

Local Government Ethics Law

Opinions of the Office of the Attorney General

Subject: **Members of County Agriculture Development Boards**

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September 20, 1991

Barry Skokowski, Sr.
Deputy Commissioner
Department of Community Affairs
CN 800
Trenton, New Jersey 08625-0800

Re: 91-0090: County Prosecutors as "Local Government Officers" Pursuant to the Local Government Ethics Law.

Dear Deputy Commissioner Skokowski:

You have asked whether county prosecutors are "local government officers" pursuant to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. For the following reasons, you are advised that county prosecutors are "local government officers" under the Local Government Ethics Law and therefore subject to its terms, particularly the requirement of filing a financial disclosure statement.

The Local Government Ethics Law was enacted on February 20, 1991 and became effective 90 days thereafter on May 21, 1991. L. 1991, c. 29 §27. The purpose of the Act is to provide a statewide standard governing the ethical conduct of local government officers and employees and requiring financial disclosure for local government officers. N.J.S.A. 40A:9-22.2(e). To effect this purpose the Legislature has established a statewide Code of Ethics applicable to local government officers and

employees. N.J.S.A. 40A:9-22.5. This Code of Ethics is enforced by the Local Finance Board. N.J.S.A. 40A:9-22.4. However, a county or municipality may establish a county or municipal ethics board to enforce the code of ethics. N.J.S.A. 40A:9-22.13, N.J.S.A. 40A:9-22.19. A county or municipal ethics board establishes the local code of ethics. N.J.S.A. 40A:9-22.13, N.J.S.A. 40A:9-22.19. If the local code is not identical to the State code, it is subject to the approval of the Local Finance Board. N.J.S.A. 40A:9-22.13, N.J.S.A. 40A:9-22.19.

In addition to adhering to the ethical guidelines set forth in the law, a "local government officer" is required to file annually a financial disclosure statement, N.J.S.A. 40A:9-22.6, which contains information about his or her sources of income, certain business interests, and his or her real estate holdings in New Jersey. Ibid. (The initial financial disclosure statement is to be filed by August 19, 1991 and thereafter by April 30. Ibid.) To be subject to the requirement of filing a financial disclosure statement, one must satisfy the test of being a local government officer of a local government agency. N.J.S.A. 40A:9-22.6.

The term "local government officer" is defined as, any person whether compensated or not, whether part-time or full-time: (1) elected to any office of a local government agency; (2) serving on a local government agency which has the authority to enact ordinances, approve development applications or grant Zoning variances; (3) who is a member of an independent municipal, county or regional authority; or (4) who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the "New Jersey Employer-Employee Relations Act," P.L. 1941, c. 100 (C. 34:13A-3), but shall not mean any employee of a school district or member of a school board. [N.J.S.A. 40A:9-22.3(g)].

Thus, a variety of persons serving in a "local government agency" are included within the definition of "local government officer."

In order to understand who is a "local government officer" the term "local government agency" should be examined. A "local government agency" is defined as,

any agency, board, governing body, including

the chief executive officer, bureau, division, office, commission or other instrumentality within a county or municipality, and any independent local authority, including any entity created by more than one county or municipality, which performs functions other than of a purely advisory nature, but shall not include a school board. [N.J.S.A. 40A:9-22.3(e)].

The term "local government agency" encompasses a myriad of local government bodies and individuals. The definition is very broad and specifically excludes only purely advisory bodies and school boards.

The threshold question to be resolved here is whether the county prosecutor serves in a "local government agency." The position of county prosecutor is established by the New Jersey Constitution. N.J. Const. (1947), Art. VII, ¶II, ¶1. A county prosecutor is appointed by the Governor with the advice and consent of the Senate, *ibid*, is a constitutional officer, *Morss v. Forbes*, 24 N.J. 341, 369 (1957), and holds an "office." *State v. Winne*, 12 N.J. 152, 169-170 (1953). The county prosecutor has broad responsibilities to enforce the State's criminal laws. N.J.S.A. 2A:158-1, N.J.S.A. 2A:158-5. Further, the county prosecutor has the authority to appoint assistant prosecutors, N.J.S.A. 2A:158-15, county detectives, N.J.S.A. 2A:157-2, and other staff personnel to assist him or her. N.J.S.A. 2A:157-19. See also *In re Application of Bigley*, 55 N.J. 53 (1969).

In *Morss v. Forbes*, *supra*, the Supreme Court examined a county prosecutor's claim that he was a member of the State's Executive Branch. The Court concluded that the county prosecutor "is primarily a local official." *Morss v. Forbes*, 24 N.J. at 373. Further, the expenses incurred by the county prosecutor are paid by the county. N.J.S.A. 2A:158-7. The authority of the county prosecutor is limited to his or her own county and is local in nature. *Passaic Cty. Prosecutor v. Passaic Cty. Bd. of Chosen Freeholders*, 159 N.J. Super. 258, 263-64 (App. Div. 1978). The oath of the county prosecutor recognizes that he or she is exercising his or her duties "in and for ... (his or her) county." N.J.S.A. 2A:158-3. The county prosecutor's assistants and staff personnel are considered county officials or employees. *Passaic Cty. Prosecutor v. Passaic Cty. Bd. of Chosen Freeholders*, *supra*. Further, when the Attorney General appoints an acting county prosecutor the county continues to fund the prosecutor's office. N.J.S.A. 52:17B-108.

It has been suggested that county prosecutors are "State officers" and therefore by implication subject to the State's Conflict of Interest Law, N.J.S.A. 52:13D-12 et seq. The Law provides a code of ethics for State officers and employees, N.J.S.A. 52:13D-23. Further, certain "public officers" and "public employees" are required to file annual financial disclosure statements. Executive Order No. 1 (1990) and Executive Order No. 9, (1990). Included within the scope of "public officers" and "public employees" are certain specifically enumerated positions and, in general, office holders in State departments and agencies. Ibid. These individuals are also restricted from being employed or having an interest in the casino industry for two years from the date they terminate State service. N.J.S.A. 52:13D-17.2. Not specifically included within the scope of the State Conflict of Interest Law or the Executive Order is the county prosecutor. If indeed the county prosecutor was subject to the State Conflict of Interest Law, it can be assumed that the Governor would have specifically included this important governmental position within the scope of his Executive Orders. This is a further indication that a county prosecutor is a "local official" rather than a "State official." Based on the above, it is our view that the office of county prosecutor is an office within a county and that the office of county prosecutor is a "local government agency" for purposes of the Local Government Ethics Law.

Having determined that the office of county prosecutor is a "local government agency," it is necessary to determine if that puts the county prosecutor in the category of a person serving in a "local government agency" deemed to be a "local government officer." Included as "local government officers" are 1) elected local officials; 2) members of local bodies that have authority to enact ordinances, approve development applications, or grant zoning variances; and (3) members of independent local authorities; N.J.S.A. 40A:9-22.3(g). The county prosecutor clearly is not within the scope of these three classes of local government officers.

The fourth and last category of "local government officer" is a person "who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the 'New Jersey Employer-Employee Relations Act,' P.L. 1941, c. 100 (C. 34:13A-3), but shall not mean any employee of a school district or member of a school district." N.J.S.A. 40A:9-22.3(g)(4). As the Local Government Ethics Law makes specific reference to the definitions contained in the Employer-Employee Relations Act, it is necessary to examine the latter statute.

The Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., provides a mechanism for the resolution of labor disputes in the private and public sectors. N.J.S.A. 34:13A-2. The Act is administered by the State's Public Employment Relations Commission (PERC). N.J.S.A. 34:13A-5.2. The Act defines "managerial executives" of a public employer as,

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district. [N.J.S.A. 34:13A-3(f)].

"Confidential employees" of a public employer are defined as,

employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties. [N.J.S.A. 34:13A-3(g)].

The significance of "managerial executives" and "confidential employees" under the Employer-Employee Relations Act is that these individuals are excluded from membership in the local collective bargaining unit comprising of local public employees. N.J.S.A. 34:13A-5.3. The underlying purpose of this exclusion is that "managerial executives" and "confidential employees" have access to highly confidential labor relations information which place persons in these positions in an intolerable conflict of loyalties if they were to be part of a collective bargaining unit. Wayne Tp.

v. AFSME, Council 52, 220 N.J. Super. 340, 346 (App. Div. 1987). In incorporating a labor relations standard into the Local Government Ethics Law, the Legislature was attempting to adopt an approach which would help identify persons of a high level with policy-making responsibilities.

Neither the Employer-Employee Relations Act nor PERC's regulations, N.J.A.C. 10:1-1 et seq., provide an enumeration of positions in local government which are deemed "managerial executive" or a "confidential employee." Rather, the determination of which positions are "managerial executive" or "confidential

employee" are case-by-case judgments. See, e.g., In the Matter of Township of Clark, 11 NJPER 283 □16104 (1985), (Township construction official was not a managerial executive). However, PERC in its decisions has provided general guidance in making the determination as to whether a person is a "managerial executive" or "confidential employee."

A "managerial executive" is a person "who formulates management policies or practices and persons ... charged with the responsibility of directing the effectuation of such management policies and practices...." N.J.S.A. 34:13A-32.3(f). PERC has established guidelines for determining whether a person formulates management policy and directs its effectuation.

A person formulates policies when he develops a particular set of objective designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercise. [Boro of Montvale, 6 NJPER 507, 508-09 011259 (1980)].

Thus, the determination as to whether a person is a "managerial executive" requires an examination of the person's position in the local agency's hierarchy, his or her job function and responsibilities, and the amount of discretion exercised by the individual. The analysis of these three factors is very often a position-by-position determination.

The determination as to whether a person is a "confidential employee" also requires an individualized

determination. PERC has narrowly construed the term "confidential employee." County of Essex, 17 NJPER 256, 257 □22118 (1991). The "key" to status as a confidential employee "is an employee's access to, and knowledge of, material used in labor relations processes including contract negotiations, contract administration, grievance handling and the preparation of these processes." Ibid. Specifically, PERC makes this case-by-case analysis as follows:

We (PERC) scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [State of New Jersey, 11 NJPER 507, 510 □16179 (1985)].

Thus, a "confidential employee" has access to confidential information of the employer which is relevant to the labor relations of the local government agency.

In examining PERC's guidelines and the statutory duties of the county prosecutor, one could conclude that a county prosecutor is per se a "managerial executive" and "confidential employee." (The county prosecutor is responsible for the preparation of a budget for the office and is empowered to take necessary action to challenge the level of county funding if he believes it to be inadequate." Application of Bigley, supra. Further, the county prosecutor is generally responsible for labor relations matters in the office. Zamboni v. Stamler, 194 N.J. Super. 598 (Law Div 1984), affirmed 199 N.J. Super. 378 (App. Div. 1985)). However, the Employer-Employee Relations Act defines these terms as "managerial executives" and "confidential employees" "of a public employer." N.J.S.A. 34:13A3(f)(g). A "public employer" includes "the several counties and municipalities ... or any other political subdivision of the State ... or any special district, or any authority, commissioner, board, or any branch or agency of the public service." N.J.S.A. 34:13A-3(c). For purposes of the Employer-Employee Relations Act the county prosecutor is a "public employer." Bergen Cty. of Chosen Freeholders v. Bergen Cty. Prosecutor, 172 N.J. Super. 363 (App. Div. 1980); In re Mercer Cty. Bd. of Chosen Freeholders v. Mercer Cty. Prosecutor, 172 N.J. Super. 411 (App. Div. 1980).

Thus, an argument could be fashioned that a county prosecutor is neither a "managerial executive" nor a "confidential employee" since he or she is the "public employer" of these individuals. The result of this argument is that the "managerial executives" and "confidential employees" of the county prosecutor, his or her subordinates who work under his or her direction, would be "local government officers," while the prosecutor would not be a "local government officer."

However, statutes are to be read sensibly rather than literally and interpretations which lead to an unreasonable or absurd result are to be avoided. *International Flavors & Fragrances, Inc. v. Div. of Taxation*, 7 N.J. Tax 652, 654-55 (App. Div. 1985), affirmed 102 N.J. 210 (1986). It is the purpose and reason for the legislation which controls over a literal interpretation of a statute. *Henry v. Shopper's World*, 200 N.J. Super. 14, 18 (App. Div. 1985).

The office of county prosecutor is an entity. McQuillin *Municipal Corporations*, ¶12.29, p. 194 (3rd Ed. 1990). It is the office of county prosecutor that is the "public employer." The purpose of the Local Government Ethics Law is, in part, to require "local government officers" to comply with a code of ethics and to require these officers to publicly disclose their financial interests. N.J.S.A. 40A:9-22.1(e). To a large extent "local government officers" are those individuals in local government who exercise a high level of authority and independent judgment which directly affects the policy and purposes of the agency and who have detailed knowledge of confidential labor relations matters. The county prosecutor is in fact the individual who exercises the ultimate authority and independent judgment for the office of county prosecutor and who determines labor relations policy for the office. Accordingly, the county prosecutor is necessarily a "managerial executive" and "confidential employee" for purposes of the Local Government Ethics Law.

Further, the First Assistant Prosecutor and the Chief of Detectives in the Office of County Prosecutor may also be "managerial executives" or "confidential employees" and accordingly "local government officers." However, this determination is necessarily an individualized determination which requires an analysis of the individual's duties, the individual's exercise of independent judgment to effectuate the policies of the office of county prosecutor, and the individual's access to confidential labor relations information. (See Attorney General Opinion No. 91-0093 for a detailed examination of the scope of the individualized

determination).

For the foregoing reasons you are advised that the office of county prosecutor is a "local government agency" for purposes of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., and that a county prosecutor is a "local government officer" for purposes of the Law and, therefore, must file a financial disclosure statement.

Very truly yours,

ROBERT J. DEL TUFO

By: _____
JOHN J. CHERNOSKI
Senior Deputy Attorney General

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