State of New Jersey

Council on Local Mandates

In re Complaint Filed by the New Jersey Association of Counties

Re: N.J.S.A. 19:63-3(a) (1), (2); N.J.S.A. 19:63-3.1(a), (b)

Sections of the Vote by Mail Law, N.J.S.A. 19:63-1 to -28

COLM No. 0001-19

Decided November 15, 2019

John G. Donnadio, Esq. argued the cause for Claimant, New Jersey Association of Counties

George N. Cohen, Deputy Attorney General, argued the cause for Respondent, State of New Jersey

Council: Hon. John A. Sweeney, Chair; David Fiore; Robert Landolfi; Jack Tarditi; Victor R. McDonald, III; Nancy Brown; Robert R. Pacicco; and Robert Salman, Esq.

Factual Background and Procedural History

On August 18, 2018, the Governor signed into law L. 2018, c. 72, an act "concerning mail-in and sample ballots," amending and supplemented "various parts" of the 2018 Vote by Mail Law, N.J.S.A. 19:63-1 to -28, (the Act). The Act modified provisions of N.J.S.A. 19:63-3(a) (1) and (2), and -3.1(a) and (b), which required a voter seeking to vote by mail, to submit applications with the county clerk each year to obtain a mail-in ballot. More specifically, under the Act, county or municipal clerks must automatically furnish each qualified voter, who chooses a mail-in ballot in 2016 election, with a mail-in ballot "in all future elections . . . without further request . . . until the voter requests in writing . . . [to] no longer be sent a mail-in ballot." N.J.S.A. 19:63-3(a)(2). The term "all future elections" includes general, primary, school, municipal, fire district, and special elections. N.J.S.A. 19:63-6(a). See also N.J.S.A. 19:63-3(a)(1) and (2).

Further under the law, county clerks were obligated to send a notice to each voter who requested a mail-in ballot in the 2016 election. The notice informed the voters mail-in ballots for all future elections would automatically be transmitted, unless the voter executed a written opt-out notice, which states the voter no longer sought to vote by mail. N.J.S.A. 19:63-3.1(b). The Act took effect immediately. L. 2018, c. 72 § 16.

On January 24, 2019, claimant, New Jersey Association of Counties (the Association) filed a complaint alleging the Act represented an unfunded state mandate, in violation of Article VIII § 2 ¶ 5 of the New Jersey Constitution, as well as N.J.S.A. 52:13H-2, because the Act did not concomitantly authorize resources to offset the additional direct expenditures required for implementation, other than the property tax. The Association alleged the statewide cost to implement and administer the new mandates exceeded one million dollars each year, to pay for personnel, printing, postage, and supplies. Yet, lack of accompanying State funding required local governments to utilize property tax revenue. The complaint was supported by resolutions from the Association and seven county Freeholder Boards.

On August 28, 2019, L. 2019, c. 265, was adopted, which added provisions to the previously modified N.J.S.A. 19:63-3.1 (collectively included in the reference "the Act"). The provisions of this law mandated additional requirements for county and municipal clerks to automatically provide mail-in ballots to all qualified voters who requested a mail-in ballot for any election in 2017 or 2018. Further, the county clerks were to send a notice informing each qualified voter who requested a mail-in ballot for any election in 2017 or 2018, that mail-in ballots would be automatically sent unless the voter opted out in writing. L. 2019, c. 265. Subsection 2 required the State Department to reimburse each county for "the actual costs incurred" in implementing the law's provisions, and allowed clerks to certify said costs by January 1, 2020. Subsection 3

appropriated two million dollars from the General Fund to the State Department to satisfy county reimbursement requests. The statute took effect immediately.

The Governor neither vetoed nor exercised a line item veto; he signed the law. However, earlier the Governor issued Executive Order 73, which immediately reserved release of appropriations, pending accumulation of a designated surplus and funding of the State's "rainy day fund." Executive Order 73, June 30, 2019, (available at https://nj.gov/infobank /eo/056murphy/pdf/EO-73.pdf).

Respondent State of New Jersey (the State) moved to dismiss the complaint arguing the Association failed to show the Act imposed "any additional costs when balanced against the cost savings to the counties." Related arguments asserted the Act was exempt from Council action as it revises and eases existing requirements to provide mail-in ballots and implements the constitutional provisions promoting the right to vote. See N.J. Const. art. VIII, § 2, ¶ 5(c)(3), (5); N.J.S.A. 52:13H–3(c), (e). The Association refuted the State's arguments and reiterated its position. Following a public hearing, conducted on July 24, 2019, the Council denied the State's motion, without prejudice.

The final hearing was held on September 23, 2019. The Association presented two fact witnesses in support of the assertions in its complaint. The parties also jointly submitted documents. On November 15, 2019, the Council issued a memorandum decision and expedited order nullifying the laws as unfunded mandates. This opinion follows.

Discussion

Council review is guided by a December 7, 1995 constitutional amendment, which states:

> any provision of law enacted on or after July 1, 1996, and with respect to any rule or regulation issued pursuant to law originally adopted after July 1, 1996, except as otherwise provided herein, any provision of such law, or of such rule or regulation issued pursuant

> to a law, which is determined in accordance with this paragraph to be an unfunded mandate upon . . . counties . . . because it does not authorize resources, other than the property tax, to offset the direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire.
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> [N.J. Const. art. VIII, § 2, ¶ 5(b)].

An unconstitutional, "unfunded mandate" exists when: (1) the law imposes a "mandate" on a unit of local government; (2) direct expenditures are required for the implementation of the law's requirements; and (3) the law fails to authorize resources, other than the property tax, to offset the additional direct expenditures on the unit of local government. See In re Ocean Twp. (Monmouth Cnty.) & Frankford Twp., Council on Local Mandates, (August 2, 2002), available at http://www. state.nj.us/localmandates/decisions.html.

The Local Mandates Act, N.J.S.A. 52:13H–1 to -22, created the Council to resolve any dispute regarding whether a law or rule or regulation issued pursuant to a law constitutes an unfunded mandate. See N.J.S.A. 52:13H–12. The Council evaluates whether a challenged rule, regulation or statutory provision constitutes an unfunded mandate upon the claimant county, municipality or school district, or multiple counties, municipalities or school districts. Ibid.; In re Highland Park Bd. of Educ. & Highland Park, Council on Local Mandates, (January 31, 2003), available at http://www.state.nj.us/localmandates/decisions.html (quoting N.J.S.A. 52:13H–12). This safeguard aligns with the constitutional provisions and Local Mandates Act, which are specifically designed "to prevent the State government from requiring units of local government to implement additional or expanded activities without providing funding for those activities." See N.J.S.A. 52:13H-1(b).

Council review is circumscribed. "A ruling of the council shall be restricted to the specific provision of a law or the specific part of a rule or regulation which constitutes an unfunded mandate

and shall, as far as possible, leave intact the remainder of a statute or a rule or regulation." N.J.S.A. 52:13H–12(a). The Council does not address the merits of a subject mandate and generally, does not assess whether "funding of any statute or any rule or regulation is adequate." Ibid. Importantly, if the Council determines a newly enacted law or any of its provisions represent an unfunded mandate, that law or provision "shall cease to be mandatory in its effect and shall expire." Ibid.

Council review also evaluates whether the law falls within certain enumerated exemptions to the "state mandate, state pay" principle. The Constitution expresses six exemptions from designation as an "unfunded mandate," despite possible costs imposed on local governmental units. N.J. Const. art. VIII, § 2, ¶ 5(c)(1) to (6). See also N.J.S.A. 13H-3(a) to (f). Mandates, falling within the constitutional parameters, even those that are unfunded, remain exempt from the Council's authority to nullify the law.

Guided by these legal provisions, the Council first considers the State's claim of constitutional exemption. The State maintains the Act falls outside the scope of the Counsil's authority citing these two exceptions.

First, any law, rule or regulation that "implements the provisions" of the Constitution cannot be considered an "unfunded mandate." N.J. Const. art. VIII, § 2, ¶ 5(c)(5). See also N.J.S.A.52:13H-3(e) (providing unfunded mandates shall not include laws "which implement the provisions of the New Jersey Constitution"). In this case, the State urges the Act enforces and promotes the right to vote granted in Article II § 1, ¶ 3 of the Constitution.

Second, if a statute repeals, revises or eases an existing requirement or mandate or reapportions costs of activities between boards of education, counties, and municipalities, it is exempt. N.J. Const. art. VIII, § 2, ¶ 5 (c)(3). Here, the State suggests the Act eases the burden

imposed by the original Vote by Mail Act, suggesting the newly enacted provisions eases the burden on voters seeking to vote by mail and upon county clerks by reducing the number of applications processed as mail-in ballot requests.

For the following reasons, the Council rejects these arguments.

The constitutional implementation exemption of (c)(5) requires clear legislative expression of an intent to implement a specific part of the Constitution. "Implement" means "to give practical effect to and ensure the actual fulfillment by concrete measures." In re Complaint Filed by The New Jersey Association of Counties, Council on Local Mandates, (April 26, 2017), available at https://www.state.nj.us/localmandates/decisions/NJAC-COLM-0004-16.html (quoting Webster's Ninth New Collegiate Dictionary 604 (1987)).

The Council discussed the parameters of this exemption when deciding In re Board of Education of the Borough of Highland Park ("Highland Park I"), Council on Local Mandates, (August 5, 1999) (available at https://www.state.nj.us/localmandates/decisions/85dec.html). In Highland Park I, the Council concluded the exemption required either the Legislature's explicit statement it imposed a mandate in furtherance of a designated constitutional provision or, in the absence of such a legislative declaration, the State must present a specific, precise, fact-based showing that the challenged mandate furthered an element of the Constitution. Ibid. The exemption of Article VIII, § 2, ¶ 5(c)(5) is not satisfied by simply stating the law has some connection to a constitutional provision. Rather to comply, the State must demonstrate with specificity how the challenged mandate is necessary. Cf. Highland Park I

Here, the State's proofs fall short. The act lacks expressed legislative intent triggering the exemption, as it omits any reference to impose the mandate in order to implement a constitutional protection. The unambiguous language of the Act merely expanded the scope of who receive mail-

in ballots, automatically each year. Also, the State offered no specific proofs establishing the relationship of the Act to the effectuation of the constitutional right to vote. As noted, the mere assertion the law deals with voting is insufficient, "otherwise the exemption would swallow the rule." Highland Park I. Accordingly, the Article VIII, § 2, ¶ 5(c)(5) exemption is inapplicable and the law is not exempted from being considered an unfunded mandate.

Next, the State offers an interpretation asserting the Act merely revises and eases restrictions on the right to vote by mail. Substantively, the argument relies solely on the fact that the existing Vote by Mail Act was modified. The Council has observed such an "interpretation of 'revise,' if taken to the extreme, could justify virtually any change made under color of a statute or regulation, regardless of its impact on a local board or municipality." Highland Park I. In construing the scope of the Article VIII, § 2, ¶ 5(c)(3) exemption, the Council recognizes its broad remedial purpose, and held that when a law "changes an earlier obligation and that change has the clear potential to increase a claimant's funding obligation, . . . the 'repeal, revise or ease' exemption [is] inapplicable." Highland Park I. Accordingly, the argument is rejected.

Concluding the constitutional exemptions do not apply, the Council turns its review to the Association's claims the Act imposed an unconstitutional unfunded mandate. Construing a statute, we look to its legislative purpose and give the words a common-sense meaning within the context of that purpose." In re T.S., 364 N.J. Super 1, 6 (App. Div. 2003). The first step in devining legislative intent is to consider the statute's plain meaning, Mody v. Brooks, 339 N.J. Super 392, 395 (App. Div. 2001), in the context of the entire legislative scheme, Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 129 (1987).

Here, additions by the Act changed N.J.S.A.19:63-3 (a) (1), (2) and N.J.S.A. 19:63-3.1a, which imposed a new mandate upon county clerks and county Boards of Election. The plain

language of the Act recognizes this mandate caused an increase in county obligations for which direct expenditures were required to send and process notices and mail-in ballots to an expanded group of designated eligible voters. There is no doubt, and the State does not dispute, the Legislature recognized the enactment included a new obligation for which L. 2019, c. 265, included a mechanism for cost reimbursement by affected counties. See N.J.S.A. 19:63-3.1(2)(a). The 2019 law also inserted an appropriations provision, not initially found in the Act.

The 2019 changes to N.J.S.A. 19:63-3.1(2)(a), added the requirement for the State Department to "reimburse each county for the actual costs incurred by the county in implementing the provisions of this act." N.J.S.A. 19:63-3.1(2)(a). Further, the law included a mechanism for each county to seek payment and appropriated two million dollars "to be distributed among the counties. . . as reimbursement for the costs of implementing the provisions of this act." N.J.S.A. 19:63-3.1 (2)(b), (3).

The Governor signed the law; neither exercising veto nor "line-item" veto authority. Thus, the final question is whether the mandate can be characterized as "unfunded." The Council concludes the answer is yes.

The Council has reinforced this principle:

> There would be little substance in the constitutional "State mandate/State pay directive" if the Legislature could avoid it by expressly electing to provide a specified partial amount of funding and leave an acknowledged balance of the cost to be shouldered by the local units. As stated in [other matters], the Council cannot allow the constitution "to be frustrated by giving blind deference to the Legislature's method of funding the costs of a mandate, if that method is seriously flawed to the point of being illusory."
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> [In re Complaint Filed By Deptford Township, Council on Local Mandates, February 17, 2016, available at https://www.state.nj.us/localmandates/decisions/Deptford-colm-0003-15.html (citations omitted).]

The appropriation funding included in N.J.S.A. 19:63-3.1 is similarly illusory. The effect of Executive Order 73 made any appropriation inaccessible with no certainty of release. Consequently, the mandates in L. 2018, c. 72 and L. 2019, c. 265, were required to be effectuated by the local governmental bodies, necessitating expenditure of property tax funds to pay any direct, expenses related to implementation of the Act's requirements, for which no authorized State resources to offset the additional direct expenditures imposed on the unit of local government were made available.

For these reasons, the Council finds and concludes the laws amending N.J.S.A. 19:63-3(a) (1), (2) and N.J.S.A. 19:63-3.1(a), and (b), are unconstitutional as "unfunded mandates" because they fail to "authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law" and accordingly "shall cease to be mandatory in its effect and expire." N.J. Const. art. VIII, § 2, ¶ 5(a), as implemented by the Local Mandates Act, N.J.S.A. 52:13H-1 through -22.

This decision is unanimous and the following members of the Council participated in the decision: (John A. Sweeney, A.J.S.C. (ret.), Victor R. McDonald, III, Nancy M. Brown, David Fiore, Robert Landolfi, Robert Pacicco, Robert Salman, Esq., and Jack Tarditi).