SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5807-12T2
A-0831-13T2

IN THE MATTER OF LAURA B. FREYTES AND PASSAIC COUNTY OFFICE OF SUPERINTENDENT OF ELECTIONS.

CEDESTINO MALAVE, WILLIAM MALAVE, and ELVIN SANCHEZ,

Plaintiffs-Appellants,

v.

LAURA B. FREYTES, individually and in her official capacity, PASSAIC COUNTY SUPERINTENDENT OF ELECTIONS,

Defendants/Third-Party Plaintiffs-Respondents,

v.

COUNTY OF PASSAIC,

Third-Party Defendant-Respondent,

and

STATE OF NEW JERSEY,

Third-Party Defendant.

Submitted November 16, 2015 – Decided February 23, 2017

Before Judges Lihotz and Fasciale.

On appeal from the Office of the Attorney General, Department of Law and Public Safety, in A-5807-12 and from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-0304-13 in A-0831-13.

Eric M. Bernstein & Associates, L.L.C., attorneys for appellants Laura B. Freytes and Passaic County Office of Superintendent of Elections in A-5807-12 and respondents Laura B. Freytes and Passaic County Office of Superintendent of Elections in A-0831-13 (Eric Martin Bernstein and Anne Marie Rizzuto, on the briefs).

Law Offices of Louis A. Zayas, attorneys for appellants Cedestino Malave, William Malave and Elvin Sanchez in A-0831-13 (Louis A. Zayas and Jason A. Rindosh, on the briefs).

John J. Hoffman, Acting Attorney General, attorney for respondent Attorney General of New Jersey in A-5807-12 (Donna Kelly, Assistant Attorney General, of counsel; Donald M. Palombi, Deputy Attorney General, on the brief).

Lum, Drasco & Positan L.L.C., attorneys for intervenor (in A-5807-12) and respondent (in A-0831-13) County of Passaic (Wayne J. Positan, Christina Silva and Elizabeth Y. Moon, of counsel and on the brief).

PER CURIAM

We consolidated two appeals, which arise from the same set of facts. The first matter is an appeal by plaintiffs Cedestino

Malave, William Malave, and Elvin Sanchez,[1] who filed a complaint against Laura B. Freytes, individually and in her official capacity as the Passaic County Supervisor of Elections,[2] alleging violations of the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-2, and the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. The resultant Law Division order dismissed plaintiffs' complaint for failure to state a claim. Plaintiffs challenged provisions of the August 29, 2013 order, which are addressed under Docket No. A-0831-13.

In the Law Division action, Freytes filed a third-party complaint against Passaic County (Passaic) and the State of New Jersey (State) demanding indemnification and payment of defense costs. Freytes' third-party complaint was not addressed by the Law Division on jurisdictional grounds, because Freytes filed an appeal from a final agency decision issued by the Attorney General seeking the same relief. The Attorney General's final decision denied Freytes' request. Her appeal of the final agency decision is presented in the companion matter, under Docket No. A-5807-12.

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[1] Because two plaintiffs have the same surname, we identify them by their first names in our opinion. Also, we refer to the three collectively as "plaintiffs."

[2] Although our opinion designates defendants by using only the surname, "Freytes," we recognize all state and federal actions named defendant individually as well as in her official capacity as Passaic County Superintendent of Elections.

I.

These are the facts alleged by plaintiffs in their Law Division action. As required, we afford plaintiffs "every reasonable inference of fact" as found in the motion record. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). See also R. 4:6-2(e).

A.

Freytes is the former Superintendent of Elections for Passaic. We note a Superintendent of Elections is nominated and appointed by the Governor, pursuant to N.J.S.A. 19:32-1. Freytes was appointed in 2005 and was responsible for managing, supervising, and conducting all primary and general elections in Passaic, including municipal and school board elections. Her staff consisted of eleven clerks, three investigators, and four voting machine technicians.

Elvin and William were two voting machine technicians, who reported to Freytes. Their complaint includes several incidents, described below, which gave rise to the current action.

In 2009, Freytes instructed Elvin and William to train her son-in-law Robert Vargas to operate voting machines. Elvin, William, and two other technicians declined because they believed it was illegal for Vargas to access voter registration logs, as he planned to run for political office. Freytes allegedly stated

plaintiffs' employment was at stake if they refused to train Vargas. Elvin and William complained to their union.

The second event involved Elvin and William's request for permission to open a door to ventilate the warehouse area and dissipate toxic fumes caused by a roof repair. Freytes allegedly declined the request. Elvin and William contacted the Occupational Safety and Health Administration, which investigated and recorded elevated levels of toxic fumes in the warehouse work area.

On June 12, 2009, the four voting machine technicians, including Elvin and William, were terminated and their responsibilities were outsourced to a private third-party. Elvin and William alleged retaliatory termination for engaging in protected activity.[3]

Cedestino is William's brother. He worked as an investigator for the Passaic County Board of Elections. Cedestino claims when the voting machine technicians were fired, Freytes began to retaliate against him. She forbade him from any contact with William, suggesting "she knows people," who would report any contact to her. Further, Cedestino alleged Freytes placed him

[3] Their complaint was initially sustained by the Public Employee Relations Committee (PERC), but on appeal the final order was vacated by the Superior Court and the matter was remanded ultimately to PERC. PERC dismissed the complaint on the remand review.

under "constant surveillance . . . around the office" and uttered "intimidating and threatening remarks."

Cedestino noted he "filed numerous grievances against Freytes due to her retaliatory treatment and harassment in the workplace." One grievance asserted Freytes demanded Cedestino fabricate a report to the Attorney General to counter testimony already provided by another voting machine technician. When Cedestino refused, Freytes became enraged and hostile, exacerbating an already hostile work environment.

Cedestino, William, and Elvin first filed a complaint in the United States District Court for the District of New Jersey. The complaint alleged claims pursuant to 42 U.S.C.A. § 1983, and violations of CEPA and the NJCRA, naming Passaic and Freytes as defendants. Plaintiffs alleged defendants violated their rights of freedom of speech, freedom of association, and equal protection of the law. Defendants moved to dismiss, arguing plaintiffs failed to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6). Plaintiffs voluntarily dismissed the complaint against Passaic. In a written opinion, the District Court judge dismissed the § 1983 claims and concluded plaintiffs failed to plead a claim protected by the First or Fourteenth Amendments. Consequently, the judge declined to exercise supplemental jurisdiction over the pendent state law claims.

On January 23, 2013, plaintiffs filed the current action against Freytes repeating the claims made in Federal Court. Freytes filed a third-party complaint against the State and Passaic. Passaic and Freytes each moved to dismiss. On August 29, 2013, the Law Division judge issued a written opinion, granting both motions, under Rule 4:6-2(e).

B.

In their appeal, plaintiffs argue the judge erred when he applied collateral estoppel and dismissed their NJCRA and CEPA claims. Plaintiffs maintain their complaint sufficiently stated a violation of their civil rights and denial of equal protection. Cedestino separately argues his CEPA claim was timely filed and should not have been dismissed. We address these issues.

"In a Rule 4:6-2(e) motion, the court reviews the complaint to determine whether the allegations suggest a cause of action, In re Reglan Litig., 226 N.J. 315, 324 n.5 (2016) (citing Printing Mart-Morristown, supra, 116 N.J. at 746.)" "[A] reviewing court 'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Major v. Maguire, 224 N.J. 1, 26 (2016) (quoting Printing Mart-Morristown, supra, 116 N.J. at 746). Appellate review of orders dismissing an action "is plenary and

we apply the same test as the Law Division." Smerling v. Harrah's Entm't, Inc., 389 N.J. Super. 181, 186 (App. Div. 2006).

The trial judge held collateral estoppel barred plaintiffs' Freedom of Speech and Freedom of Assembly claims, concluding:

> As a threshold matter defendants argue plaintiffs should be collaterally estopped from asserting their [NJCRA] claims in this court based on the District Court's dismissal of their 42 U.S.C.A. § 1983 claims. Plaintiffs claim that they were discharged in violation of the freedom of speech, freedom of association, and equal protection clauses of the New Jersey Constitution. Because freedom of speech and association under NJCRA provide no greater protection than its federal equivalent, and were already considered and dismissed on the merits by the District Court, these claims are collaterally estopped. However, because the courts utilize a different test to analyze equal protection under the New Jersey Constitution, plaintiffs' equal protection claim is not subject to collateral estoppel.

The judge concluded plaintiffs' NJCRA allegations, stating violations of the First and Fourteenth Amendments of the New Jersey Constitution, were directed to the same protections afforded by the United States Constitution. Noting the NJCRA was "modeled after § 1983," the judge determined "the elements of a substantive due process claim under NJCRA are the same as under § 1983." The judge applied collateral estoppel because the underlying issue in the federal action was analogous to that in the state action.

The judge dismissed plaintiffs' equal protection claim on different grounds, stating:

> Although collateral estoppel does not operate to bar plaintiffs' equal protection claim, this claim must still be dismissed because the facts alleged fail to suggest an equal protection claim under the New Jersey Constitution. Plaintiffs allege they were terminated in violation of the New Jersey Constitution, not based on their membership in any particular class, but rather in retaliation for their complaints and grievances. Therefore, plaintiffs essentially claim that they were singled out as a so-called "class-of-one."
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> . . . .
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> [T]he class of one theory is not applicable in the public employment context. Even if New Jersey recognized the "class of one" theory of equal protection in the context of public employment, plaintiffs' fail to demonstrate that defendant treated them differently from other similarly situated employees. Since plaintiffs' complaint fails to allege facts sufficient to sustain an action under NJCRA, plaintiffs' equal protection claim is also dismissed with prejudice.

On appeal, plaintiffs argue the trial judge's reasoning failed to recognize the distinct state and federal causes of action. They maintain our state constitution affords broader protections to civil rights, including freedom of speech, than its federal counterpart. See Sisler v. Gannett Co., Inc., 104 N.J. 256, 271 (1986) (addressing defamation, the Court noted the New

Jersey Constitution "has supported broader free speech rights than its federal counterpart.").

"As a general principle, '[c]ollateral estoppel is that branch of . . . res judicata which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action.'" Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 114 (2011) (alteration in original) (quoting State v. Gonzalez, 75 N.J. 181, 186 (1977)). In Gannon v. American Home Production, 211 N.J. 454, 469 (2012), the Supreme Court resolved "the question about the proper analytical framework for testing the collateral estoppel effect of federal judgments," making it clear "the issue is governed by reference to federal rather than to state law principles."

> Our conclusion that federal principles must govern the preclusive effect of a federal judgment is grounded on our recognition that "cohesion between state and federal courts is necessary for the continuing vitality of the federalist system." As such, we commented that "[m]aintaining a cohesive federal system requires not only that federal courts honor state court judgments . . . but also that state courts honor federal court judgments."
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> [Ibid. (alteration in original) (Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 410 (1991))].

See also In re Liquidation of Integrity Ins. Co./Celotex Asbestos Tr., 214 N.J. 51, 67 (2013) ("When the prior action is the subject of a prior federal court judgment, the binding effect of that judgment, whether applying principles of res judicata or collateral estoppel, is determined by the law of the jurisdiction that rendered it.").

In its analysis in Watkins, supra, 124 N.J. at 411, the Court stated: "[i]n general, the binding effect of a judgment is determined by the law of the jurisdiction that rendered it . . . ." "[T]his rule applies with equal force when considering the effect to be given to a federal court judgment in a state court proceeding." Gannon, supra, 211 N.J. at 469. The Court further noted, "federal concepts of res judicata would not bar state law claims that could have been, but were not, raised as pendent claims in the federal action . . . [and] our essential holding was grounded on an analysis of generally applicable federal principles of claim preclusion." Id. at 469-70.

> [T]he appropriate source of authority is found in the controlling decisions of the United States Court of Appeals for the Third Circuit. That Court has held that in order for a judgment to be entitled to be given the effect of collateral estoppel, or issue preclusion, there must be a coalescence of four factors, which have been identified as follows:
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> > (1) the identical issue was decided in a prior adjudication; (2) there

> was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question.
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> [Gannon, supra, 211 N.J. at 471-72 (quoting Del. River Port Auth. v. FOP, Penn-Jersey Lodge 30, 290 F.3d 567, 574 n.10 (3d Cir. 2002)).]

The current appeal is distinguishable from Gannon on the facts. Here, a common set of facts gave rise to both federal and state law claims. The District Court analyzed allegations of deprivation of freedom of speech, freedom of assembly, and equal protection, to determine whether § 1983 was violated. Although the District Court judge specifically declined to consider the pendent state law claims, she nevertheless fully analyzed whether plaintiffs engaged in constitutionally protected speech. Although the federal analysis is helpful, our review must determine whether alleged state claims are identical to its federal counterparts.

Giving plaintiffs all favorable inferences, we consider whether the allegations of constitutional infringement state a claim under the NJCRA. We conclude, as a matter of law, plaintiffs failed to set forth an actionable claim. Accordingly, dismissal of the civil rights count of the complaint was appropriate.

The State Constitution protects the rights of freedom of speech and assembly, providing:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.
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> . . . .
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> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances.
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> [N.J. Const. art. I, ¶¶ 6, 18.]

Our Supreme Court "has long held that the rights of speech and assembly cannot be curtailed by the government." Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344, 355 (2007). "In fact, our constitutional guarantee of free expression 'is an affirmative right, broader than practically all others in the nation.'" Id. 355-56 (quoting Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000)).

However, the Court has expressed the limits of a claim for violation of the State Constitution's guarantee of freedom of speech. In Karins v. Atlantic City, 152 N.J. 532, 547-48 (1998), the Court observed:

> The protections of the Free Speech Clause of the First Amendment extend to all citizens. U.S. Const. amend. I. The First Amendment has

> been made applicable to the states by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218 (1940). We rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution, art. I, ¶6. Horizon Health Ctr. v. Felicissimo, 263 N.J. Super. 200, 214 (App. Div. 1993), modified and aff'd, 135 N.J. 126 (1994); Robert F. Williams, The New Jersey State Constitution 34 (1990). But cf. Sisler[, supra,] 104 N.J. [at 271] (stating that in defamation cases, the New Jersey Constitution "has supported broader free speech rights than its federal counterpart.").
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> Although the First Amendment was designed to assure that debate on matters of public importance is uninhibited, and wide open, Roth v. United States, 354 U.S. 476, 484, 77 S. Ct. 1304, 1308, 1 L. Ed. 2d 1498, 1506 (1957), that amendment's guarantees have never been absolute. Many exceptions to the free speech guarantee have been carved out. In each of the exceptions, the right of free expression must be balanced against some competing governmental interest. The exception pertinent to the present case involves the balancing of public employees' freedom of expression against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The Court noted "[s]ome governmental agencies, however, have a stronger interest in regulating the conduct-related speech of their employees than non-governmental employers, particularly when such speech may disrupt governmental operations." Id. at 548. See Connick v. Myers, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690,

75 L. Ed.2d 708, 719 (1983) (reviewing the development of the law relating to the rights of government as employer to regulate the speech of employees).

Without question, government cannot condition public employment on the surrender of First Amendment rights. See Keyishian v. Bd. of Regents, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed.2d 629 (1967). However, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Connick, supra, 461 U.S. at 146, 103 S. Ct. at 1690, 75 L. Ed.2d at 719. Like its federal counterpart, the constitutional protections make "the threshold question . . . whether the employee's speech may be 'fairly characterized as constituting speech on a matter of public concern.'" Karins, supra, 152 N.J. at 549 (quoting Connick, supra, 461 U.S. at 146, 103 S. Ct. at 1690, 75 L. Ed.2d at 719). The examination is the balance "between the interest of public employees in speaking freely and that of public employers in operating their workplaces without disruption." In re Randolph, 101 N.J. 425, 430-31 (1986) (citation omitted), cert. denied, 476 U.S. 1163, 106 S. Ct. 2289, 90 L. Ed. 2d 730 (1986).

Here, in reviewing Elvin and William's claims we determine they do not invoke a denial of the right to speak freely about public issues. Plaintiffs' challenge to the directive to train Vargas amounted to a refusal to abide an employer's instruction, based on a mistaken belief the direction was illegal.[4] This is not a public expression with attendant constitutional protections. Also, plaintiffs' reports of toxic fumes was a workplace complaint regarding personal safety, not a public safety issue.

Importantly, plaintiffs were never prevented from voicing their concerns. In fact, they followed workplace procedures by submitting grievances to their union. Further, no evidence suggests either William or Elvin spoke publicly about public issues or ever publicly discussed their employment-related disagreements with Freytes. Since there is no evidence of speech regarding public concerns, we affirm the dismissal of the NJCRA claims as failing to allege infringement of constitutionally protected free speech. Karins, supra, 152 N.J. at 547-48. The trial judge's analysis of the issue is supported by the law. Essentially for the reasons identified by the District Court and Law Division judges, plaintiffs' claims were properly dismissed.

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[4] Plaintiffs' belief voter registration information is confidential was erroneous. The public is permitted to access voter registration rolls, pursuant to N.J.S.A. 19:31-18.1(a)-(b).

While factually intertwined with his co-plaintiffs' claims, Cedestino's claims are based on different facts. Cedestino's civil rights violation occurred following William's termination, when Freytes threatened Cedestino with loss of his government employment if he associated with his brother.

The constitutionally protected association interest involves the "freedom to engage in association for the advancement of beliefs and ideas." NAACP v. Alabama, 357 U.S. 449, 460, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488, 1498 (1958). The First Amendment protects public employees from discharge or other adverse employment action, based upon such associations.

In this matter, viewed in the most indulgent light, there are no facts supporting interference with the right to associate for the purpose of advancing matters of political importance or public interest. The breadth of Cedestino's claimed infringement is Freytes ordered him not to talk to his brother after William's employment ended. We discern no constitutionally-based cause of action falling within the scope of First Amendment protections.

Following our review, we also conclude the judge properly dismissed plaintiffs' equal protection claims, applying the analytical framework of Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985) and the balancing test set forth in Caviglia v. Royal Tours of America, 178 N.J. 460, 473 (2004). We affirm substantially for

the reasons set forth in the judge's written opinion. R. 2:11-3(e)(1)(A). Accordingly, count one of the complaint was properly dismissed.

Turning to the CEPA causes of action alleged in count two, the judge dismissed all CEPA claims as time barred. Noting William and Elvin were terminated on June 12, 2009, but their federal complaint was not filed until June 13, 2011, the judge found they failed to file within the one-year statute of limitations set forth in N.J.S.A. 34:19-5.

However, Cedestino remained an employee of the Office of Superintendent of Elections when this action was filed. He alleged Freytes engaged in retaliatory conduct, which continued as of February 11, 2011, and subjected him to a hostile work environment causing him emotional distress.[5] See N.J.S.A. 34:19-5 (providing a CEPA plaintiff may assert all remedies available for common law torts). Therefore, he argues his claims were not barred.

To successfully prove a claim under CEPA, a plaintiff must demonstrate:

> (1) that he . . . reasonably believed that his . . . employer's conduct was violating either a law or a rule or regulation promulgated pursuant to law; (2) that he . . . performed

[5] The same facts are alleged to support Cedestino's NJCRA and CEPA claims. We note N.J.S.A. 34:19-8's waiver provision is not implicated based on our affirmance of the dismissal of the NJCRA claim.

> whistle-blowing activity described in N.J.S.A. 34:19-3[(a), (c)(1), or (c)(2)]; (3) an adverse employment action was taken against him . . .; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
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> [Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 127 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003).]

The allegations forming the cause of action under CEPA state:

> Plaintiffs' complained of and/or refused to participate in unlawful activities engaged in by Superintendent Freytes. As a result of [p]laintiffs' complaints and protected activities under this Act, Superintendent Freytes engaged in a pattern of retaliatory conduct from at least February 2009 to the present. Such pattern of retaliatory conduct constitutes a continuing violation under this Act.

Cedestino alleges Freytes ordered him to fabricate a submission to contradict an earlier report served upon the Attorney General by a voting machine technician in the office. More specifically, Cedestino claims Freytes ordered he advise the Attorney General Freytes was not interviewed prior to the report's filing. When he refused, Cedestino alleged Freytes exacerbated her hostility.

Reviewing these allegations, we conclude they state whistleblower activity and sufficiently support a prima facie claim under CEPA, which was not barred by the statute of

limitations.[6] In this regard, the order must be vacated and the complaint reinstated, as to that count.

II.

We now turn to the consolidated appeal. In response to plaintiffs' state court action, Freytes and the Passaic County Office of the Superintendent of Elections (collectively referred to as Freytes), filed a third-party complaint against the State and Passaic for indemnification, contribution, and defense costs.

Passaic assigned counsel to represent Freytes. Prior to the motion hearing on the application to dismiss plaintiffs' complaint, Freytes formally served a demand for indemnification upon the State.[7] This initiated administrative review by the Attorney General, who rejected Freytes' demand in a final decision dated July 25, 2013. The opinion concluded "Freytes is not entitled to legal representation by the Attorney General under N.J.S.A. 59:10A-1, et seq. because she is not an employee of the State," reasoning:

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[6] The date of Cedestino's interaction with Freytes regarding the Attorney General report is stated in the record.

[7] Freytes maintains prior to the formal July 19, 2013 demand for "a defense, indemnity, contribution and insuring as well as reimbursement for the costs of defending the related Federal matter brought by the same [p]laintiffs," correspondence seeking similar relief was transmitted on October 10, 2011; March 13, April 10, and October 19, 2012; and March 8, 2013.

> While the Attorney General does provide legal representation to the offices of a county superintendent of elections to assure proper enforcement of the election laws, this representation does not extend to any personnel matters. The employment, civil rights, and tort claims against Ms. Freytes arise in connection with her administration and supervision of three County employees over extended periods of time, and are not directly related or material to a county superintendent's enforcement of electoral matters under Title 19, Election Laws of New Jersey, N.J.S.A. 19-1, et seq.

Freytes appeals from that decision. Passaic's motion to intervene was granted.

The appeal was pending at the time the Law Division judge rendered his opinion ordering dismissal of plaintiffs' complaint. Consequently, he did not address the issues raised in the third-party complaint, concluding "the indemnification request will be handled by a direct appeal to the Appellate Division and will not be part of the instant case."

Appealing from the final agency decision, Freytes argues she is a state employee, or alternatively, she served in a dual role for both Passaic and the State when the alleged offending conduct occurred. She contends the State, Passaic, or both must bear her defense costs and provide indemnification. Passaic also challenges the final agency determination, and asserts the State

is solely responsible for payment of defense costs and indemnification.

Our review of agency decisions is limited. In re Stallworth, 208 N.J. 182, 194 (2011). We defer to an agency decision unless "it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." In re Taylor, 158 N.J. 644, 657 (1999) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 581 (1980)).

When determining whether agency action is arbitrary, capricious, or unreasonable, a reviewing court must examine:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [In re Carter, 191 N.J. 474, 482-83 (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

A court owes "substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007). "[I]f substantial evidence supports the agency's decision, a court may not substitute its own judgment for the agencies even though the court might have reached a different result . . . ." Carter, supra, 191 N.J. at 483 (citation omitted).

That said, our review of a "strictly legal issue" is de novo. In re Langan Eng'g & Envtl. Servs., Inc., 425 N.J. Super. 577, 581 (App. Div. 2012).

"[T]he Attorney General must provide a defense to a state employee who requests representation pursuant to N.J.S.A. 59:10A-1, unless the Attorney General determines that it is more probable than not that one of the three [statutory] exceptions . . . applies."[8] Prado v. State, 186 N.J. 413, 427 (2006). See also Wright v. State, 169 N.J. 422, 444 (2001) (holding that "the Attorney General must defend a State employee for actions committed in the scope of employment as long as one of the . . . exceptions does not apply"). Excluded are claims where

> a. the act or omission was not within the scope of employment; or
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> b. the act or the failure to act was because of actual fraud, willful misconduct or actual malice; or
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> c. the defense of the action or proceeding by the Attorney General would create a conflict of interest between the State and the employee or former employee.
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> [N.J.S.A. 59:10A-2.]

[8] N.J.S.A. 59:10A-1 provides: "the Attorney General shall, upon a request of an employee or former employee of the State, provide for the defense of any action brought against such State employee or former State employee on account of an act or omission in the scope of his employment."

To prove plaintiff is a state employee, plaintiff relies on the fact the superintendent is "nominated by the Governor with the advice and consent of the Senate." N.J.S.A. 19:32-26. Although the Attorney General concedes, "county election officials are, in some respects, considered 'state officers,'" County of Mercer v. Mercer County Superintendent of Elections, 172 N.J. Super. 406, 409 (App. Div. 1980), he notes the State would be authorized to provide legal representation to the Office of the Superintendent of Elections "to assure the proper enforcement of election laws." However, plaintiffs' complaint involves personnel matters, which are administrative and not a state function.

We have reviewed the cases cited by Freytes to support her claim for reversal, suggesting she was a state employee. We find them inapposite because the facts and issues addressed in these authorities are very different from those posed here.

We recognize the Secretary of State has limited statutorily defined ministerial duties as chief elections official for the State of New Jersey. Importantly, Title 19, N.J.S.A. 19:1-1 to -63-28, is specifically directed to the county election board and the superintendent of elections, which is local in nature. The authority of the county superintendent of elections is restricted to election matters in the county. N.J.S.A. 19:31-2. The legislative scheme requires the county pay costs and funding for

the office, N.J.S.A. 19:32-27 to -29 (obligating counties to provide funding for county superintendent of elections); N.J.S.A. 19:32-2 (requiring counties to pay salaries of employees of county superintendent of elections); N.J.S.A. 19:32-52 (authorizing county appropriations to pay costs of office).

The Supreme Court's discussion in Lavezzi v. State, 219 N.J. 163 (2014) is instructive. The Court analyzed the State's obligation to indemnify county prosecutors, citing authority, which "differentiate[s] between liability arising from county prosecutor's law enforcement functions, for which the State is generally required to assume the burden of defense and indemnification, and liability derived from the prosecutor's administrative functions, which is deemed to be the county's responsibility." Id. at 178. The test stated is "whether the act or omission of the county prosecutor's office and its employees that gave rise to the potential liability derived from the prosecutor's power to enforce the criminal law, and constituted an exercise of that power." Ibid. (citing Wright, supra, 169 N.J. at 454).

Applying that same test, we reject Freytes' suggestion the allegations in plaintiffs' complaint arose from her duties to assure "proper enforcement of election laws." Rather we conclude plaintiffs' claims fall within the scope of Freytes'

administrative role of supervising county employees. The Attorney General's final decision is neither arbitrary nor capricious. We discern no basis to alter the final decision.

III.

In conclusion, we affirm the order dismissing the Law Division complaint, except as to Cedestino's CEPA claim, which is reinstated and the matter remanded, pending further discovery of the specifics of the cause of action (A-0831-13). We also affirm the final agency decision issued by the Attorney General (A-5807-12).

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.