IN THE MATTER OF A COMPLAINT FILED BY

ATLANTIC COUNTY

Council on Local Mandates

Argued May 5, 2011

Decided June 7, 2011

Written Opinion issued November 16, 2011

Syllabus

(This syllabus was prepared for the benefit of the reader and is not part of the opinion of the Council. The syllabus does not purport to summarize all portions of the opinion.)

Atlantic County filed a Complaint with the Council alleging that a November 18, 2010 memorandum issued by the Director of the Division of Elections in the New Jersey Department of State directing that county employees "whose duties encompass access to the internal components of voting machines" attend, at county expense, a one-day training session constitutes an unfunded mandate. After the Attorney General filed an answer on behalf of the Department of State, the parties cross-moved for summary judgment and the Council heard argument, the Council granted summary judgment to Atlantic County and so advised counsel. This opinion explains and memorializes that decision.

Atlantic County relies on the undisputed facts that the Director's memorandum requires present, and presumably future, county election technicians to attend a one-day training session; that it presently has 13 part-time technicians, each of whom it would have to pay $125 to attend the training; that the State offered no resources to offset those costs; and that those additional expenditures would have to be paid through county property taxes.

The State responds, first, that the training obligation was not imposed by "rule or regulation" but by a judgment of the Superior Court in a litigation that challenged the reliability of the direct recording electronic voting machines certified for use throughout the state. The Superior Court judgment, however, only directed the State to provide training to election technicians; it did not say anything about how the costs of that training might be borne. The Department of State's decision to impose a portion of the training costs on the counties directly

contravenes the requirements of the New Jersey Constitution and the Local Mandates Act.

The State's second argument is that the Department of State memorandum is but an informal communication, not a "rule or regulation". But it has been recognized by the courts, the legislature and the Council itself that informal administrative action is a common and accepted means of imposing duties of general applicability and continuing effect. The practical effect of the memorandum, and its enforceability, are no different than those of a formally-adopted rule or regulation.

The State's final argument is that the memorandum does not mandate any county expenditures at all because it only directs that "[a]ny person who is not so trained cannot perform any voting machine duties that require or may entail access to the internal components of the voting machines." Counties, however, cannot perform their election duties unless they have the technicians to assure fair, accurate, efficient voting procedures and counts. Failure or refusal to provide the required training is not a realistic or acceptable county option.

The Council accordingly grants summary judgment in favor of Atlantic County.

Council Chair John A. Sweeney and Members Leanna Y. Brown, Timothy Q. Karcher, Jack Tarditi, James J. Toolen, Sharon L. Weiner and Janet L.Whitman join in the opinion.

Maneesha S. Joshi, Assistant County Counsel, argued the cause for complainant Atlantic County (James F. Ferguson, Atlantic County Counsel, attorney)

Todd A. Wigder, Deputy Attorney General, argued the cause for respondents New Jersey Department of State and Division of Elections (Paula T. Dow, Attorney General, attorney)

OPINION

I

On December 3, 2010, the Atlantic County Superintendent of Elections, with the authorization of the Atlantic County Executive, filed a complaint with the Council on Local Mandates seeking a declaration that a November 16, 2010 memorandum issued by the Director of the Division of Elections in the New Jersey Department of State is a "rule or regulation" imposing an unfunded mandate because it does not authorize resources for its implementation. N.J.Const. Art. III, section II, par. 5; N.J.S.A. 52:13H-2. The memorandum, addressed to all County Boards of Election and County Superintendents of Elections, requires all county employees "whose job duties encompass access to the internal components of a voting machine" to attend a one-day training session with respect to a State protocol for security enhancements used on all voting machines.

By letter of December 23, 2010, the Council notified the appropriate state officials of the filing of the complaint, directed the Attorney General to file an answer on behalf of the State and fixed a schedule for the further proceedings. On January 7, 2011, the Council temporarily enjoined the Director from requiring county employee attendance at the scheduled training unless the State paid the costs incurred by the

counties. See N.J.S.A. 52:13H-16. The parties ultimately cross-moved for summary judgment, the Council heard oral argument on May 5, 2011, and the parties were informed on June 7, 2011 that summary judgment was awarded to the County. This opinion explains and memorializes that decision.

II

The dispute arises out of a Superior Court lawsuit brought in 2004 against then Governor James E. McGreevey and Attorney General Peter C. Harvey seeking to restrain the use of direct recording electronic (DRE) voting machines, which were, and remain, in use throughout the State. Gusciora v. McGreevy, Superior Court of New Jersey, Law Division, Mercer County, Docket No. MER-L-2691-04.[1] Although DRE voting machines had been certified by the State for use (N.J.S.A. 19:53A-4), plaintiffs complained that the DRE technology was flawed and that the use of the DRE machines violated New Jersey constitutional and statutory requirements that every vote be counted accurately and that voting equipment be secure. See N.J. Const. Art. II, sec. 3(a), and Art. I, sec. 1; N.J.S.A. 19:28-1 et seq.; N.J.S.A. 19:48-1 (d), (f)and (h); N.J.S.A. 19:53A-3(a),(g) and (h).

In her March 8, 2010 final opinion, the trial judge held that the DRE voting machines properly record votes cast and

[1] Governor Jon C. Corzine and Secretary of State Nina Mitchell Wells were later substituted as defendants.

produce accurate results and that plaintiffs' claims of security risks were unsupported. The judge further found, however, that "the State does not have an adequate inspection protocol" with respect to the machines' seals and locks and that "the State must take steps to require election officials to: (1) check and record the serial numbers; (2) adopt a uniform seal-use inspection protocol; and (3) provide inspectors with adequate training." Gusciora v. Corzine, 2010 WL 444173 (2010), at page 94. Her order for judgment, entered March 8, 2010, included the following provision:

> FURTHER ORDERED that the State shall develop a seal-use protocol for the tamper-evident seals on the State's voting machines, and that said protocol shall include a training curriculum and standardized procedures for the recording of seal serial numbers and maintenance of appropriate serial number records.

On November 16, 2010, Director Robert F. Giles of the Division of Elections in the New Jersey Department of State issued a memorandum to all County Boards of Election and County Superintendents of Election advising, among other things, that "by way of the March 8. 2010 Order in the matter of Gusciora et al. v. Corzine, et al., the State is required to implement a seal-use protocol for the security enhancements used on all voting machines in the 21 counties"; that the protocol "must include training"; that "any individual whose jobs duties

encompass to the internal components of a voting machine is mandated to attend training" including "any individual employed by a county, whether on a full-time or part-time basis"; and that each of the affected employees must select one of six dates specified in January 2011 to attend a training session. The memorandum further directs that "[a]ny person who is not so trained cannot perform any voting machine duties that require or may entail access to the internal components of the voting machines."

On November 18, 2010, Atlantic County Superintendent of Elections John W. Mooney emailed Director Giles to report that he had 13 part-time technicians whom he would need to pay $125 each to attend the mandated training and to inquire whether the State would reimburse those costs. On November 30, 2010, Director Giles responded that "the State will not be compensating any counties or their employees for attendance at the seal-use protocol training." Superintendent Mooney filed the complaint in this matter on December 3, 2010.

III

The operative facts are not in dispute. The Giles memorandum requires present, and presumably future, county election technicians to attend a one-day training session; unsalaried part-time workers are entitled to be paid for that

day; the State offers no resources to offset those costs; if the memorandum is implemented, those additional expenditures must be paid through county property taxes. Those facts, Atlantic County submits, render the Giles memorandum a "rule or regulation" constituting a unfunded mandate within the meaning of N.J.Const. Art. VIII, sec. 2, par. 5.

The Attorney General urges, to the contrary, that the Giles memorandum is not a "rule or regulation" and that it accordingly lies beyond the Council's jurisdiction. Her argument is three-fold: the training requirement is imposed by a Superior Court order, not an executive branch "rule or regulation"; the memorandum is but a communication from a subordinate executive branch official and carries none of the procedural or substantive weight of a "rule or regulation"; and in any event the memorandum does not "mandate" attendance at a training session, but simply advises that attendance is a prerequisite to working on the internal components of voting machines. None of those arguments is persuasive.

A

The State has broad responsibility to oversee the use of electronic voting devices (N.J.S.A. 19:53A-1 to 15) to assure, among other things, that they "record correctly and count accurately every vote cast". N.J.S.A. 19:53A-3(h). In applying

that law, the Superior Court found, and ordered, that certain procedures were inadequate, that inspection and recording protocols must be improved and that technicians be trained in their use. Atlantic County does not challenge that order. Visiting of the costs of attendance at the required training on the counties was a determination of the executive branch, not of the Court. The Court imposed no requirements as to how those obligations might be fulfilled, nor did it say anything about how the costs of the training might be borne. The State was required by the Court to provide training, but not required to impose the additional costs of that training on the counties.

The Giles memorandum thus represents nothing more than an executive decision as to how the burdens of the training program should be allocated between the State and the counties. As the Council held in I/M/O Counties of Morris, Warren, Monmouth and Middlesex (December 22, 2006), that is the very kind of decision that is interdicted by the Local Mandates Act. The Council there invalidated an announcement by the New Jersey Department of Transportation that it would no longer remove deer carcasses from county and municipal roads, reasoning as follows:

> The Attorney General essentially asked the Council to rewrite the [New Jersey Constitution and the Local Mandates Act] to permit costs to be shifted to local governments if the State thinks those burdens are more properly borne by local taxpayers. That directly contravenes the requirements of the [Constitution and the Act].

That reasoning is equally apropos and persuasive here. The State's administrative decision that certain costs of the mandated training program should be borne by the counties cannot prevail over the commands of the New Jersey Constitution and the Local Mandates Act.

B

The contention that only a formally-adopted "rule or regulation" can constitute an unfunded mandate is unsound. Our Supreme Court has long recognized not only that "administrative agencies may act informally," but that "informal action constitutes the bulk of the activity of most administrative agencies" and is "indispensable, widespread and perhaps abused." In re Solid Waste Utility Customer Lists, 106 N.J. 508, 518 (1987). In the Administrative Procedure Act, the legislature has similarly recognized that administrative action can be informal: it defines a "rule" as "an agency statement of general applicability and continuing effect that implements law or policy." N.J.S.A. 52:14B-2. Most tellingly, the legislature has stated that the Local Mandates Act, which the Council administers, should be interpreted and applied with recognition that, until unfunded mandates were prohibited, "the State routinely and systematically imposed greater and greater numbers

of mandates, orders, directives and burdens on local governments." N.J.S.A. 52:13H-21.

Indeed, in I/M/O Counties of Morris, Warren, Monmouth and Middlesex, supra, the Council itself rejected the argument that only a formally-promulgated "rule or regulation" can qualify as an unfunded mandate. The Council found that the "practical effect" of the DOT notice that it would no longer remove deer carcasses from county and local roadways was to impose an unfunded mandate "because it does not authorize resources to offset the additional direct expenditures for [its] implementation." The practical effect of the Giles memorandum is the same.

C

The practical effect of the Giles memorandum also belies the State's claim that it does not mandate any county expenditures but only disqualifies untrained technicians. Just as counties and municipalities could not leave deer carcasses unattended on their roads, so too counties cannot fulfill their public duties unless they have the technicians needed to assure fair, accurate, efficient and secure voting procedures and counts. Failure or refusal to provide the required training would not be a realistic or acceptable county option.

* * * *

The Council accordingly holds that the November 16, 2010 memorandum of Director Robert F. Giles of the Division of Elections in the New Jersey Department of State constitutes an unfunded mandate and shall cease to be mandatory in its effect and expire. N.J.Const. Art. VIII, sec.5(a); N.J.S.A. 52:13H-2.