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February 9, 2011

SENT VIA E-MAIL: Council.onLocalMandates@Treas.state.nj.us

Hon. Jack Tarditi, Chairman and Council Members
State of New Jersey
Council on Local Mandates
135 W. Hanover St., 4th Floor
PO Box 627
Trenton, NJ 08625-0627

Re: In the Matter of Complaint filed by the County of Atlantic (12-10)
Letter Brief on Behalf of the County of Atlantic
In Support of its Application for Preliminary Injunction.

Dear Chairman Tarditi and Council Members:

Please accept this Letter Brief and exhibits attached hereto on behalf of the County of Atlantic in support of its application for summary judgment, pursuant to Rule 8 of Procedure of the Council on Local Mandate, as the State's Order to employ Seal-Use Protocol Training is an impermissible unfunded State mandate, which is prohibited by the New Jersey Constitution and the statutes and regulations promulgated thereto. The Council is presently scheduled to consider this relief on February 22, 2011. In the alternative, should the council determine that this matter is not ripe for summary judgment, the County respectfully requests that the State's mandate to attend training be enjoined.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The material facts in this case are not in dispute. On or about December 3, 2010, John W. Mooney, Superintendent of Elections for Atlantic County (Superintendent), with the consent of the Atlantic County Executive, filed a Complaint with the Council on Local Mandates (the Council), stating that the memorandum of November 16, 2010 authored by Robert Giles,

Director of the Division of Elections, is a "Statute, Rule or Regulation" that does not authorize resources, other than property tax, to offset direct expenditures, and, therefore is an impermissible unfunded State mandate. This matter has been supported by the County Executive of Atlantic County, Dennis Levinson, via his correspondence dated January 22, 2010. (See letter of County Executive, Exhibit A). The Board of Chosen Freeholders for the County of Atlantic was also sent a copy of the letter for its support in this matter.

The Complaint sets forth the fact that the County currently has thirteen (13) part-time voting machine technicians who, unlike regular employees at the County, must be compensated for time and travel to attend required training. The Department of State and its Division of Elections (hereafter the State) alleges that the memo from Giles dated November 16, 2010 is simply a memo that informed all County Superintendents and Board of Elections that the State was now required by Superior Court Order in Gusciora v. Corzine, MER-L-2691-04, to implement a Seal-Use protocol for security enhancements used in all voting machines in the twenty-one counties and that the "protocol must include training." Specifically, the memo states:

> This proposal must include training which will be conducted as follows: first, any individual whose job duties encompass access to the internal components of a voting machine is mandated to attend training. This requirement applies to any individual employed by a county, whether on a full-time or part-time basis, and it also applies to any individual employed by a vendor who is contracted for voting machine purposes. To be clear, even if an individual is hired only for the day of an election to perform voting machine duties, that person is subject to training. There would be no exceptions to this requirement." (See Exhibit A to the State's Letter Brief in Opposition to the County's application). (Emphasis Added).

The State is suggesting that the Court Order in Gusciora required the training that was the subject of Giles memorandum. However, the County respectfully disagrees with this assertion.

In the Court opinion in the Gusciora matter, which is attached as Exhibit B to the State's application, the Order in part states, on page 3, as follows:

> FURTHER ORDERED that the State shall develop a Seal-Use protocol for the tamper-evidence seals on the State's voting machines, and that such protocols shall include a training curriculum and standardized procedures for the recording of sealed serial numbers and maintenance of appropriate serial number records.
>
> Further, on page 4 of the opinion, the court states:
>
> FURTHER RECOMMENDED that the State develop and implement Statewide training and training materials for County Clerks, Board of Election, Superintendents of Election, Technicians, Warehouse Personnel and District Board workers. Part of that training must include protocols for the chain of custody and maintenance of election records and documentation, including, but not limited to, authorization slips, poll books, result cartridges, seals and serial numbers, emergency ballots, provisional ballots, mail in ballots, military and overseas ballots, ballot bags, voting machine tapes and printouts. (Emphasis added).

Although it is unclear exactly what a Court recommendation is as opposed to an Order of the court, nonetheless Mr. Giles sent the November 16, 2010 memo to the County of Atlantic, thereby mandating that training be completed, but did not provide any source of funds as required by the New Jersey Constitution and the statutes and regulations promulgated thereto.

ARGUMENT

The Council must grant summary judgment to the County, as the requirement of Seal-Use protocol training results in a significant financial hardship to the County, and the training ordered by the State is an impermissible unfunded State mandate.

The standard for summary judgment was addressed in In re Board of Education and Borough of Highland Park. Requests for summary disposition are to be reviewed "with great caution" (Id. at 13), because decisions of the Council are final. This type of relief may be granted "only if the Council concludes that no further factual information would be relevant to its decision." In In re Ocean Twp. (Monmouth County) and Frankford Twp. at 5. As there is no material factual dispute, this matter is ripe for the Council's determination for summary judgment. In the alternative, should the Council determine that this matter is not ripe for

summary judgment, the County respectfully requests that the State be enjoined from issuing this mandate.

The Counsel has authority to enjoin enforcement of a Statute, Rule or Regulation pursuant to N.J.S.A. 52:13H-16, which states:

> The Council shall have the authority to issue a preliminary ruling enjoining enforcement of a statute or a rule or regulation pending the Council's consideration of whether the statute or the rule or regulation constitutes an unfunded mandate whenever a complaint filed with the Council by a county, municipality or school district demonstrates, to the satisfaction of the Council, that significant financial hardship to the county, municipality or school district would result from compliance and there is a substantial likelihood that the statute or the rule or regulation, is, in fact, an impermissible unfunded State mandate.

The State argues that the complaint does not demonstrate either a significant financial hardship or that there is a substantial likelihood that a statute, rule or regulation imposes an impermissible unfunded State Mandate. The State indicates that of "critical importance," the Complaint alleges that only thirteen (13) part-time employees are affected and that the training is estimated to cost approximately $1,600.00. Although the State may not consider this to be a significant financial hardship to the County, the County does have a significant financial hardship in having to pay for an unfunded State mandate. In these difficult economic times, the County Executive and the Board of Chosen Freeholders seeks to save any and all monies. To argue that $1,600.00 is not a substantial financial hardship to the County is unwarranted and unsubstantiated, and in fact a bit surprising considering the nature of the economy throughout this country. Therefore, the County does meet the burden to demonstrate a significant financial hardship, and satisfies the requirement of N.J.S.A. 52:13H-16.

In addition, the County asserts that the Giles memorandum is an unfunded State mandate, which is prohibited by the New Jersey Constitution. The New Jersey Constitution, Article 8, Section 2, Paragraph 5 states in relevant part:

> Any provision of such law, or of rule or regulation issued pursuant to a law, if it is determined in accordance with this paragraph to be an unfunded mandate upon Board of Education, Counties and Municipalities because it does not authorize resources, other than property tax, to offset the additional 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.

Although the State argues that the Giles memorandum is neither a statute, rule or regulation, the County respectfully disagrees.

The Local Mandates Act (LMA) does not define the phrase "rule or regulation," but the State has failed to demonstrate that the restrictive application implied by its' argument has been adopted. On several occasions since the adoption of the LMA, the Legislature has indicated in its statements of policy that clearly contemplate a broad definition of the phrase "rule or regulation." For instance, L. 2000 C. 126, Section 1, codified at N.J.S.A. 52:13H-21 provides:

> Over the past four decades, prior to adoption of the Constitutional Amendment prohibiting unfunded State mandates on local government, the State routinely and systematically imposed greater and greater numbers of mandates, orders, directives, and burdens and the underlining on local government (Emphasis added).

Chapter 126 then granted Legislative relief as to a specific group of local mandates that were not otherwise subject to the LMA because they had been imposed prior to 1996, when the amendment was approved. See N.J.S.A. 52:13H-2. The Legislature's demonstrable concern, consistent with the remedial purpose of the LMA, goes with the fact of the mandated burden, not with the outward form, as the State would have it. (Emphasis added). A similarly pragmatic approach is taken by the Administrative Procedure Act, N.J.S.A. 52:14B-2(e), which defines the word "rule" as an "agency statement of general applicability and continuing effect that implements or interprets law or policy." The Supreme Court reinforced this conclusion.

The Supreme Court explicitly recognized that "As an alternative to acting formally through rule making or adjudication, administrative agencies may act informally." In Re The Quest for Solid Waste Utility Customer Lists, 106 N.J. 508, 518 (1987). (Emphasis added). The

Court continued "informal action constitutes the bulk of the activity of most administrative agencies. It is indispensable, wide spread and perhaps abused." Id.

In In re the Matter of Complaint filed by the Counties of Morris, Warren, Monmouth and Middlesex, decided December 22, 2006, opinion issued October 31, 2006, the Counties of Morris, Warren, Monmouth and Middlesex (claimants) filed complaints with the Council contending that a change in State policies governing the pickup and disposal of deer carcasses violated the Constitutional prohibition against new unfunded mandates, N.J. Constitution, Article 8, Section 2, Paragraph 5, as codified in the LMA. In a press release issued on June 7, 2006 (hereinafter June 7th Notice), the New Jersey Department of Transportation (NJDOT) informed counties and municipalities that its practice of removing dead deer from all State, County and local roadways, in place for at least the past 20 years, would end on September 30, 2006, after which "Counties and Municipalities should be prepared to begin performing this function in their jurisdictions." The Commissioner of the NJDOT answered the complaint at the Council's request. The Commissioner of the New Jersey Department of Environmental Protection (NJDEP) also answered the complaints. Respondent NJDEP filed a Motion to Dismiss the complaint, contending that there was neither a Constitutional nor statutory requirement that it perform deer removal services and denying that its past funding practices raised to the level of a statutory mandate. The Council unanimously denied the State's Motion to Dismiss the complaint, and granted Summary Judgment on behalf of the claimant. The Council noted that the practical effect of the June 7th notice was to create an unfunded mandate. The Council could not accept the State's unrealistic assertion that it had not "ordered anyone to do anything." To the contrary, as the amicus curiae brief filed by the New Jersey Association of Counties (NJAC) pointed out, the June 7th notice stated that the deer removal policy is "being changed for FY 2007." The NJAC also noted a follow up (undated) letter from NJDOT's Deputy Commissioner Stephen Dilts to all counties and municipalities stating that "they should be prepared to begin performing this function in their jurisdiction by September 30th." At the hearing held by the Council, representatives of each county came and confirmed that each county did indeed

understand the June 7th notice was a mandate to prepare and perform the function of deer carcass removal. The State argued that the new "policy" communicated in the June 7th notice amounted to nothing more than a proportional allocation of responsibilities among levels of government that follows responsibilities for the roads themselves. The State indicated that removing deer carcasses was simply another form of "maintenance," and thus the State would continue to remove deer from State and Inter-state highways (its highways), while assigning local maintenance to the counties and municipalities respectively. The Council found that "the obvious flaw" in this reasoning is that it ignores the "State mandate/State pay" principle of the New Jersey Constitution and Local Mandate Act.

> The Attorney General essentially asked the Council to rewrite Article 8, Section 2, Paragraph 5 of the New Jersey Constitution and the LMA to permit costs to be shifted to local governments if the State thinks those burdens are more properly born by local tax payers. This directly contravenes the requirements of the Amendment and the LMA. (Emphasis added).

Therefore, the Council concluded that the June 7th notice constituted an unfunded mandate "because it does not authorize resources to offset the additional direct expenditures required for the implementation of the law or the rule or the regulation. Accordingly, it shall cease to be mandatory in its effect and shall expire, per N.J.S.A. 52:13H-2." The State's Motion to Dismiss was denied, and Summary Judgment was granted on behalf of the claimants.

As in the case at bar, the November 16, 2010 memo from Robert Giles is in fact a "rule" within the meaning of the New Jersey Constitution, and as set forth in the decisions outlined above. Therefore, it is an impermissible unfunded State Mandate, and therefore the State must be precluded from issuing such a directive or order.

The Court Order of March 8, 2010 in the matter of Gusciora v. Corzine makes the recommendation that training be provided. It is not an order of the Court. Therefore, the State has issued an unfunded State mandate which is impermissible as a matter of law. Even if the State argues that it is pursuant to a Court Order, the New Jersey Constitution states that "the

additional 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." (Emphasis added). If indeed it is a Court Order that states that training is required, and the State is implementing the Court Order, it is then implementing the law, i.e. the Court Order, and it becomes an unfunded State mandate.

The State relies upon the decision and Order in In the Matter of the Complaint filed by Township of Branchburg, which can be found on the Council's website. However, the State's reliance upon this case is misplaced.

In that matter, the Township of Branchburg (Somerset County) filed a Complaint with the Council on Local Mandates, seeking a determination that the Court's holding in the case of Smith v. Hudson County Register, 411 N.J. Super 538 (App. Div. 2009) imposed an unfunded mandate, namely, insufficiencies for the copying of public documents requested pursuant to the Open Public Records Act (OPRA) found at N.J.S.A. 47:1A-1-13. When the Township filed its Complaint and the form provided by the Office of the Council, the Township did not enter a citation for a "statute, rule or regulation" as required by the Constitution. Instead, the Complaint referred to the decision of the Appellate Division in the Smith matter rather than actually providing a statute, rule or regulation. Although the Council dismissed the Complaint", the Council did note "Although we believe that we have concurrent jurisdiction with the Superior Court to hear and decide issues such as those presented in Smith, Supra, we determined the Complaint must be dismissed because it fails to place a statute squarely before us as the Constitution requires." (Emphasis added). As such, the Council actually determined that it did have concurrent jurisdiction with the Appellate Division, but that there was no statute, rule or regulation placed before them to decide. This is a different factual scenario than that which is presented to this Council.

Again, the memorandum issued by Mr. Giles is the "rule" that is being presented before the Council which must be decided. Again, if the Council determines that the State is enforcing

a "Order", whether it be a recommendation or not, then the State has placed an impermissible unfunded mandate upon the County of Atlantic to attend training without compensating them, other than using property taxes.

In sum, the Complaint satisfies the two statutory standards as set forth in N.J.S.A. 52:13H-16. The total cost of over $1,600.00 to the County for part-time employees to attend the training is certainly a "significant financial hardship" to the County. For the State to argue otherwise is without merit. And it is the substantial likelihood that the "rule" is a source of a training requirement, rather than the court decision in Gusciora. Whether or not the training has been ordered is in question, as that is not how the Order reads. In addition, even if this Council decides that this is an implementation of the Court Order, then it is implementing the law, as a Court Order is a law which must be enforced. However, the rule that the State has mandated training for all County election employees is an impermissible unfunded State mandate, which requires reimbursement of expenses to the County. Therefore, the Council must enter a rule enjoining the State mandated training while the Commission considers their Complaint.

Very truly yours,

MANEESHA S. JOSHI
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cc: NJ Elections@sos.state.nj.us
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James F. Ferguson, County Counsel (ferguson_james@aclink.org
Jerry DelRosso, County Administrator (delrosso_jerry@aclink.org

EXHIBIT A

Atlantic County
Executive Office

Dennis Levinson
County Executive

DL-346-10

609/343-2201 FAX: 343-2194
TDD: 348-5551

December 20, 2010

Shawn D. Slaughter, Executive Administrator & Coordinator
Council on Local Mandates
135 West Hanover Street, 4th floor
PO Box 627
Trenton, NJ 08625-0627

Dear Mr. Slaughter:

Recently the Superintendent of Elections in Atlantic County, John Mooney, was notified that there was to be mandated training in 2011 for any employees, volunteers and/or contractors that may have direct contact and access to the internal components of a voting machine. It has come to my attention that Mr. Mooney has submitted a complaint with the Local Council that the costs associated with that training be reimbursed by the State as this is a state mandate state pay issue.

I am writing this letter to support Mr. Mooney's position and have copied the Board of Chosen Freeholders on this letter. There are a number of continuing issues that will arise as result of this mandate. For example, future vacancies when filled will require like training. In effect, the State is creating an ongoing cost, beyond the installation of the new firmware. Atlantic County believes this training is a state mandate, the cost of which the State should fully reimburse to local governments.

If there are any questions, please feel free to call my office.

Sincerely,

Dennis Levinson
County Executive

DL:jdc

c: Board of Chosen Freeholders
Sonya Harris, Clerk, Board of Chosen Freeholders
Jerry DelRosso, County Administrator
John Mooney, Superintendent of Elections
Jane Lugo, County Treasurer

SUPERINTENDENT OF ELECTIONS
2010 DEC 21 PM 3:42
ATLANTIC COUNTY