NJAC LEGISLATIVE UPDATE

November 24, 2010

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1. INTEREST ARBITRATION REFORM

Both the Senate and General Assembly plan to vote on December 13th on an interest arbitration reform proposal that imposes:

- a 2.0% cap on interest arbitration awards that limit salaries, wages, and all steps, guides, and longevity, but does not include health, pension, fringe, and other benefits;
- a three year sunset provision;
- enhanced education requirements for arbitrators; and
- the random selection of arbitrators.

As previously noted, NJAC issued the following statement in light of yesterday's dueling press conferences:

> "The New Jersey Association of Counties (NJAC) has long advocated for meaningful and equitable interest arbitration reform as a critical component for providing long-term property tax relief. With this in mind, NJAC supports in concept this fair and significant restructuring of the interest arbitration process, which places a 2.0% cap on interest arbitration awards limiting salaries, wages, and all steps, guides and longevity pay accordingly.
>
> On behalf of county governments and as a non-partisan organization, NJAC urges the Legislature and Administration to act swiftly on this critical initiative. Failure to do so in light of the recent reduction to the property tax cap levy will force county governments throughout the State to eliminate essential services and personnel, and drastically reduce improvements to county facilities, roads, and bridges.
>
> NJAC looks forward to working with the Legislature and Administration on the daunting task of making our great State a more affordable place to work, live, and raise a family."

Although leadership in the Legislature appreciated our efforts to work on a compromise on this very heated issue, the Administration and minority caucus in the General Assembly strongly oppose the proposal's sunset provision. Although we pointed out that we do not necessarily endorse the sunset provision, we support the proposal as a whole as a significant and fair compromise. We'll make sure to forward you a draft copy of the bill as soon as it becomes available sometime early next week.

2. CIVIL SERVICE REFORM - WORK GROUP DISCUSSIONS AND ACTION

As you know, we have been working for several months with Assemblywoman Linda Stender on advocating for legislation to streamline the current civil service bureaucracy. As you may recall, our recommendations include: extending temporary seasonal employee appointments to ten months; expanding the working test period to six months; extending the time frame for disciplinary review appeals to 15 days; authorizing reconciliation plans; modifying special reemployment lists; modifying individual transfers; eliminating bumping rights, and altering the open competitive process. With this in mind, the Assemblywoman plans on introducing and considering legislation that addresses many of our recommendations at Monday's Assembly State Government Committee. Please note that Senate President Steve Sweeney plans on moving similar legislation in the Senate as well.

In summary, this bill allows local public employers in the civil service to negotiate with the majority representative of its employees in areas such as disciplinary review, ways to avoid or reduce layoffs, and terms and conditions of employment. When a public employer and a majority representative are unable to reach agreement with respect to a particular issue, the provisions of the civil service statutes in Title 11A and regulations will remain in full force and effect.

In addition, the bill makes certain changes to civil service procedures with regard to the establishment, consolidation and abolition of titles, requires public notice of such proposed actions, and provides for the negotiation of compensation or wage rates for new titles and the public posting of a proposed layoff plan. The bill increases the length of seasonal appointments to no more than nine months from the current limit of no more than six months, extends the working test period for State and local employees to a uniform six months, and requires that local employers adopt an employee performance evaluation system. The bill instructs the Civil Service Commission to provide for the completion and submission of an application for an examination on its website and, when appropriate, to arrange for the online-administration of examinations.

The bill also establishes a temporary Civil Service Modernization Task Force to take recommendations, within 90 days of its formation, to the Civil Service Commission on how to achieve the goal of a 30 percent reduction in the number of titles in State and local government service that were in effect at the beginning of State fiscal year 2011 and how to expedite and streamline the examination process. The task force will have seven members: one from the New Jersey State League of Municipalities, one from the New Jersey Association of Counties, one appointed by the Governor, and four from unions that represent State and local government employees in New Jersey, two appointed by the Senate President and two appointed by the Speaker of the General Assembly in consultation with the New Jersey State AFL-CIO.

3. COUNTY PROSECUTORS' TASK FORCE

Morris County Administrator and Task Force Member John Bonanni, Hudson County Administrator Abe Antun, Passaic County Administrator Tony DeNova, Atlantic County Administrator Jerry DelRosso, and Hudson County Executive and Task Force Member Thomas DeGise provided the Task Force with the following recommendations called the "Abe Doctrine" on November 18th.

INTRODUCTION

The Governor appoints all county prosecutors with the advice and consent of the Senate; the State's Attorney General may supersede any actions taken by a county prosecutor in all law enforcement matters; and county governments exercise little control over the fiscal or administrative functions of its county prosecutor. Nonetheless, current State law mandates that county governments bear the full responsibility to pay for the operation and maintenance of the county prosecutorial offices and facilities at a conservative estimate of $450,000,000.00 per year, which equals approximately 10.5% of the statewide amount raised by county taxes. Even more alarming is the fact that although statewide county budgets decreased by 2.1% from 2009 to 2010, statewide county prosecutor budgets increased by nearly 13.0%.

With this in mind, county governments strongly supported Governor Chris Christie's Executive Order No. 33, which established a Study Commission to review the costs associated with the operation, maintenance, and capital expenses of this inequitable funding mechanism. In light of the fact that the State faces a $10.5 billion structural deficit in fiscal year 2012 with seemingly no end in sight, it does not appear as if the Study Commission is prepared to recommend that the State assume a substantial portion of these costs at this time. As such and based on the recommendations of the five county executives, the County Administrators' Association of New Jersey, and the New Jersey Association of Counties, the Study Commission should recommend implementation of the following cost containment measures:

1. Require county prosecutors to comply with State mandated property tax cap levy restrictions.
2. Require the Attorney General's Office to provide a defense and indemnification for all legal matters arising out of the county prosecutors' offices relating to law enforcement activities.
3. Require county prosecutors to adopt, implement, and enforce the personnel policies and procedures of their respective county; and until such time, require the Attorney General's Office to assume all litigation expenses and any claims or judgments resulting from such matters. *Please note that f the prosecutor follows the county's personnel policies and procedures, and acts upon county counsel's advice on said matters, then the county would agree to pay for any litigation, claims, or judgments rendered in said matter*
4. Prohibit county prosecutors from filing In re Bigley applications; and until such time, require the Attorney General's Office to assume all litigation expenses incurred as a result of defending all applications. *See 4 below.*
5. In the event that interest arbitration awards are in excess of the 2.0% property tax cap levy restriction, the State shall be responsible for the excess portion.

6. Authorize the use of forfeiture funds to offset county operating expenses in excess of State mandated property tax cap levy restrictions

PROPERTY TAX CAP LEVY RESTRICTIONS

On July 14, 2010, Governor Chris Christie signed into law **SENATE, NO. 29** *(Sweeney)* as P.L. 2010, c.44, which reduced the statutory property tax cap levy to 2.0% and took effect immediately. County governments generally supported this initiative, but cautioned that it should have included meaningful interest arbitration reform, civil service reform, and pension and health benefits reform. Unfortunately, the Legislature has failed to act on these critical initiatives, which will ultimately force county governments throughout the State to eliminate essential services and personnel, and drastically reduce improvements to county facilities, roads, and bridges. In light of this recently enacted law and inaction of the Legislature to provide necessary relief, county prosecutor budgets should be restricted in the same manner as well.

LITIGATION EXPENSES

The New Jersey Supreme Court in Wright v. State, 169 N.J. 422 (2001) held that the State may be found vicariously liable under the "New Jersey Tort Claims Act" N.J.S.A. 59:1-1 et. Seq. for the conduct of a county prosecutor or the prosecutor's investigative subordinates. Importantly, this decision required the State to provide a defense and indemnification in actions brought against a county prosecutor when the prosecutor commits negligent acts or omissions during the investigation of criminal activity or enforcement of the law. The Supreme Court's decision in Wright recognized the inequitable burden imposed upon county governments and shifted liability and relevant costs accordingly.

As previously noted, the Attorney General is charged with supervising county prosecutors in all law enforcement matters and supersedes county prosecutors in all criminal actions or proceedings. The Court in Wright also pointed out that both the Attorney General and county prosecutors are constitutional officers pursuant to N.J. Const. (1947) Art. V, Sec. IV, par 3. In light of this compelling relationship, county governments concurred with the Court that county prosecutors are in fact agents of the State for the purposes of determining vicarious liability. However, county governments submit that this groundbreaking decision should be codified into law through recently introduced legislation **ASSEMBLY NO. 3269** *(McKeon)*; and, given the lack of appointive authority or fiscal and administrative control at the county level, be taken a step further to require that the Attorney General provide a defense and indemnification for county prosecutors in all matters committed during the course of employment.

BIGLEY APPLICATIONS

County prosecutors may file with the court an In re Bigley, 55 N.J. 53 (1969) application to challenge a county government's decision on its budget. In fact, prosecutors may file such a lawsuit in which an assignment judge is called upon to identify expenses that were not approved in the prosecutor's budget, but that are reasonably necessary for the prosecutor to carry out the statutory obligation to "use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the law." Although prosecutors seldom file

Bigley applications, the threat of such a costly, divisive, and protracted lawsuit carries significant weight throughout the governing body's budgetary process. With this in mind, county prosecutors should be prohibited from the use of this antiquated and unfair resource that has long burdened county governments with an unlevel playing field.

INTEREST ARBITRATION AWARDS

As has been well documented, county governments dedicate approximately 50% of their budgets to salaries, wages, and health benefits; and have actively advocated for vital resources necessary to control these costs in a more effective and efficient manner. Most significantly, county governments support meaningful interest arbitration reform to address the fact that binding interest arbitration awards often exceed property tax cap levy restrictions by ignoring step, guide, and longevity pay increases and using surplus funds as a factor when considering a local government's ability to pay. Although Senator Michael Doherty has introduced legislation to prohibit arbitrators from awarding contracts that exceed property tax levy restrictions **SENATE, NO. 2310,** the measure has stalled in the Legislature and its future is uncertain at best at this point. In light of the fact that the Legislature has failed to act on interest arbitration reform, but found the will to impose significant restrictions on a county's ability to raise revenues to fund often mandated services, the State should be held accountable for its inaction and pay for arbitration award amounts that exceed property tax cap levy restrictions.

FORFEITURE FUNDS

Although the Appellate Division in State v. One 1990 Thunderbird, 371 N.J. Super. 228, 243 (App. Div. 2004) and Institute for Justice advise against the use of forfeiture funds to pay prosecutorial salaries and budgets, case law seems silent on whether forfeited revenues could be used to offset a governing body's operating expenses in excess of State mandated property tax cap levy restrictions. Despite the fact that the collection of these revenues varies from county to county and fluctuates each year, county governments should have the ability to offset operating expenses with the nearly $15.0 million collected in forfeiture funds in 2009.

Please note that the figures provided in this document were collected from four comprehensive worksheets completed by all twenty-one counties, and were designed to capture the significant costs associated with the county prosecutors' offices.

4. ADDITIONAL LEGISLATION

SENATE, NO. 1248/ASSEMBLY, NO. 2900 *(Rice D-28)(Coutinho D-29),* which requires local governments to provide the Director of the Division of Local Government Services with a report concerning law suits to which it is a party before budget approval. NJAC advocated for amendments to establish a minimum reporting threshold for such law suits in which the governing body expects to expend more than $50,000 in legal fees or settlement costs. The Legislature amended the legislation accordingly and further limited the reporting requirements to include lawsuits where a local government understands that such a lawsuit may not be covered by liability insurance. S-1248/A-2900 passed both houses on November 22nd and is on the Governor's Desk awaiting his signature.

SENATE, NO. 514/ASSEMBLY, NO. 1592 *(Girgenti D-35)(Scalera D-36),* which permits bids for public works contracts to be withdrawn due to error under certain circumstances, and permits contracting unit to require financial statement from bidders. Our county purchasing officials have been working with DCA and the Utility Contractors Association of New Jersey (UTCA) on a compromise that seems appropriately memorialized in this legislation, which passed both houses on November 22nd and is on the Governor's Desk awaiting his signature.

SENATE, NO. 2220/ASSEMBLY, NO. 3211 *(Sarlo D-36*)(*Casagrande R-12),* which limits unused sick leave pay and vacation leave carry-forward for school and local employees. NJAC has not taken a position on this bill at this time, but its board of directors will consider the matter at its next regularly scheduled meeting.

In summary, this bill amends current law to make applicable for all current and future officers and employees of boards of education and local governments the limit of $15,000 for the payment of supplemental compensation at retirement for accumulated unused sick leave, and the limit on the carrying forward of vacation leave for one year only. Current officers and employees will be permitted to retain any supplemental compensation for unused sick leave, or to carry forward any vacation leave, already accrued as of the bill's effective date. In addition, the bill amends a section of law that permits local units to adopt an ordinance authorizing special emergency appropriations for contractually required severance liabilities resulting from the layoff or retirement of employees by removing the condition that this occur only when the total liability is in excess of 10 per cent of the amount to be raised by taxes for municipal purposes in the fiscal year in which the layoffs or retirements take place. The bill goes on to provide that such liabilities are to be paid without interest and, at the sole discretion of the local unit, may be paid in equal annual installments over a period not to exceed 10 years. Finally, the bill imposes limits on the use of sick leave by a State, local, or board of education employee in the twelve months before retirement. This provision applies to employees who commence employment with an individual employer on or after the bill's effective date. Specifically, the bill prohibits the use of six or more consecutive days of accumulated sick leave, without medical necessity verified in writing by a physician, by an officer or employee in the twelve months prior to retirement in anticipation of that retirement. The bill would not be deemed to impair the obligation of a collective negotiations agreement or individual contract of employment with relevant provisions in effect on the bill's effective date.

S-2220/A-3211 passed both houses on September 25th and is on the Governor's Desk awaiting his signature.

SENATE, NO. 1/ASSEMBLY, NO. 3447 *(Lesniak D-20/Green D -22),* which reforms the procedures concerning affordable housing and abolishes the Council on Affordable Housing. The Assembly Housing and Local Government Committee considered this legislation on November 8th and made several changes to the version passed by the Senate on June 10th. Most notably for counties, the Committee added the following language.

> "Prior to filing a plan with the Department of Community Affairs, the county planning board by resolution shall adopt the housing element. In adopting the housing element or any amendment there to the board shall hold at least one

> public hearing for presentation and review of the housing element. Notice …. The Department shall provide any technical assistance required by the county planning board."

We are working to clarify some potential issues that stem from the fact that county planning boards do not currently review or approve any elements of a municipality's master plan; and that this change may not consider the use of county resources or potential exposure to litigation. In addition to the above-noted substantive issues, several technical issues exist as well as this language amends the "Fair Housing Act," but not the "County Planning Act." Additionally, it seems to require county planning boards to adopt resolutions supporting a municipality's housing element as a mere formality. Although we don't believe this is the sponsors' intent, the language seems to create an unnecessary level of bureaucracy at the county level.

The bill has been second referenced to the Assembly Appropriations Committee, which may not meet again until December 9th. Although the provision concerning county planning boards may not work for a number of reasons, it may be in county governments' best interest to provide the sponsors with some constructive feedback instead of opposing the legislation as an unfunded mandate. As such, instead of requiring county planning boards to adopt a municipality's housing element by resolution, NJAC submitted proposed amendments in conjunction with our county planners to authorize a municipality to prepare its affordable housing plan in consultation with the county planning board. This language seems to insulate counties from incurring potential liability and mitigates the use of depleted resources.