believes that the FLIs are independent contractors rather than public employees covered by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

The Director of Representation investigated this petition and the earlier petition pursuant to N.J.A.C. 19:11-2.2 and 2.6. The parties submitted statements of positions, briefs, and exhibits. The Director determined that no factual issues required a hearing.

On February 14, 2003, the Director issued a decision finding the facts, applying common law agency principles, and concluding that the petitioned-for FLIs are public employees covered by the Act. D.R. No. 2003-13. He directed an election in this negotiations unit:

> 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

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1/ (...continued)
Representation dismissed RO-2001-60 and directed an election in RO-2003-43.

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

Those FLIs eligible to vote must have been contracted by the Judiciary for interpreter assignments for a minimum of 288 hours during 2002; must be listed in the "Registry of Free-Lance Interpreters and Interpretation/Translation Agencies"; and must continue to be willing to accept assignments. The election was to commence within 30 days of the Director's decision.

On March 3, 2003, the Judiciary requested review of the Director's decision and a stay of the election. The Judiciary asserted that the Director erred in not concluding that FLIs were independent contractors and in not holding a hearing.

CWA received an extension of time to file a response. In the interim, it consented to delaying an election until the Judiciary's request for a stay could be resolved.

On March 17, 2003, CWA filed its response. It argued that the Director had correctly articulated and applied the tests for determining employee status; had accurately found the facts; and had properly declined to hold a hearing.

On March 24, 2003, the Chair granted review. She also stayed the election until the Commission decided whether the petitioned-for FLIs are public employees.

Findings of Fact

The Director of Representation made extensive findings of fact (D.R. at 8-25). We have reviewed the record in light of the parties' submissions regarding these findings. We adopt and incorporate the Director's findings with the following corrections and additions.

The Director's findings concerning full-time staff interpreters are set forth at pages 9-13 of his decision. We make some minor corrections. There are 21 counties, but only 15 vicinages (D.R. at 9); the American Sign Language Interpreter is an Administrative Specialist 4, not a staff interpreter (D.R. at 9); and some counties do not have telephone interpreting equipment (D.R. at 13). The Judiciary's responses to the Director's questionnaire stated that most staff interpreters are supplied with personal computers, but the Judiciary now asserts and CWA does not dispute that all staff interpreters receive personal computers.

The Director's findings concerning the FLI guidelines are set forth under that heading at pages 13-16 of his decision and under other topical headings thereafter. We add the first two paragraphs of the Policy Statement introducing these guidelines:

> The Supreme Court has adopted the principle that the courts and their support services must be equally accessible for all persons regardless of the degree to which they are able to communicate effectively in the English language. One of the primary means for overcoming linguistic barriers to equal access is providing qualified interpreters. [footnote omitted].
>
> The Supreme Court has directed the Judiciary to seek adequate funding so that qualified interpreters are provided "to all persons who need them." In order to implement this policy, it is necessary to employ qualified interpreters who work either as (1) full or part-time employees of the Judiciary or as (2) free-lance interpreters hired on an ad hoc, contractual basis.

The Director's findings concerning FLI qualifications are set forth on pages 16-18 of his decision. These findings accurately state that FLIs, unlike full-time interpreters, provide interpretation services only and that FLIs do not coordinate case preparation or provide interpretation training or translate documents except as needed in court or at hearing (D.R. at 17-18). We add that the job specifications for staff interpreters set forth other duties including translating specified documents (e.g. official forms, public forms, pubic signs, notices, posters, form letters, job applications, and correspondence); creating and updating terminology lists; assembling materials; compiling records; operating electronic data processing or peripheral equipment; collecting data; and

participating in study and training activities, team/work unit meetings, and training and professional conferences.

We also modify the finding that FLIs sign professional service agreements (D.R. at 16-17). The Judiciary's responses to the Director's questionnaire stated that they did, but the "agreement" attached as an exhibit is a W-9 form. FLIs sign three documents required for inclusion in the "Registry of Free-Lance Interpreters and Interpretation/Translation Agencies." Those documents are the W-9 form, an application form, and an affidavit (Guidelines at 4). The affidavit ensures that FLIs agree to abide by the Code of Professional Conduct for Interpreters; understand that their services will be managed under the FLI Guidelines; accept the conditions of those Guidelines, including the rate structure; and affirm that the information and answers provided are true (Guidelines at 4, 20; Registry at ii). While subject to the Code of Professional Conduct for Interpreters, however, FLIs are not subject to the Code of Judicial Conduct limiting outside employment for staff interpreters.

The Director's findings concerning retention of FLIs are set forth at pages 18-20 of his decision. We add pertinent guidelines concerning refusal of assignments, non-responsiveness to assignments, and cancellation of assignments.

With respect to refusal of assignments:

> [t]he Judiciary's basic assumption is that every registered interpreter is available for all types of assignments in all parts of the state regardless of the unit of time (i.e. two-hour, one-half day, or full day) or type of case (e.g., criminal, family, small claims) [that] may be involved. It is also assumed that registered interpreters will accept assignments except when they have prior commitments (whether professional or personal). [Guidelines at 20]

The Judiciary encourages interpreters to identify concerns about their ability to provide quality services, but adds that "there are some circumstances where, notwithstanding an interpreter's personal or professional reluctance, the courts really need that interpreter's services because no one else is available." The Guidelines state that in such situations:

> If they do not already have another commitment, interpreters should not refuse to accept an assignment when a court representative has indicated a significant need for his or her services and, after being made aware of the interpreter's reasons for wanting to decline the assignment, still asks the interpreter to provide the service. [Id. at 21]

The Judiciary expects that every interpreter will accept some assignments that may not be especially profitable, but vendors are not expected to operate at a loss and an FLI has a right to decline an ordinary assignment that would not make good business sense. Ibid.

With respect to non-responsiveness, the Guidelines specify what happens when FLIs either do not respond to telephone calls or take assignments:

> 3. Non-responsive Interpreters. The aim of this provision is to prevent the VCIS [the vicinage coordinator of interpreting services] from making repeated telephone calls to prospective interpreters that are fruitless. Interpreters may be temporarily removed from the rotation if they are not responsive to calls or do not take assignments as described in the following steps. Temporary removal is appropriate if the interpreter is non-responsive in one or more of the following ways:
>
> (A) Not returning two or more telephone calls over a period of four or more weeks; or
>
> (B) Not accepting and filling an assignment after having had at least five opportunities for assignments within a period of at least three months. However, unavailability due to other professional interpreting commitments should not be counted against the interpreter.
>
> Second, the VCIS must advise the interpreter in writing, with a copy to the Interpreting Section at the AOC, that the VCIS has found the interpreter to be "non-responsive" and, absent an adequate response from the interpreter, will designate the interpreter as such. The interpreter must also be advised that the designation can be avoided if the interpreter contacts the VCIS and agrees to be responsive in the future.

> Third, if the interpreter does not respond at all or responds without satisfying the VCIS that the prior non-responsiveness will be corrected, the VCIS may designate that interpreter to be "non-responsive" and routinely skip him or her.
>
> Finally, the VCIS should remove the "non-responsive" marker any time an interpreter subsequently demonstrates his or her responsiveness and should restore the interpreter back into the normal rotation. [Id. at 17]

The Guidelines also set forth the Judiciary's Cancellation Policy, applicable to cancellations by the VCIS, a Force Majeure, or the FLI (Guidelines at 15-17). The policy specifies the conditions under which interpreters will be compensated for cancelled assignments and the amounts of compensation to be received. The Guidelines require FLIs to notify the VCIS as soon as possible if the FLI must cancel and provide that a "variety of forms of discipline could eventuate pursuant to established procedures" if the FLI does not give advance notice and there is no verifiable emergency (Guidelines at 12). The Guidelines also stress:

> Except by prior arrangement with the VCIS, the interpreter is not authorized to find and send another interpreter to fill an assignment. [Id. at 17]

The Director's findings concerning FLI work hours and compensation are set forth at pages 20-22 of his decision. We

add that the Guidelines prohibit negotiations over the fees paid to FLIs. The Guidelines state:

> 5. Negotiation of Fees. Under the Guidelines, the fees are established and apply to every registered free-lance interpreter. Fees are not negotiable and each interpreter's signature on the affidavit indicates an agreement to abide by the existing rate structure. Free-lance interpreters should refrain from engaging in any behavior that a VCIS could perceive to be an attempt to negotiate fees. [Id. at 20]

We add as well that the Guidelines empower the VCIS to determine whether an FLI should be paid for preparation time. Preparation time is ordinarily approved only for trials that involve highly specialized and technical testimony. The VCIS may require that preparation time be spent at the offices of the committee on services to linguistic minorities ("CSLM") or staff court interpreters (Guidelines at 10).

The parties agree that an FLI cannot leave an assignment before the end of the contracted period. But they disagree over how much freedom an FLI has to leave when an assignment runs beyond that period. The Guidelines state:

> The VCIS should not assume that if an assignment runs longer than the amount of time originally agreed to, the interpreter is required to stay to finish the assignment. It is the interpreter's prerogative to leave if he or she has another commitment and the time of the original agreement has been reached. The VCIS should not require

> interpreters in these situations to stay if they cannot stay. [Emphasis added; id. at 11]

Given the underlined part of this section, FLIs cannot rely on a personal preference to leave - - instead the FLI must identify another commitment. If the FLI can stay, the FLI can be required to stay. This understanding accords with the section stating that an FLI should not refuse to accept an assignment if he or she does not have another commitment and a court representative needs his or her services. We will assume that the Judiciary will not require an FLI to continue an assignment if an FLI has identified another commitment, but FLIs are not free "to come and go as they please, regardless of whether the need for their services is completed. . ." (Judiciary brief at 9).

The Director's findings concerning FLI evaluations and discipline are set forth at pages 22-24 of his decision.

We add to the findings on evaluation that the Guidelines mandate that the VCIS establish a system for verifying that FLIs actually perform their assignments and state that the VCIS should establish a mechanism for inviting feedback from judges and others who preside over hearings and Superior Court events. The verification form contains a box for the judge or presiding officer to rate the FLI's performance as satisfactory, unsatisfactory, or mixed. The form has a Comments box; comments

are requested for a mixed rating and urged for an unsatisfactory rating (Guidelines at 18, 25).

We supplement the Director's findings concerning VCIS complaints against FLIs for alleged violations of the Code of Professional Conduct. The Guidelines set forth procedures which are common parts of a disciplinary system - - a written complaint specifying allegations of misconduct, service of the complaint on the interpreter, a written response, and a determination of whether there is "cause" to remove the FLI from the vicinage's list for a specified period of time. The Guidelines also permit the VCI to skip the interpreter in the rotation while the complaint is pending, a procedure akin to a temporary suspension (Guidelines at 7-8).

In addition to this implicit incorporation of a disciplinary system for misconduct, the Guidelines explicitly refer to discipline. Failure to give an advance notice of a cancellation may subject an FLI to a "variety of forms of discipline" and FLIs who appear on an agency's behalf after declining to do so personally may be disciplined, including removal from the Registry (Guidelines at 17, 21-22). The Judiciary correctly notes, however, that the Guidelines do not contain a dress code or mention discipline for improper attire, although anyone conducting business before a court would be subject to "the exercise of courtroom decorum" (Judiciary brief at 10).

We supplement the Director's findings concerning a complaint filed against an FLI in 1998 by the Director of the Municipal Court in Clifton. The complaint was forwarded to the FLI by Robert Joe Lee, Supervisor, Court Interpreting, Legal Translating, and Bilingual Services Section of the Administrative Office of the Courts. Lee's cover letter stated that the alleged conduct could violate the Code of Professional Conduct and that his office was handling such complaints until the creation of the Court Interpreter Professional Board mentioned in the Guidelines. He directed the FLI to respond to each allegation and advised that if the complaint was substantiated, his office would determine whether and what "habilitative or punitive disciplinary action should be taken." The letter also stated that not replying to the complaint would "leave this office no choice but to remove you from the Registry and ban you from providing court interpreting services in the future."[2/]

The Director's findings concerning regularity of FLI services and miscellaneous terms and conditions of FLI services are set forth at page 25 of his decision. We accept these findings as stated.

2/ Although the Guidelines do not apply to municipal courts (Guidelines at 1, 3), this incident shows the disciplinary lens through which the AOC viewed a possible infraction of the Code of Professional Conduct.

Analysis

The Director of Representation concluded that FLIs who work for the Judiciary a minimum of 288 hours during a 12-month period are "public employees" as defined by the Act. In determining whether that conclusion is correct, we will review our Act's definition of "public employee", compare that definition to the definition of "employee" under the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA"), consider the common law tests for distinguishing between employees and independent contractors, and examine our Act's labor relations purposes and policies.

1. The Act's definition of "public employee"

Among other rights, the Act entitles "public employees" to seek union representation in negotiations and grievance processing concerning their terms and conditions of employment. N.J.S.A. 34:13A-5.3. N.J.S.A. 34:13A-3(d) defines both "employee" and "public employee":

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

> employer, except elected officials, members of boards and commissions, managerial executives and confidential employees. [Emphasis added]

It is undisputed that none of the statutory exclusions apply and that the Judiciary is a public employer. The question, therefore, is whether the FLIs included in the negotiations unit hold their positions "by appointment or contract, or employment in the service of a public employer." The answer to that question depends on how broad that definition is and where it intersects with common law and labor relations concepts distinguishing between an employer-employee relationship and independent contractor status. Locating that intersection requires comparing the definition of "public employee" under our Act with the definition of a private sector "employee" under the NLRA, a task to which we now turn.

2. The NLRA's definition of "employee"

Among other rights, the NLRA entitles private sector employees to seek union representation in negotiations and grievance processing concerning their terms and conditions of employment. 29 U.S.C. § 157. As a model for our Act, the NLRA is a guide for construing the Act in instances where the two statutes have nearly identical language - - for example, each statute's unfair labor practices provisions. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 1, 9 (1978). However, there are also signal differences between the two statutes that

may lead to differences in interpretation. Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 159 (1978). For example, private sector employees enjoy a broader scope of negotiations than public sector employees in New Jersey and possess the right to strike, but their right to representation is limited to non-supervisors. In re New Jersey Turnpike Auth., 150 N.J. 331, 352-354 (1997). The sphere for public employee representation in New Jersey was expanded to include supervisors and some managers while the scope of negotiations was narrowed and the power to strike was withheld.

29 U.S.C. § 152(3) defines "employee" under the NLRA. This subsection provides:

> (3) The term "employee" shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. [Emphasis added]

The NLRA's definition of "employee" expressly excludes "independent contractors" whereas the Act's definition of "employee" does not. The Judiciary argues however, that the definition of "public employee" under our Act implicitly contains

the same "independent contractor" exclusion as under the NLRA. We will thus examine that difference in greater detail.

Before 1947, the NLRA's definition of "employee" did not exclude "independent contractors." In NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944), the employer argued that newsboys were "independent contractors" under common law agency principles instead of "employees" under the NLRA's definition. The Supreme Court rejected both an approach centering on "the narrow technical legal relation of master and servant as the common law had worked this out in all its variations" and an approach covering the "entire range of rendering services to others." In discerning the boundaries of the intermediate region between what is clearly employment and what is clearly enterprise, the Court embraced an approach focusing on the NLRA's history, terms and purposes, and the facts of the economic relationship between the putative employer and the workers. Applying that test, the Court held that the "newsboys" (actually adults working over 40 hours a week) were entitled to the NLRA's protections.

In 1947, Congress responded to Hearst by expressly excluding "independent contractors" from the NLRA's coverage. See Hardin and Higgins, The Developing Labor Law at 2131 (4th ed. 2001). In March 1968, the United States Supreme Court held that this express exclusion required the NLRB and reviewing courts to apply

the common-law agency test. NLRB v. United Ins. Co of America., 390 U.S. 254 (1968). The Court stressed that this test could not be reduced to a shorthand formula or magic phrase and that all the incidents of a work relationship would have to be assessed without any one fact being decisive. Applying the common-law test, the Court held that an insurance company's debit agents were employees rather than independent contractors.

Effective July 1, 1968, the New Jersey Legislature expanded the definition of "employee" in N.J.S.A. 34:13A-3(d) to encompass any "public employee". The Legislature rejected various private sector exclusions - - e.g. supervisors and all managerial employees - - and did not copy the NLRA's exclusion of "independent contractors." See State of New Jersey, E.D. No. 67, 1 NJPER 2 (1975) (contrasting NLRA exclusion, Executive Director finds that independent contractors are not, per se, excluded from the Act's coverage). In addition, the Legislature decided that "employment" is but one of three ways to hold a position in the service of a public employer - the other ways are by "appointment" or "contract." Given the definitional differences between the NLRA and our Act, common law agency cases should not be applied mechanistically, regardless of the context in which they arose, in determining whether individuals performing services for a public employer are public employees. We will consider common law agency cases, but with an emphasis on the

labor relations cases applying those principles and the labor relations policies informing our Act.

The New Jersey Supreme Court has similarly stressed that an individual may be an employee for some purposes, but an independent contractor for other purposes and that the answer to the employee/contractor question will properly vary with the varying consequences of that determination and the public policies engaged in each context. MacDougall v. Weichert, 144 N.J. 380, 388 (1996). Moreover, the coverage of remedial laws should be construed broadly; an employer-employee relationship may be found under such laws even though one might not be found under common law principles. See Carpet Remnant Warehouse, Inc. v. New Jersey DOL, 125 N.J. 567 (1991) (unemployment compensation law); Fernandez-Lopez v. Jose Cerrino, Inc., 285 N.J. Super. 14 (App. Div. 1996) (workers' compensation law); New Jersey Property Liability Ins. Guaranty Ass'n v. State, 195 N.J. Super. 4 (App. Div. 1984) (workers' compensation law). Our Act is remedial legislation and should be liberally construed to effectuate its purposes of reducing workplace strife and improving morale and efficiency. Galloway; Bergen Cty. Freeholder Bd. v. Bergen Cty. Prosecutor, 172 N.J. Super. 363, 369 (App. Div. 1980); compare NLRB v. Town & Country Electric, Inc. 516 U.S. 85 (1995) (construing "employee" broadly under the NLRA).

In sum, common law agency principles are relevant to determining whether FLIs are public employees entitled to seek union representation, but so are the policies of our Act. We will consider the principles first and then the policies.

3. Common law principles

Under the common law, an independent contractor is "one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work." Bahrle v. Exxon Corp. 145 N.J. 144, 157 (1996). Independent contractors "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods and labor and what they receive for the end result, that is upon profit." The Developing Labor Law at 2132 (quoting a House Committee report criticizing Hearst and endorsing an independent contractor exclusion). We must thus determine whether the petitioned-for FLIs are in the service of the Judiciary subject to its control and conditions or whether they are independent contractors free to do their work as they see best to increase profits. Are they more like employees carrying out the business of the Judiciary or entrepreneurs conducting their own businesses?

In Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), the Court laid out 13 factors for determining whether an individual is an employee or a contractor. These factors are:

1. the hiring party's right to control the manner and means by which the product is accomplished;
2. the skill required;
3. the source of the instrumentalities and tools used;
4. the location of the work;
5. the duration of the relationship between the parties;
6. whether the hiring party has the right to assign additional projects to the hired party;
7. the extent of the hired party's discretion over when and how long to work;
8. the method of payment;
9. the hired party's role in hiring and paying assistants;
10. whether the work is part of the regular business of the hiring party;
11. whether the hiring party is in business;
12. the provision of benefits; and
13. the tax treatment of the hired party.

See also National Mut. Ins. Co. v. Darden, 503 U.S. 323 (1992); Restatement (Second) of Agency, § 220 (1958). The parties agree that these are relevant factors. In addition, we will consider two more factors, one proposed by the Judiciary and one proposed by CWA. The factor proposed by the Judiciary is "whether or not

the parties believe they are creating the relationship of master and servant." Restatement, § 220(2)(i). The factor proposed by CWA is whether the putative independent contractor has "a significant entrepreneurial opportunity for gain or loss." Corporate Express Delivery System v. NLRB, 292 F.3d 777, 778 (D.C. Cir. 2002).

All these factors must be assessed and weighed; no one factor is decisive. United Ins. Co.; Darden. Analyzing all these factors individually and collectively, we must determine whether there is a sufficient group of favorable factors to establish an employer-employee relationship. Restatement, § 220, comment c on §§ (1). We turn to a factor-by-factor assessment.

The Regular Business of Hiring Party and Whether the Hiring Party is in Business.

Despite the order of analysis in Reid, we begin with these two factors because it is important to understand the nature of the Judiciary's "business" and how integral the services of FLIs are to that business. That understanding will illuminate our examination of the other factors, especially the control factor.

The Judiciary provides justice for all. The Supreme Court has thus adopted "the principle that courts and their support services must be equally accessible for all persons regardless of the degree to which they are able to communicate effectively in the English language" (Guidelines at 1). This commitment to

equal justice and equal access requires that the Judiciary employ qualified interpreters. Some of those interpreters are full-time or part-time staff employees; other are FLIs hired on an ad hoc, contractual basis. While the staff interpreters perform more duties than FLIs, all interpreters working for the Judiciary perform the same essential function of enabling all witnesses in New Jersey courts to be heard despite linguistic barriers. All interpreters constitute an integral, indispensable part of the Judiciary's business of providing justice. See United Ins. Co.; Roadway Packaging System, Inc., 326 NLRB No. 72, 159 LRRM 1153 (1998); contrast Reid (creating sculptures was hardly "regular business" of non-profit organization dedicated to eliminating homelessness). These two factors strongly support a finding of employee status.

The Hiring Party's Right to Control the Manner and Means by Which the Product is Accomplished

Employee status turns on 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. at 389. We will thus examine the extent of the Judiciary's control over the FLIs' services and especially over the terms and conditions of their working relationship with the Judiciary. See, e.g., Carpet Remnant, 125 N.J. at 579-580; Aetna Ins. Co. v. Trans American Trucking Service, Inc., 261 N.J. Super 316, 327 (App. Div. 1993);

New Jersey Property Liability Ins. Guaranty Ass'n; cf. Union Tp., D.R. No. 95-9, 21 NJPER 14 (¶26008 1994), sustained P.E.R.C. No. 96-38, 22 NJPER 22 (¶27009 1995) (in determining employer status, control of labor relations is key factor). The control factor, while not dispositive by itself, may be accorded more weight than other factors in a particular case. Eisenberg v. Advance Relocation & Storage, 237 F.3d 111, 115 (2d Cir. 2000); Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993); Merchants Home Delivery Service v. NLRB, 580 F.2d 966, 99 LRRM 2291 (9th Cir. 1978); The Developing Labor Law at 2133 n. 356. Cf. Clackamas Gastroenterology Associates v. Wells, __ U.S. ___ (2003), 123 S. Ct. 1673, 155 L. Ed.2d 165 (common law element of control is principal guidepost in determining whether an individual is an employee under the ADA).

Because interpreting services are critical to achieving equal access to justice, the Judiciary must ensure both their quality and availability. The Judiciary thus developed the FLI Guidelines "as a policy to parallel the one for staff interpreters" (Guidelines at 1). Those Guidelines establish a system of managing free-lance interpreters and help accomplish several objectives; the objectives include ensuring quality and availability, promoting uniformity, maintaining the number and diversity of both FLIs and staff interpreters, apportioning assignments fairly, and coordinating FLI services efficiently and

cost-effectively. To implement this management system and meet these objectives, the Guidelines fix conditions for all FLIs and prohibit individual FLIs from negotiating different contractual arrangements. Every FLI must agree to follow the Code of Professional Conduct for interpreters and to abide by every provision of the Guidelines (Guidelines at 4). The Judiciary also controls the quality of FLI services by requiring FLIs to pass a Court Interpreter Screening Examination (if one is available for the language) and to complete a seminar on the Code of Professional Conduct.

The Guidelines comprehensively cover these areas: interpreters who may be used; rotation of assignments; exceptions to the rotation policy; schedule of rates; cancellations; double payments; verification and evaluation of services; negotiation of fees; refusal of assignments; and working as a private consultant rather than through an agency. These guidelines specify working conditions such as pay, hours, evaluation procedures, and disciplinary review procedures. The parties disagree over the significance of some of the Guidelines' particulars, but as a whole the Guidelines put the Judiciary's stamp of control on FLI services and working conditions.

The Judiciary asserts that the Guidelines do not restrict the freedom of FLIs to come and go or subject FLIs to discipline. We disagree. FLIs must work during the time contracted and they

can be required to continue to work after that time if an assignment has not been completed and the FLI does not have another commitment (Guidelines at 11). Further, the Guidelines expressly refer to "discipline" in two places - - cancelling without advance notice and appearing through an agency after turning down an assignment (Guidelines at 17, 21-22) - - and implicitly incorporate disciplinary review procedures in connection with complaints of unprofessional conduct (Guidelines at 7-8).[3/] We add that an AOC manager has treated an allegation of unprofessional conduct as potentially subjecting an FLI to discipline.

The Judiciary also notes that FLIs are given a great deal of discretion in how they carry out their interpretation duties. This discretion flows from their expertise. Nevertheless, they must appear in court at the time set for a proceeding; they are subject to the supervision of the judge or presiding officer and

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3/ The section on non-responsiveness also incorporates procedures typical of disciplinary systems - - a written notice specifying non-responsiveness, a response, and a determination of whether the reason for non-responsiveness is acceptable (i.e. other professional commitments). Further, the Guidelines recognize in another context that removal from the registry may be a form of discipline (Guidelines at 21-22). However, the aim of this section is to prevent a VCIS from having to make repeated fruitless calls to secure an interpreter, a non-disciplinary purpose. This section therefore has a mix of disciplinary and non-disciplinary aspects.

must behave professionally; and they are subject to verification and evaluation (Guidelines at 18).

Re/Max of New Jersey, Inc. v. Wausau Ins. Companies, 162 N.J. 282 (2000), held that sales agents were employees given an elaborate set of guidelines and quality controls governing them. The FLI Guidelines and the Code of Professional Conduct similarly evidence substantial Judiciary control over FLIs and hence employee status.

Skill Required

Unskilled laborers are usually regarded as employees, not independent contractors. Restatement, §220, comment i on §§ (2). But that does not mean that skilled workers should necessarily be viewed as independent contractors. The Act covers attorneys and other professional employees. N.J.S.A. 34:13A-6(d); N.J.A.C. 19:10-1.1; City of Newark and Association of Government Attorneys, 346 N.J.Super. 460 (App. Div. 2002). Their exercise of substantial discretion and authority within their areas of expertise does not divest them of employee status. NLRB v. Yeshiva Univ., 444 U.S. 672, 690 n. 30 (1980). Moreover, our Act covers a broader range of higher-level employees than does the NLRA. The FLIs possess specialized skills, but these skills are also possessed by staff interpreters and used in the normal course of the Judiciary's business. In that context, this factor

is consistent with a finding that the petitioned-for FLIs, like the staff interpreters, are employees.

The Source of the Instrumentalities and Tools

Independent contractors generally own their own businesses, invest their own capital, and supply their own tools. The cost of providing such tools may be sizable and thus a significant factor in determining a contractor's profit or loss. C.C. Eastern Inc. v. NLRB, 60 F.3d. 73 (D.C. Cir. 1995) (drivers owned tractors valued at $20,000 to $40,000); Dial-A-Mattress, 326 NLRB No. 75, 159 LRRM 1166 (1998) (owner-operators provided the most costly piece of equipment - - trucks or vans - - for making deliveries). The Judiciary does not require FLIs to provide any equipment, but does expect them to have their own dictionaries and simultaneous interpreting equipment. However, the Judiciary will make simultaneous interpreting equipment available, especially in multi-party proceedings where the average FLI would not have enough receivers. Given the absence of any requirement that FLIs supply their own equipment and the willingness of the Judiciary to supply more complicated equipment, we do not believe this factor strongly suggests that FLIs are independent contractors. But neither do we believe that this factor strongly suggests that FLIs are employees.

Location of the Work

FLIs provide their interpreting services in the courts before judges and other officials and subject to their oversight and evaluation. Significantly, if an FLI needs time to prepare, the VCIS may require the FLI to come to the offices of the CSLM or Staff Court Interpreters (Guidelines at 10). The FLIs working in the courts and Judiciary offices differ from house painters who work at a customer's home, but who are not rendering services that are subject to an employer's control and supervision as part of its normal business. This factor supports a finding of employee status.

Duration of Relationship

While this factor would normally focus on how long an individual has worked for an entity, the Director appropriately focused on the historical usage of FLIs by the Judiciary and the regularity of work by the group of petitioned-for FLIs. The FLIs included in the negotiations unit have all worked at least 288 hours during a 12 month period; they have a continuing rather than ephemeral relationship. The Guidelines, in effect since 1995, seek to strengthen that continuing relationship by making work as an FLI as attractive and fair as possible - - the Judiciary needs a dependable pool of FLIs to draw upon and these FLIs presumably desire a dependable source of income. This factor is consistent with a finding of employee status. Compare

Somerset Cty. College, P.E.R.C. No. 87-129, 13 NJPER 361 (¶18150 1987), aff'd NJPER Supp.2d 185 (¶164 App. Div. 1988), aff'd S. Ct. Dkt. No. A-60 (1/24/89) (unpublished) (adjunct faculty who have continuing relationship with college are "employees", even though they have other primary occupations); cf. N.J.A.C. 4A:3-3.8 (recognizing a Civil Service category of "intermittent employees" with "unpredictable work schedules").

The Extent Of The Hired Party's Discretion Over When and How Long To Work and Whether The Hiring Party Has The Right To Assign Additional Projects To The Hired Party

The Director considered these factors together. We do so as well because these factors both concern the relative freedom of FLIs to accept or refuse assignments.

The Guidelines do not require FLIs to accept assignments, but they do not grant FLIs unrestricted freedom to refuse assignments either. The Judiciary's basic assumption is that all FLIs are available for all types of assignments and that FLIs will accept assignments unless they have a prior commitment. They are even expected to take some assignments that may not be especially profitable and to take assignments, despite reservations about their abilities, when a court representative repeats a request that the FLI provide that service (Guidelines at 21). If an FLI repeatedly declines to take assignments, he or she will be deemed to be "non-responsive" and temporarily removed from the rotation of assignments absent an adequate explanation.

If the FLI cancels an assignment without advance notice, he or she is subject to a variety of forms of discipline (Guidelines at 17). If an FLI takes an assignment, the FLI must remain during the contracted period and a VCIS can assign additional work if the work ends before the period ends (Guidelines at 18). If the assignment is not completed before the period ends, the FLI can be required to stay if he or she does not have another commitment (Guidelines at 11). Generally, the Judiciary determines when an assignment will be performed by choosing a block of time, but occasionally a matter may be rescheduled to accommodate an FLI's schedule. Under all these circumstances, the Judiciary has retained enough control over whether, when and how long FLIs work to favor a finding of employee status. Contrast Reid (apart from the deadline from completing the sculpture, artist had absolute freedom to decide when to work and how much time to invest in the work).

Method of Payment

Independent contractors are usually paid for completing a job. By contrast, the purchase of personal labor by a unit of time indicates an employer/employee relationship. Restatement, § 220(2)(g); Lesniewski v. W.B. Furze Corp., 308 N.J. Super. 270, 281 (App. Div. 1998). FLIs are not paid by the job; they are paid for hourly, half-day or full-day periods according to fixed, non-negotiable and uniform payment schedules. Contrast Reid;

Dial-A-Mattress; C.C. Eastern, Inc. Compensating FLIs in this manner strongly suggests that FLIs are employees rather than entrepreneurs.

Hiring and Paying Assistants

An independent contractor typically has the power to hire assistants and subordinates to do the agreed-upon job. Corporate Express. That is not the case here, as implicitly recognized by the Judiciary's brief when it states that "[FLIs] are free to hire and pay assistants to handle services other than the actual interpreting of a court-related proceeding" (Emphasis added). Such interpreting is the very work FLIs are hired to do. The Guidelines confirm that FLIs are not authorized (absent a prior arrangement with the VCIS) to send another interpreter if they cannot fill an assignment (Guidelines at 17). This factor supports a finding of employee status.

Benefits

FLIs do not receive any benefits. This factor supports a finding of independent contractor status.

Tax Treatment

FLIs are paid by vendor check. Taxes and pension contributions are not deducted from these checks. FLIs file 1099 tax forms and must also file business registration forms with the

State. This factor supports a finding of independent contractor status.[4/]

The Parties' Beliefs About Their Relationship

The Restatement, but not Reid, lists the parties' subjective beliefs as a factor in determining whether a master/servant relationship exits. No formal contract specifies a mutual understanding that FLIs are independent contractors. The Guidelines state that it is necessary to employ full and part-time staff interpreters and free-lance interpreters hired on an ad hoc, contractual basis and they specify that FLIs include "self-employed individuals" and individuals who work through an agency. The Judiciary thus believes it is hiring independent contractors, a belief FLIs may have shared since they are paid by vendor checks rather than paychecks with withholdings deducted. Contrast State of New Jersey Council of New Jersey State College Locals), P.E.R.C. No. 97-81, 23 NJPER 115 (¶28055 1997), denying rev. D.R. No. 97-5, 24 NJPER 295(¶29141 1996) (adjunct faculty were treated as employees for payroll purposes and were never notified they were considered to be independent contractors). This factor supports a finding of independent contractor status.

4/ We agree with CWA that the method of payment factor focuses on whether an individual is paid by the job or by a time unit, not on whether an individual is paid by vendor check or paycheck. We have thus analyzed these facts under the tax treatment factor.

Significant Entrepreneurial Opportunity for Gain or Loss

Recent NLRB cases stress this factor. Corporate Express; Roadway Packaging. In Corporate Express, the District of Columbia Court of Appeals agreed with the NLRB that this factor captures the distinction between an employee and an independent contractor better than the traditional test focusing on a company's control over the means and manner of the work performed. The Court stated:

> For example, as the Board points out, "the full-time cook is regarded as a servant [rather than as an independent contractor] although it is understood that the employer will exercise no control over the cooking." Restatement (Second) of Agency, §202(1) cmt. D (1957). Similarly, a corporate executive is an employee despite enjoying substantial control over the manner in which he does his job. Conversely, a lawn-care provider who periodically services each of several sites is an independent contractor regardless how closely his clients supervise and control his work. The full-time cook and the executive are employees and the lawn-care provider is an independent contractor not because of the degree of supervision under which each labors but because of the degree to which each functions as an entrepreneur - that is, takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder. [Id. at 780]

We agree with stressing this factor, but we will not discard the traditional control test. The two tests together help demarcate the poles between being an employee subject to an employer's control and being an entrepreneur investing one's

capital, scheduling one's time, and seeking to maximize one's profits.

While FLIs can seek profit-maximizing opportunities when working elsewhere, this factor strongly favors finding that FLIs are employees when working for Judiciary. FLIs are barred from negotiating over the fees to be earned or even from engaging in any behavior that could be perceived as an attempt to negotiate; they cannot hire other workers to provide interpreting services; they cannot determine how much time to spend on an assignment; and they are expected to take some assignments that may not be especially profitable. In short, they cannot profit from "working smarter, not just harder" for the Judiciary.

Overall Assessment of Common Law Factors

Looking at all these factors together, we are persuaded that FLIs are employees rather than independent contractors. The most important factors are the integral and critical nature of the interpreting services provided as part of the Judiciary's mission; the control exercised by the Judiciary to manage the quality and availability of interpreting services by FLIs and staff interpreters; and the lack of any opportunity for entrepreneurial gain by the way in which FLIs perform their assignments. A few other factors tilt towards independent contractor status, but not enough to outweigh these factors so robustly supporting employee status. For example, agencies and

courts construing remedial laws may choose to accord benefits and tax treatment factors less significance than other factors evidencing control. Eisenberg; Roadway Express. And objective criteria should be given more weight than the subjective criterion concerning the parties' beliefs; otherwise employers could avoid having individuals covered by a vast range of laws by simply declaring them to be self-employed. Eisenberg; Restatement, comment m. on § (2) (parties' subjective belief is not determinative, except insofar as belief indicates control).

On balance, we conclude that there is a sufficient group of favorable factors to establish an employee-employer relationship between the petitioned-for FLIs and the Judiciary under our Act.

The Act's Purposes and Policies

We have concluded that a finding of employee status is warranted under common law principles. That conclusion is reinforced for us by a consideration of the Act's purposes and policies. The Act posits that workplace stability, morale and efficiency may be improved by allowing a group of employees to choose representation concerning their terms and conditions of employment and it extends the right to such representation to a greater range of employees than in the private sector. The Supreme Court has stated that "the ultimate organization of all employees who desire collective representation with the State is a logical objective of the public policy underlying the statute."

State v. Professional Ass'n of the New Jersey Dept. of Education, 64 N.J. 231, 253 (1974).

These considerations, of course, do not answer whether a group of individuals consists of independent contractors or public employees. But we find it significant in light of these purposes that the FLIs are treated as a collective group subject to uniform working conditions. Seeking to maintain a pool of FLIs it can depend upon to provide interpreting services regularly, the Judiciary established Guidelines which detail provisions covering all FLIs and precluding FLIs from negotiating variations. Contrast Dial-A-Mattress (owner-operators could negotiate special pay deals). The petitioned-for FLIs have a similar interest in providing interpreting services regularly and thereby having a dependable and significant source of income. The opportunity to negotiate over working conditions for regularly employed FLIs is compatible with the system set forth in the Guidelines rather then contradictory.

Given the common law agency principles and the Act's purposes, we hold that the FLIs are public employees entitled to seek collective representation under the Act. We limit this holding to this group of petitioned-for employees, these facts, and this statute.

Request for A Hearing

The Judiciary asked us to hold that FLIs are independent contractors on this record. For the reasons just reviewed, we declined that invitation. In the alternative, the Judiciary invites us to order a hearing if we believe there are factual disputes. For the reasons that follow, we decline that invitation as well.

Normally representation cases are decided based on investigations, submissions and proffers. A hearing will not be held unless required to resolve material and substantial factual issues. N.J.A.C. 19:11-2.6(e). See also State of New Jersey, P.E.R.C. No. 97-81, 23 NJPER 115 (¶28055 1997); State of New Jersey (NJSEA), P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981), aff'd NJPER Supp.2d 123 (¶104 App. Div. 1982).

There are no such issues. In accordance with the Judiciary's requests, we have corrected and supplemented several findings of fact. The parties had a chance to respond to the Director's tentative findings in RO-2001-60 and could have submitted other evidence concerning the certification program (D.R. at 17), resolution of complaints (D.R. at 23), temporary removal from the rotation list (D.R. at 30) and treatment of other vendors (D.R. at 31). The record is a full one, without any significant factual tensions and with an ample basis for answering the employee/contractor question.

ORDER

The order of the Director of Representation directing an election is affirmed. The election shall commence no later than thirty (30) days from the date of this decision.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani and Ricci voted in favor of this decision. Commissioner Sandman abstained from consideration. Commissioner Katz was not present.

DATED: May 29, 2003
Trenton, New Jersey
ISSUED: May 30, 2003