

The New Jersey State Employee "Layoff Priority Amendment"-P.L. 1992, Chapter 99, An Act to Amend "An Act Making Appropriations for the Support of the State Government and the Several Public Purposes for the Fiscal Year Ending June 30, 1993 and Regulating the Disbursement Thereof," Covering Sections 38 & 39 of P.L. 1992, Chapter 40

New Jersey P.L. 1992, Chapter 99, involved a bitter, partisan struggle for control of the State budgetary process.¹ Governor James Florio had previously vetoed the appropriations bill for 1993 presented to him from the Legislature.² This marked the first time in New Jersey history that a Governor had vetoed an annual appropriations bill.³ The Legislature's override of the Governor's veto was equally historic.

The stage was now set for further confrontation. The Republican controlled Legislature sought to prioritize the layoffs of State employees, and to unconditionally protect certain classes of employees. Conversely, the Democratic administration of Governor Florio regarded this legislative initiative as an unconstitutional intrusion upon executive authority.⁴ Beyond the provisions of the Act itself, the separation of powers questions raised by this interaction between the Legislature and Governor sparked a spirited court battle.⁵ When state employees must be let go, can the Legislature dictate to the Governor who is to be released, and the order?⁶ Should seniority, or should degree of the employee's im-

¹ ANTHONY J. CIMINO, COMMISSIONER OF N.J. DEPT. OF PERSONNEL, STATE LAYOFF REPORT TO DONALD DiFRANCESCO, SENATE PRESIDENT, AND GARABED "CHUCK" HAYTAIAN, ASSEMBLY SPEAKER, Oct. 15, 1992 [hereinafter LAYOFF REPORT]. Cimino wrote that "the Legislature on June 18, 1992 introduced its \$14.6 billion budget, \$1.1 billion less than what was proposed by Governor Florio. . ." *Id.*

² James J. Florio, Governor, New Jersey, veto message of S. 996, to the New Jersey Legislature (Sept. 10, 1992)(on file with the *Seton Hall Legislative Bureau*).

³ *Id.*

⁴ Advisory opinion of Robert Del Tufo, Att'y General of New Jersey (July 2, 1992) (unpublished opinion on file with the *Seton Hall Legislative Bureau*) [hereinafter *Advisory Opinion*].

⁵ See *Hartmann & LaRossa v. Florio*, A-429-92T5 (N.J. Super. Ct. App. Div., Oct. 5, 1992); *Communications Workers of America v. Florio*, A-428-92T5 (N.J. Super. Ct. App. Div., Oct. 5, 1992).

⁶ In a confidential memo to Senate President Donald DiFrancesco and Assembly Speaker Garabed "Chuck" Haytaian, dated October 6, 1992, Senator Dick LaRossa expressed concern that a Supreme Court ruling in favor of the Florio Ad-

portance to the public welfare, determine lay-off priorities?

I. Legislative History

The Layoff Priority Amendment first appeared in the New Jersey Assembly as A. 121 on June 25, 1992.⁷ The bill was sponsored by Assemblyman John Hartmann (R-Mercer) and Assemblyman Robert Singer (R-Burlington/Monmouth/Ocean).⁸ That same day, an identical bill was introduced in the New Jersey Senate as S. 996.⁹ The Senate version was principally sponsored by Senator Dick LaRossa (R-Mercer), Senator Peter Inverso (R-Mercer/Middlesex), and Senator Louis Kosco (R-Bergen).¹⁰ S. 996 passed the Senate by a vote of twenty-six to seven on June 29, 1992.¹¹ Simultaneously, S. 996 was substituted for A. 121, and passed the Assembly by a vote of sixty-one to zero.¹² Governor Florio vetoed S. 996 on September 10, 1992. In vetoing S. 996, the Governor declared that "this bill would impose upon the Executive Branch a series of restrictions that would clearly interfere in the Executive's constitutional duty to manage government."¹³ On September 14, 1992, the Senate overrode the Governor's veto by a vote of twenty-eight to three, while the Assembly overrode the veto by a fifty-seven to eight margin.¹⁴ The bill was designated Chapter 99, without approval, on September 14, 1992.¹⁵

II. Legislative Intent

The Legislature determined that the administration was top-heavy with managerial and exempt personnel.¹⁶ Over 14,000

ministration could adversely impact upon the budgetary authority of the Legislature for years to come. (Memo on file with the *Seton Hall Legislative Bureau*).

⁷ 9 N.J. LEGIS. INDEX, at S18 (June 30, 1992).

⁸ NEW JERSEY STATE LEGISLATIVE BILL GUIDE, A CUMULATIVE GUIDE TO THE 205TH LEGISLATURE, FIRST ANNUAL SESSION, JAN. 14, 1992 TO OCT. 6, 1992, at 27 [hereinafter CUMULATIVE GUIDE TO THE 205TH LEGISLATURE].

⁹ *Id.*

¹⁰ *Supra* note 7, at S18.

¹¹ CUMULATIVE GUIDE TO THE 205TH LEGISLATURE, *supra* note 8, at 27.

¹² *Id.*

¹³ *See supra* note 2.

¹⁴ CUMULATIVE GUIDE TO THE 205TH LEGISLATURE, *supra* note 8, at 27. New Jersey requires a two-thirds majority vote to override the Governor's veto.

¹⁵ *Id.*

¹⁶ Kathy Barrett Carter & Joe Donohue, *Justice Stays Layoffs of 900 State Staffers*,

such employees earned \$50,000 or more per year.¹⁷ The Legislature believed that, by trimming the ranks of unclassified managerial personnel, maximum savings could be achieved with the least possible hardship.¹⁸ Assembly Speaker Garabed Haytaian found the amendment language "clear and unequivocal: middle-management and high-paid patronage jobs were targeted for layoffs, not classified employees."¹⁹

The political implications of the Legislative determination were also clear. The Republican Legislators sought to lay off the unclassified, predominantly Democratic political appointees, while preserving the jobs of unionized, civil servant constituents. Considerations of fairness also played a role in the process. Many Legislators advanced the proposition that political appointees should accept termination of employment as a consequence of political defeat.²⁰ The alternative, placing the budgetary burden on career civil servants who had worked to achieve seniority, was deemed unacceptable.²¹

III. *Analysis of the Act*

The controversial portion of the Layoff Priority Amendment is contained in the amendment to Section 38 of P.L. 1992, Chapter 40 of the Fiscal Year 1993 Annual Appropriations Act. The amendment states "notwithstanding the provisions of any law to the contrary, no State Troopers, corrections officers, personnel providing services in any institution operated by the State or communications operators, security guards, alcoholic beverage control inspectors or marine police officers within the Division of State Police shall be laid off." Certain groups of State Police personnel, and other types of employees, were unconditionally shielded from layoffs by this provision.

The Governor viewed this flat prohibition against the firing

STAR-LEDGER (Newark), Oct. 3, 1992, at 7. Exempt or unclassified personnel are non-civil service employees (often political appointees) who can be fired at any time. *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Assemblyman Monroe Lustbader (R-Essex), Address Before the *Seton Hall Legislative Bureau* (Oct. 22, 1992).

²¹ *Id.*

of particular groups of employees as especially objectionable. His veto message announced that "such restrictions may sound defensible in theory, but in many cases, they pose impracticable limitations that make little sense in the real world."²² The Governor agreed with the Attorney General that the bill violated the separation of powers doctrine.²³

The second half of the amendment to Section 38 of P.L. 1992, Chapter 40, contains less specific language, yet its provisions are formulated in command form:

Savings required to be realized through the reduction of personnel shall be made by the reduction of managerial and other exempt personnel outside the collective negotiations units in the unclassified service, and then, if necessary, by the reduction of managerial and other exempt personnel outside the collective negotiations units in the career service. As used in this section, managerial and other exempt personnel means employees assigned to employee relations groupings X, M, E, V, Z, Y, and W.²⁴

The Legislature intended, by this portion of the amendment, to direct the Governor to first fire as many managerial and non-union employees as possible, before reaching the ranks of union and civil service workers.²⁵ Five of the seven Republican sponsors represented Mercer County.²⁶ Over 30,000 state workers, representing forty one percent of the entire state payroll, reside in Mercer County.²⁷ The Legislature clearly reflected the feelings of its constituents in this case.

IV. The Governor's Response and the Court Proceedings

Following the override of his veto of the Fiscal Year 1993 Appropriations Act, Governor Florio sought the advice of his At-

²² See *supra* note 2.

²³ *Id.*

²⁴ P.L. 1992, c. 40, § 38. See *supra* note 16 for definition of exempt personnel.

²⁵ See Carter & Donohue, *supra* note 16. Senate President Donald DiFrancesco (R-Union), in referring to the Florio Administration's opposition to the amendment, said, "hopefully, the administration can somehow find a way to avert the lay-offs of the long-term people who are on the line as opposed to middle-manager political types." *Id.*

²⁶ See *supra* note 7. The Mercer County Representatives were Senators LaRossa and Inverso, and Assemblymen Hartmann, Kramer, and Wright. *Id.*

²⁷ See *supra* note 14.

torney General.²⁸ The Governor questioned a general clause, incorporated into each departmental budget, which authorized the transfer of funds:

from the other appropriations made for salaries and wages in the department from the reduction of employees whose annual salaries exceed \$50,000. Such savings shall first be made by reduction of employees in the unclassified service. If those reductions in the unclassified service are insufficient, additional reductions of employees shall be made among management and administrative personnel. If reductions are made of employees in the classified service, the Commissioner shall provide written notice and justification of such action to the Director of the Division of Budget and Accounting and the Joint Budget Oversight Committee.²⁹

On July 2, 1992, Attorney General Robert Del Tufo advised Governor Florio that the budget language should be read permissively, because a mandatory interpretation would constitute a separation of powers violation.³⁰ The same reasoning was applied to the provisions of S. 996.³¹

The Governor, through his chief counsel, immediately sent memoranda to all department heads.³² The memoranda included copies of the Attorney General's opinion, and said, in part, "you are hereby instructed not to follow the language provision [the Attorney

²⁸ Advisory Opinion, *supra* note 4.

²⁹ Brief for Appellant at 1,2, *Communications Workers of America v. Florio*, A-428-92T5 (N.J. Super. Ct. Law Div. 1992).

³⁰ Advisory Opinion, *supra* note 4, at 6, "The Legislature may not, by the device of carefully drafted 'conditions, restrictions, or limitations,' administer the appropriation once it has been made, nor may it hamper the necessary operation of constitutional officers by unreasonable appropriation restraints." (quoting *In re Karcher*, 462 A.2d 1273 (N.J. Super. Ct. App. Div. 1983), *aff'd in part, rev'd in part*, 479 A.2d 403 (N.J. 1984)).

³¹ *Id.*

³² See *supra* note 29, James Florio, Governor, New Jersey, letter listed as Exhibit C. The Governor said:

I have told my cabinet to take every prudent step possible to minimize the number of layoffs. I have instructed them to follow the language in the budget, to the greatest extent possible, directing that layoffs start with higher salaried management employees. We all know that management is composed of both classified and unclassified employees and that some of these employees are represented by labor unions. Therefore, it is unavoidable that layoffs will reach into the rank and file given that we operate within the seniority-based civil service system.

Id.

General] has identified as unconstitutional.”³³ The Commissioner of the Department of Personnel, Anthony J. Cimino, coordinated all department layoff plans, making sure that each one followed the Governor’s guidelines.³⁴ On August 5, 1992, the plans were announced. They called for the layoff of 2,376 employees. Almost seventy five percent of the affected employees came from the classified³⁵ service ranks.

On August 12, 1992, the Communications Workers of America (CWA) brought suit, seeking to block implementation of the Governor’s plan.³⁶ At least 875 CWA members were among those workers targeted for layoffs. Seven Republican legislators, five of them from Mercer County, filed a companion suit.³⁷ In the next few weeks, the Administration scrambled to save as many employees as possible.³⁸ The jobs of 1,510 state employees could not be saved.³⁹ More than 1,000 of the affected workers came from the ranks the Legislature had intended to shield. Roughly 5,000 other workers would be demoted or transferred, in accordance with the “bumping rights” system established under the New Jersey Civil Service system.⁴⁰

The actions, originally brought in Mercer County Superior Court, were transferred to the Appellate Division. On October 2, 1992, a three judge Appellate Court panel heard the cases. By a two-one vote, the court denied the appellants’ motion for a stay of

³³ M. Robert DeCotiis, Chief Counsel, Office of the Governor, Memorandum to Department Heads on Appropriations Act 1992-93, July 2, 1992.

³⁴ See *supra* note 29, Exhibit E.

³⁵ The persons comprising the classified ranks are civil service employees, most of whom are unionized.

³⁶ See *supra* note 14. The CWA represents 38,000 out of 57,000 unionized state workers. *Id.*

³⁷ See *supra* note 16, at 7. They were Senators LaRossa and Inverso, and Assemblymen Hartmann, Kramer, and Wright (R-Mercer); Assemblymen Singer and Cottrell (R-Ocean).

³⁸ Joe Donohue, *Justices Open Way for State to Lay Off 1,500 Employees*, STAR-LEDGER (Newark), Oct. 6, 1992, at 19. Commissioner Cimino said that transferral of employees to federally funded and fee supported programs enabled the Administration to save 866 of those originally slated for termination. *Id.*

³⁹ See *supra* note 38, at 1.

⁴⁰ LAYOFF REPORT, *supra* note 1. The report states:

Bumping, it should be clarified, allows an employee targeted for layoff with more seniority, in a specific title, to bump the least senior employee in that same title. It also permits targeted employees to bump other employees in titles that have “substantially comparable” duties and the “same or similar” education and experience requirements.

Id.

the Governor's layoff plan.⁴¹ That afternoon, Supreme Court Justice Handler heard the appeal of CWA, and the legislators, on an emergency basis. Justice Handler granted a stay until the following week, when the matter could be determined by the full Court.⁴²

On October 5, without comment, the full Court declined to continue the stay by a five-two margin.⁴³ The Court also certified the constitutional question of whether the legislation infringed executive authority for consideration on an expedited basis.⁴⁴ Meanwhile, the layoffs began.⁴⁵ 900 workers immediately lost their jobs, and the remaining 497 were let go within weeks.⁴⁶

V. Conclusion

Can the Legislature tell the Governor exactly how a layoff plan is to be executed? On December 29, 1992, the New Jersey Supreme Court confirmed the hunches of political and legal prognosticators by ruling in favor of Governor Florio, and against the legislators and the CWA. Justice Garibaldi, writing for the Court, cited the intent of the framers of New Jersey's State Constitution as a factor in their decision.⁴⁷ While disclaim-

⁴¹ CWA v. Florio, A-428-92T5 (N.J. Super. Ct. App. Div., Oct. 5, 1992), Hartmann & LaRossa v. Florio, A-429-92T5 (N.J. Super. Ct. App. Div., Oct. 5, 1992). In a dissenting opinion, Judge Long wrote:

I view the separation of powers question as an exquisitely difficult one not resolved definitively. . . . In reaching my conclusion, I have given great weight to the fact that the attorney general has failed to advance the argument that the statute, as written, cannot be accommodated with the executive's obligation to run the government for the benefit of the public.

Id.

⁴² See *supra* note 16, at 1. Steven Weissman argued on behalf of the Communications Workers of America, Michael Hartsbough represented Senator LaRossa and Assemblyman Hartmann, and Assistant Attorney General Edward Dauber pleaded the State's case. *Id.* at 7.

⁴³ M-291 (N.J., Oct. 6, 1992) "Justices Handler and Garibaldi would continue the stay pending disposition of the appeal." *Id.*

⁴⁴ *Id.* The Court set a date of October 13, 1992 for further oral arguments. *Id.*

⁴⁵ LAYOFF REPORT, *supra* note 1. The report notes that "[o]n October 5, the Supreme Court removed its stay of the layoff. In accordance with its ruling, I directed all departments to implement all layoffs and displacements at 5:00 p.m." *Id.*

⁴⁶ See *supra* note 32, at 1. 113 workers had already been fired by this time. *Id.*

⁴⁷ "The New Jersey Constitution is unusual because it is the only state constitution under which the Governor is the only official elected on a statewide basis. 'This pinpoints responsibility for executive branch operations in the Governor's Office

ing any active role in the political process,⁴⁸ the Court clearly articulated how that process should be conducted.⁴⁹ However, there is another perspective on the issue.

Perhaps questions of governance do not belong in court at all. That point of view, the subject of a book by Jesse H. Choper,⁵⁰ holds federal separation of powers questions to be non-justiciable. According to Choper, participation by the Supreme Court in a partisan political battle only serves to discredit and disempower the Court, detracting from its primary function as the foremost protector of individual liberties. Choper's thesis has drawn praise from both the United States Supreme Court and constitutional scholars.⁵¹

Choper's original idea, that the United States Supreme Court should not adjudicate political disputes between the Executive and Legislative branches, has already been applied to state government by the New Jersey Supreme Court. In *Karcher v. Kean*,⁵² Justice Handler intuitively applied the same reasoning to uphold line-veto authority, exercised by Governor Thomas Kean, over an appropriations act.⁵³ While the Attorney General argued that the budgetary provisions vetoed by Governor Kean violated

and adds to his power.' " 617 A.2d 223, 231 (N.J. 1992)(quoting ROBERT F. WILLIAMS, *THE NEW JERSEY CONSTITUTION, A REFERENCE GUIDE* 91 (1990).

⁴⁸ *Id.* at 235. The Court said:

Our role is not to judge whose plan is better. That power and duty belongs ultimately to the people, who through their elected representatives and officials. . . can determine what kind of government they want. Our role and duty is to interpret the New Jersey Constitution and apply it to the situation before us.

Id.

⁴⁹ *Id.* The Court further noted "[f]or better or worse, decisions on how to use the funds appropriated by the Legislature to staff executive agencies are for the Governor to make, and the Legislature may not dictate whom he may, or may not, lay off." *Id.*

⁵⁰ JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

⁵¹ *Id.* Choper's thesis formed the basis of Justice Blackmun's majority opinion in *Garcia v. San Antonio Met. Transit Auth.*, 469 U.S. 528 (1985). See also The Honorable John J. Gibbons, *The Court's Role In Interbranch Disputes Over Oversight Of Agency Rulemaking*, 14 CARDOZO L. REV. 957 (1993), in which Judge Gibbons examines more recent Supreme Court cases, and concludes that Choper's separation of powers analysis should be consistently followed by the Court.

⁵² 479 A.2d 403 (N.J. 1984).

⁵³ The Governor may veto certain budgetary provisions, or "lines," in an appropriations bill, without rejecting the bill in its entirety.

the separation of powers doctrine,⁵⁴ the Court instead based its analysis on whether the Governor had constitutionally exercised his line-veto power.⁵⁵ Finding that the Governor had lawfully exercised his authority, the Court upheld his authority. In the absence of unlawfulness, the Court stayed out of a political dispute.

Interestingly, a similar approach in this case would lead to an opposite result. As Governor Kean did in *Karcher*, Governor Florio rightfully exercised his line veto power. Unlike *Karcher*, the Legislature exercised its power to override the Governor's veto. Here, the Legislature overrode Governor Florio's veto in full compliance with constitutionally mandated procedures. While the *Karcher* Court did not invoke the separation of powers doctrine to resolve a political conflict between Governor and Legislature, this Court felt compelled to do so. Had the reasoning behind *Karcher* been followed, the outcome of this case might have been very different.

While the boundaries between constitutional interpretation and political participation are often unclear, the Court should give serious consideration to Choper's thesis in the future. The political issue of state employee layoffs belongs in the political arena, not in a court.

Richard S. Robinson

⁵⁴ 479 A.2d at 413.

⁵⁵ 479 A.2d at 417.