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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF COUNTY OF ERIE,

Respondent,

-against-

No. 178

CIVIL SERVICE EMPLOYEES ASSOCIATION,  
LOCAL 815,

Appellant .

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20 Eagle Street  
Albany, New York 12207  
September 12, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Jessica B. Cahill  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of County of  
2 Erie. Counselor?

3 MS. PERRI ROBERTS: I'd like to reserve two  
4 minutes for rebuttal.

5 CHIEF JUDGE LIPPMAN: You have it. Go  
6 ahead.

7 MS. PERRI ROBERTS: Thank you. Diane Perri  
8 Roberts appearing for the respondent/appellant CSEA.  
9 May it please the court, the issue in this case - - -

10 CHIEF JUDGE LIPPMAN: Who bargained this  
11 agreement, counsel?

12 MS. PERRI ROBERTS: Who bargained it?

13 CHIEF JUDGE LIPPMAN: Yeah, where the  
14 election clerks are in the collective bargaining  
15 agreement.

16 MS. PERRI ROBERTS: This goes back to 1971,  
17 and - - -

18 CHIEF JUDGE LIPPMAN: Right, but who  
19 bargained? Who makes the agreement?

20 MS. PERRI ROBERTS: The agreement is  
21 bargained for by a representative of the County of  
22 Erie and by representatives of CSEA.

23 JUDGE READ: By the way is the arbitration  
24 provision of the collective bargaining agreement  
25 somewhere in the record?

1 MS. PERRI ROBERTS: The arbitration  
2 provision? I'm not sure that that is, actually.

3 JUDGE READ: Okay. I couldn't find it. I  
4 just wanted to ask, and I thought maybe you could  
5 tell me.

6 MS. PERRI ROBERTS: No, I - - - now that  
7 you bring it up, I don't think the actual provision  
8 is in there.

9 CHIEF JUDGE LIPPMAN: So is the county in  
10 touch with the board in terms of the fact that these  
11 election clerks are in the contract?

12 MS. PERRI ROBERTS: The election clerks  
13 have been, since the very first contract - - -

14 CHIEF JUDGE LIPPMAN: I know, but was the  
15 board, do you think, aware of it this whole time?

16 MS. PERRI ROBERTS: I would have to say  
17 that over the course of forty years I would be  
18 surprised if they weren't aware that they were - - -

19 JUDGE GRAFFEO: Are other board employees  
20 also in the contract?

21 MS. PERRI ROBERTS: There are other titles.  
22 I'm not sure if those positions are filled at this  
23 time, such as voting machine technicians.  
24 Specifically here, we were talking about election  
25 clerks. Those are the individuals that go out on

1 election day and make sure everybody signs the books  
2 and - - -

3 JUDGE PIGOTT: It strikes thinking about  
4 those people, and particularly - - - I forget what  
5 '09 was like, but lately when we've had members of  
6 Congress who, for one reason or another, have had to  
7 shorten their career, and we've had a special  
8 election in Congress, or we have a school board in  
9 March, and then a primary in September, and maybe  
10 another primary some other time, and then - - -  
11 shouldn't the board, as they're arguing, say these  
12 people don't fit within these, and we should have the  
13 right to set their hours and duties? Isn't that  
14 essentially what they're saying, and it's not a  
15 bargainable thing?

16 MS. PERRI ROBERTS: I would agree that  
17 Election Law 3-300 does provide, as one of the  
18 enumerated powers of the Board of Election  
19 commissioners to establish the duties of the Board of  
20 Elections clerks that do work.

21 JUDGE SMITH: And also their salaries.

22 MS. PERRI ROBERTS: Pardon me?

23 JUDGE SMITH: And their salaries, right?

24 MS. PERRI ROBERTS: And their salaries, and  
25 the right to - - -

1 JUDGE SMITH: Well, why does that not  
2 include the right to try to limit their overtime?

3 MS. PERRI ROBERTS: Because that is not  
4 part of the salary. That's something over and above.  
5 That's more of a benefit. The provision - - - the  
6 overtime provision is tied in with the contractual  
7 obligation to not change their hours of work so as to  
8 avoid - - -

9 JUDGE SMITH: Isn't the general idea - - -  
10 I mean, the statute basically gives rather broad  
11 power to the Board of Elections over its employees,  
12 and isn't the idea to maintain the independence of  
13 the board employees from political influence? Isn't  
14 that the obvious point of the statute?

15 MS. PERRI ROBERTS: That is and that's why  
16 the power to hire and fire - - -

17 JUDGE SMITH: If you win this case and the  
18 county acquire - - - the county and the union  
19 representing county employees, generally, acquire the  
20 power to make deals about this subject matter, about  
21 what kind of overtime restrictions there are on the  
22 Board of Election employees, aren't you giving  
23 leverage to the county, maybe to the union, also  
24 certainly to the county over the board's employees?

25 MS. PERRI ROBERTS: No, I don't think so,

1           Your Honor, because we also have the provision about  
2           the representation. There has to be an equal number  
3           of employees of either of the political parties that  
4           are appointed. So to that end - - -

5                    JUDGE SMITH: Yeah, but aren't you worried  
6           - - - the fear behind the statute is you have an  
7           election clerk sitting there saying I think I better  
8           do what the county executive wants. Maybe I'm a  
9           republican, and he's a democrat, but I don't want him  
10          mad at me, because he's going to be negotiating  
11          tomorrow over my benefits. Isn't that - - - isn't  
12          there a risk there?

13                   MS. PERRI ROBERTS: I don't think it's a  
14          risk, because we're talking overtime. Here we're  
15          talking about a provision that only states that in  
16          the event the hours of work are changed to avoid  
17          casual overtime that the county - - - that the  
18          individual employees are paid overtime.

19                    JUDGE SMITH: Well, a lot of people care a  
20          lot about their overtime.

21                    MS. PERRI ROBERTS: Pardon me?

22                    JUDGE SMITH: A lot of people care a lot  
23          about their overtime.

24                    MS. PERRI ROBERTS: But they can't have the  
25          overtime unless it's assigned to them. They can't

1 just decide on their own to work the overtime. It's  
2 going to be an assigned change in their schedule.  
3 That's what we're talking about with casual overtime.

4 JUDGE READ: Are you arguing this is a  
5 question for the arbitrator?

6 MS. PERRI ROBERTS: I am arguing that's a  
7 question for the arbitrator and that this should not  
8 have been stayed. This should have been before the  
9 arbitrator whether or not the - - - the work  
10 situation was such that the hours of work were  
11 changed so as to avoid casual overtime and these are  
12 the decisions - - -

13 JUDGE SMITH: The Board of Elections never  
14 agreed to commit this to the arbitrator, did it?

15 MS. PERRI ROBERTS: The Board of Elections  
16 wasn't a party to this motion.

17 JUDGE SMITH: Right, but this is - - - if  
18 you treat the Board of Elections as having a separate  
19 interest from the county, then how can they be bound  
20 - - - how can their interests be subject to an  
21 arbitration they never agreed to?

22 MS. PERRI ROBERTS: The provision here is  
23 on overtime and the county has obligated itself to  
24 pay in the event the Board of Elections commissioners  
25 decide that they need to change their individual

1 employees' schedules.

2 CHIEF JUDGE LIPPMAN: Are the Board of  
3 Elections employees county employees?

4 MS. PERRI ROBERTS: Yes, they are. Yes,  
5 they are. The Board of Elections is given office  
6 space by the county; the money to pay everybody at  
7 the Board of Elections comes from the county.  
8 Everything is appropriated by the county legislature.  
9 There's no independent funding source for the Board  
10 of Elections.

11 CHIEF JUDGE LIPPMAN: So the - - -

12 MS. PERRI ROBERTS: I daresay the county  
13 attorney represents the Board of Elections.

14 CHIEF JUDGE LIPPMAN: The pencils and pens  
15 that they use at the Board of Elections come from the  
16 county?

17 MS. PERRI ROBERTS: I don't think there's  
18 anything in the record. I would have to guess at  
19 that.

20 CHIEF JUDGE LIPPMAN: I'm just asking you,  
21 common sense.

22 MS. PERRI ROBERTS: I would have to guess  
23 at that.

24 JUDGE GRAFFEO: Who hires the employees at  
25 the board?

1 MS. PERRI ROBERTS: I'm sorry, who hires?

2 JUDGE GRAFFEO: Who hires them? Who does  
3 the interviewing and hires them? Do the board  
4 commissioners do that?

5 MS. PERRI ROBERTS: That is a specifically  
6 enumerated right under Election Law 3-300. We don't  
7 dispute that, that they get to hire and they get to  
8 relieve their employees of duty.

9 JUDGE READ: Could they negotiate that  
10 away?

11 MS. PERRI ROBERTS: Did the county  
12 negotiate that away?

13 JUDGE READ: Could you?

14 MS. PERRI ROBERTS: Do we?

15 JUDGE READ: Could the county?

16 MS. PERRI ROBERTS: I think that is  
17 something that CSEA has recognized is a specifically  
18 enumerated right with the Board of Election  
19 commissioners under Election Law 3-300.

20 CHIEF JUDGE LIPPMAN: So you stay clear of  
21 the Board of Elections except in something - - - some  
22 specific provision that has nothing to do with - - -  
23 where do you draw the line? There's nothing to do  
24 with hiring, firing - - -

25 MS. PERRI ROBERTS: Right.

1 CHIEF JUDGE LIPPMAN: - - - specs, what  
2 else, job specs, what else?

3 MS. PERRI ROBERTS: Setting - - -

4 CHIEF JUDGE LIPPMAN: What is their domain?

5 MS. PERRI ROBERTS: It's the five specific  
6 things that are in Election Law 3-300 of which you've  
7 enumerated most of them, other than setting the  
8 salaries within the amount the county legislature  
9 appropriates and with making sure that there's equal  
10 representation between the political parties in terms  
11 of who's hired in to work.

12 CHIEF JUDGE LIPPMAN: Right, I see.

13 JUDGE SMITH: It says salaries. What about  
14 bonuses? Who decides the bonuses for these  
15 employees?

16 MS. PERRI ROBERTS: I don't think there's  
17 anything in the record. I'm not aware of any  
18 bonuses.

19 JUDGE SMITH: Well, what is your view of  
20 the law? If there's a question of whether an  
21 employee - - - if the Board of Elections wants to pay  
22 a bonus or doesn't want to pay a bonus, the county  
23 thinks otherwise. Whose decision is that?

24 MS. PERRI ROBERTS: If there's a bonus to  
25 be paid I guess in part it might depend on whether or

1 not it's for merit, but that would be something that  
2 I believe would probably be the Board of Elections  
3 commissioners.

4 JUDGE SMITH: Yeah, but it doesn't say  
5 bonus in there. What about health - - - what about  
6 benefits? What about health care benefits?

7 MS. PERRI ROBERTS: That's a big thing.  
8 That's part of the reason that I'm here today is  
9 because the Fourth Department and the Supreme Court's  
10 decision basically removes any contractual benefits  
11 that the county has agreed to provide to these Board  
12 of Elections employees including sick leave, vacation  
13 time, health care.

14 JUDGE SMITH: So you say sick leave,  
15 vacation time, health care, all those things can be  
16 bargained, but between the county and the union?

17 MS. PERRI ROBERTS: Yes, the county has  
18 agreed to bargain for those.

19 JUDGE SMITH: So again, I come back - - -  
20 doesn't - - - aren't you giving the county a lot of  
21 leverage over Board of Election employees?

22 MS. PERRI ROBERTS: In terms of providing  
23 benefits and contractual - - -

24 JUDGE SMITH: In terms of being able to  
25 help or harm those employees in a way that might make

1 the employees politically responsive to them.

2 MS. PERRI ROBERTS: They have. This is - -  
3 - historically, these employees have been part of the  
4 certified bargaining unit under the Taylor Law under  
5 PERB. They've - - -

6 JUDGE PIGOTT: They're covered in, right?  
7 You negotiate this contract, and then they're covered  
8 in. Is that - - -

9 MS. PERRI ROBERTS: They are all brought in  
10 and the county has never done anything to remove  
11 them.

12 JUDGE GRAFFEO: Who assigns their work  
13 duties, the commissioners?

14 MS. PERRI ROBERTS: The commissioners do  
15 and that's again one of their specifically enumerated  
16 - - -

17 JUDGE GRAFFEO: I see distinction between  
18 employment benefits like health, and retirement, and  
19 dental, and eye care, because it doesn't have to do  
20 with their actual day-to-day work duties. But when  
21 it comes to the autonomy of the board to decide what  
22 actual job duties they're going to assign to the  
23 election clerks, it seems to me that if the county -  
24 - - if the agreement impinges on that ability because  
25 there's some contractual limitation of overtime, that

1           that affects the autonomy of the board.

2                       MS. PERRI ROBERTS: Well, it's not - - -  
3           it's not a limitation on what the board can do. The  
4           board can do whatever they need to do. In fact, it  
5           gives them more flexibility. If they need to  
6           reschedule people, they can do that and the county is  
7           the one that has to pay - - - under the contract, has  
8           to pay for that overtime. We're not looking to the  
9           Board of Elections commissioners to fund any of this.

10                      CHIEF JUDGE LIPPMAN: Okay, Judge Pigott.

11                      JUDGE PIGOTT: Aren't you saying - - - let  
12           me just ask, I know where you're from, and you see  
13           all of the criticisms of, like, the police saying,  
14           you know, there's too much overtime, at the jail  
15           there's too much overtime, you've got to cut down on  
16           overtime, you know, the budget can't take it. Aren't  
17           the commissioners here just trying to cut down on  
18           overtime?

19                      MS. PERRI ROBERTS: The commissioners have  
20           a set budget to draw the salaries for their employees  
21           from.

22                      JUDGE PIGOTT: I understand that, but  
23           aren't they - - - isn't that what they're trying to  
24           do is cut down on overtime and aren't you saying they  
25           have no right to do that?

1 MS. PERRI ROBERTS: No, I don't think  
2 that's what they're trying to do.

3 CHIEF JUDGE LIPPMAN: Who does the  
4 overtime? What budget does the overtime come out of,  
5 the counties or the boards?

6 MS. PERRI ROBERTS: Our position is that  
7 the county is the one that has obligated - - -

8 CHIEF JUDGE LIPPMAN: Exclusive of whatever  
9 budget the Board of Elections has?

10 MS. PERRI ROBERTS: Exclusive of the salary  
11 budget that they set.

12 JUDGE PIGOTT: No, no, no. I mean the - -  
13 - well, the Board of Elections gets - - - is part of  
14 the county's budget. They go in and they say I need  
15 - - - you know, we need a million dollars to run the  
16 Board of Elections this year and that's their money.  
17 Now, they got to run the Board of Elections on a  
18 million dollars. If there's overtime the county  
19 executive doesn't go to the treasurer and say give  
20 the board more money. I mean, they have to at some  
21 point, but you're talking about the Board of  
22 Elections budget.

23 MS. PERRI ROBERTS: Well, I would -- my  
24 position would be that in the event that this case  
25 went to arbitration and an arbitrator ruled that the

1 overtime was owed to these workers, what the Board of  
2 Election commissioners go back and argue with the  
3 county executive as to where - - -

4 JUDGE PIGOTT: And the county legislature.

5 MS. PERRI ROBERTS: - - - they get that  
6 money from is an issue between the two of them. And  
7 that - - -

8 CHIEF JUDGE LIPPMAN: Well, it wouldn't  
9 necessarily - - - it would or wouldn't necessarily  
10 come out of the million dollars, you don't know, the  
11 budget that Judge Pigott mentioned.

12 MS. PERRI ROBERTS: I would argue that it  
13 doesn't, because - - -

14 JUDGE PIGOTT: Oh, stop. They have a  
15 budget. They got to live within it. If they - - -  
16 if they go over their budget, they have to go to the  
17 county legislature and say we went over budget, and  
18 we need some more money, and the county legislature  
19 says we're not giving it to you, you got to take it  
20 out of next year's budget. It's not like they're a  
21 division of - - - they're not like the - - - I'm  
22 trying to think of a good one - - - DEP where, you  
23 know, they're part of the county executive's budget.  
24 They have a separate budget. And those commissioners  
25 go there every year and complain about how they don't

1 get enough, but it's theirs.

2 MS. PERRI ROBERTS: I agree they have their  
3 own budget - - -

4 JUDGE PIGOTT: Okay.

5 MS. PERRI ROBERTS: - - - but in this  
6 particular case if the election clerks who are part  
7 of the bargaining unit have their hours changed to  
8 avoid casual overtime, then it's the county that has  
9 the obligation to make sure that those election  
10 clerks are paid.

11 CHIEF JUDGE LIPPMAN: Yeah, but his only -  
12 - - the judge's point, I think, is that the county  
13 could take it out of the hide of the Board of  
14 Elections budget if they wanted to.

15 JUDGE GRAFFEO: In the next budget.

16 MS. PERRI ROBERTS: I suppose that's within  
17 their prerogatory.

18 CHIEF JUDGE LIPPMAN: Okay. Let's hear from  
19 your adversary. Thanks, counselor.

20 MR. DELUCA: Good afternoon, Your Honors,  
21 may it please the court. My name is Scott DeLuca  
22 from Shchrader, Israely & DeLuca, on behalf of the  
23 County.

24 CHIEF JUDGE LIPPMAN: Are these - - - these  
25 people are county employees, right?

1 MR. DELUCA: They're not.

2 CHIEF JUDGE LIPPMAN: They're not county  
3 employees?

4 MR. DELUCA: They are not county employees,  
5 Judge. We admit that they are paid out of the  
6 county's funds, but courts across the state have said  
7 that is merely a ministerial duty.

8 JUDGE PIGOTT: They're hired and fired by  
9 the commissioners?

10 MR. DELUCA: They are hired and fired by  
11 the commissioners. They are the appointing authority  
12 and that's the key phrase for purposes of civil  
13 service law.

14 JUDGE SMITH: When they get W2s, whose name  
15 is the employer on the W2?

16 MR. DELUCA: I don't know the answer to  
17 that, Judge.

18 CHIEF JUDGE LIPPMAN: Do you think it's the  
19 Board of Elections?

20 MR. DELUCA: It would make sense that it  
21 would be.

22 CHIEF JUDGE LIPPMAN: I can't imagine it  
23 is.

24 MR. DELUCA: I don't know the answer to  
25 that, Judge. I simply do not know.

1 CHIEF JUDGE LIPPMAN: I think it's highly  
2 unlikely. Does the county realize all these years  
3 that these people are covered under the collective  
4 bargaining, and if they're not covered in this  
5 situation what does that provision mean that's been  
6 in place for forty years?

7 MR. DELUCA: Well, the key thing, Judge,  
8 and this is not in the record, but counsel's made a  
9 point that they've been in this bargaining unit since  
10 1971. Election Law 3-300 was enacted in 1976, a  
11 couple years after that. So - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but still,  
13 after they still have been included all these years?

14 MR. DELUCA: They've been included, yes.  
15 So if the County of Erie employed an election clerk  
16 they would be covered by the agreement, but the  
17 County of Erie does not. The County of Erie does not  
18 employ election clerks.

19 JUDGE PIGOTT: Within the state budget, you  
20 know, the court system, for example - - -

21 MR. DELUCA: Right.

22 JUDGE PIGOTT: - - - we have union  
23 employees, and we have people that are not. They're  
24 confidential or whatever, and usually what we do, and  
25 the Chief might correct me if I'm wrong, is that once

1 the union negotiates its benefits and salaries and  
2 everything, we cover in the confidentials - - -

3 CHIEF JUDGE LIPPMAN: Right.

4 JUDGE PIGOTT: - - - and things like that.  
5 Isn't that what happens here? I mean the - - - the  
6 commissioners know that all of their employees,  
7 particularly the full-time ones - - - I'm not talking  
8 about the election inspectors but - - - are going to  
9 be covered in under the contract with the county.

10 MR. DELUCA: No, that's not correct, Your  
11 Honor, because - - -

12 JUDGE PIGOTT: They don't know that?

13 MR. DELUCA: They don't know that, because  
14 the board - - - the commissioners get to choose how  
15 much they are paid. They get to choose what they do;  
16 they get to choose all of these things. And as  
17 you've indicated and as is argued in county hall  
18 every year, they have a set amount of money, and they  
19 have to pay their entire staff within that set of  
20 money.

21 CHIEF JUDGE LIPPMAN: But is there anything  
22 that they realize is governed by what the county  
23 does? In other words, we talked about - - - Judge  
24 Graffeo said maybe there's a distinction between  
25 certain benefits and overtime. Anything goes by what

1 the county negotiates - - -

2 MR. DELUCA: No.

3 CHIEF JUDGE LIPPMAN: - - - or is it  
4 nothing if the board says it's nothing. Is that the  
5 board's option? County negotiates certain  
6 provisions: benefits, health care, whatever. Can  
7 the board say we don't want our employees to have any  
8 of those things and that's their decision, or is it  
9 the county's decision you bargain, and you just, in  
10 your adversaries framework that she built, you just  
11 stay away from things that are clearly enumerated as  
12 the - - - you know, within the province of the board?  
13 How does that work?

14 MR. DELUCA: I understand, Judge, and the  
15 answer to that is it's up to the board. The board  
16 decides the - - -

17 CHIEF JUDGE LIPPMAN: The board says no  
18 health care for our employees.

19 MR. DELUCA: I can't imagine that.

20 CHIEF JUDGE LIPPMAN: But can they say - -  
21 -

22 JUDGE PIGOTT: I don't think they can.

23 MR. DELUCA: I don't know that they can say  
24 that.

25 JUDGE PIGOTT: I think you're down to

1 hours, and, like, election night when it comes up on  
2 November 6th, they're going to be there until  
3 midnight, I predict, and - - -

4 MR. DELUCA: Probably later.

5 JUDGE PIGOTT: Yeah, and that's what the  
6 commissioner says. You got to stay here, and you got  
7 to count. They're going to be at the polling places  
8 until 9, that's when they close, and then they're  
9 going to be there because they got to close up the  
10 machines, they got to get the records, et cetera.  
11 All of that is determined by the commissioners.  
12 Whose out there, because they've got a two - - -

13 MR. DELUCA: Yes.

14 JUDGE PIGOTT: -- and then they come back,  
15 but - - - and that sometimes is overtime, sometimes  
16 isn't it?

17 MR. DELUCA: True.

18 JUDGE PIGOTT: And you're saying it's  
19 within the discretion - - -

20 MR. DELUCA: And they have to plan for that  
21 within their budgeting, within what the County of  
22 Erie has designated each year in its budget.

23 CHIEF JUDGE LIPPMAN: What's your answer to  
24 the question we were discussing before with the  
25 million dollar budget? If your adversary wins in

1 arbitration, where does that money come out of?

2 MR. DELUCA: It's going to come out of the  
3 Board of Elections budget.

4 CHIEF JUDGE LIPPMAN: In one way or the  
5 other.

6 MR. DELUCA: Of course. Frankly, not the  
7 other, Judge. It's going to come out of the county -  
8 - - I'm sorry, out of the Board of Elections budget  
9 as it stands this year.

10 JUDGE SMITH: The county legislature could  
11 choose to appropriate the money to cover it.

12 MR. DELUCA: They could, unlikely, but - -  
13 - that's possible, but - - -

14 JUDGE GRAFFEO: If we agree with you do  
15 these people run the risk of not automatically being  
16 included in the health care benefits that the county  
17 negotiates, that the union and the county come to  
18 agreement on in the collective bargaining process?

19 MR. DELUCA: Again, the health benefits  
20 that these employees receive, A, it's not an issue in  
21 this case as you're aware, I'm sure, but it's not  
22 part - - -

23 JUDGE GRAFFEO: But that can be the next  
24 case, so that's why we're asking.

25 MR. DELUCA: And I understand that, Judge.

1 I think the bottom line here is this. The Board of  
2 Elections does not have a collective bargaining  
3 relationship with the CSEA; the county does. That's  
4 it. So if you were to force the Board of Elections  
5 to start obeying all of the terms in this collective  
6 bargaining agreements - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but, counselor,  
8 I guess the question is how do we draw the line or  
9 where is the line drawn between A benefit, B benefit,  
10 C benefit, D benefit, overtime? Is there a policy  
11 distinction or a way of distinguishing between  
12 things? I think you would agree that health benefits  
13 is something that they're entitled to, because it's  
14 bargained for, they have it, they should get it. The  
15 board wouldn't dream, and I don't know whether they  
16 have, in answer to Judge Graffeo's question, I can't  
17 imagine they have the ability to say no health  
18 benefits, but assume that they can say no health  
19 benefits, where do we draw the line? How do we know?  
20 Is it because - - - and maybe this is a rationale  
21 that might work for your argument, is it that  
22 overtime is so intimately related to salary as  
23 opposed to health benefits and whatever other kind of  
24 benefits versus compensation, is that the  
25 distinction?

1 MR. DELUCA: Yes, that's part of the  
2 distinction, Judge. Certainly, the 3-300 of the  
3 Election Law says that the Board of Elections can, as  
4 you mentioned, Judge Smith, that they can set the  
5 salaries and certainly overtime is part of that key,  
6 but let me dispel what - - -

7 CHIEF JUDGE LIPPMAN: Overtime is not  
8 salary, but that would be your argument.

9 MR. DELUCA: It would be part of salary, of  
10 course it would.

11 JUDGE SMITH: But benefits aren't.

12 MR. DELUCA: No, they're not, but, Judge -  
13 - -

14 JUDGE SMITH: Let me - - -

15 MR. DELUCA: Sure.

16 JUDGE SMITH: Suppose, hypothetically, the  
17 county thinks that we're going broke with the health  
18 benefits, we can't afford health benefits anymore.  
19 They tell the Board of Elections the health benefits,  
20 from now on, for your employees, we're charging to  
21 your budget. The Board of Elections says you're  
22 charging to my budget, I just as soon we not - - -  
23 then we're going to put our employees on a cheaper  
24 plan. Can they do it?

25 MR. DELUCA: If - - - I think they could,

1 Judge.

2 JUDGE SMITH: Yeah, so the Board of  
3 Elections does have some control over the benefits.

4 MR. DELUCA: They could. But, Judge - - -

5 JUDGE SMITH: You think it's not going to  
6 happen, but in theory the Board of Elections cannot  
7 be directed by the county as to what benefits its  
8 employees get and what it doesn't.

9 MR. DELUCA: And I think that's consistent  
10 with 3-300.

11 CHIEF JUDGE LIPPMAN: You could  
12 unilaterally give them a different health plan when  
13 the union has bargained, and you know that these  
14 listed employees, this particular employee, the Board  
15 of Election clerk, is listed as someone who's  
16 bargained between the county and the union, and  
17 you're going to say that they don't get health  
18 benefits, we're giving you some other health benefit.  
19 Is that possible?

20 MR. DELUCA: There's nothing in the record  
21 to suggest that the election clerks that work for the  
22 Board of Elections get health insurance benefits  
23 because of this collective bargaining agreement.

24 CHIEF JUDGE LIPPMAN: Why are they listed  
25 in the agreement?

1 MR. DELUCA: Because it's gone back that  
2 way, apparently, since 1971.

3 CHIEF JUDGE LIPPMAN: Yeah, but you're the  
4 one who makes the agreement. Why don't you say take  
5 these Board of Election clerks out, because the board  
6 has independent authority and - - -

7 MR. DELUCA: And that goes right to the  
8 heart of the case, Judge. There's never been a  
9 previous instance where -- that I am aware of, and  
10 there's nothing in the record. The CSEA has never  
11 previously tried to enforce this agreement against  
12 the Board of Elections in terms of overtime.

13 CHIEF JUDGE LIPPMAN: Yeah, but you put  
14 them in the agree - - -

15 MR. DELUCA: And they've been rejected in  
16 other cases.

17 CHIEF JUDGE LIPPMAN: - - - but you put  
18 them in the agreement.

19 MR. DELUCA: Yes.

20 CHIEF JUDGE LIPPMAN: Did you say that - -  
21 - did you put them in the agreement for no purpose  
22 whatsoever that they are covered under the collective  
23 bargaining, and then - - - but there's no reason we  
24 put them and their name is just there. There's got  
25 to be something things, let's say, like certain

1 benefits - - - maybe overtime, maybe not - - -  
2 there's got to be something that you're bargaining  
3 for them or against them - - -

4 MR. DELUCA: Against them.

5 CHIEF JUDGE LIPPMAN: - - - with the union.  
6 I'm just trying to get a common sense - - - they're  
7 there for a reason. I'm assuming you're not keeping  
8 this here for forty years for nothing. And I guess  
9 my take on it is the where do we draw the line, sort  
10 of the same question that Judge Graffeo asked and - -  
11 - because I don't believe, again, at least it doesn't  
12 comport with my sense of what this kind of agreement  
13 would be about that they're just there for no reason  
14 whatsoever. There's got to be certain things that  
15 you and the union are bargaining for in relation to  
16 those people.

17 MR. DELUCA: And there's nothing  
18 specifically being bargained between the county and  
19 the union for these people.

20 CHIEF JUDGE LIPPMAN: Why are they - - -

21 JUDGE READ: You're saying, what, it's a  
22 historical artifact, basically?

23 MR. DELUCA: Thank you for that answer,  
24 Judge. I think that that's probably the best answer.

25 JUDGE GRAFFEO: Why aren't the listed areas

1 of autonomy in Section 3-300 of the Election Law - -  
2 - why doesn't that set the parameters of what the  
3 board's authority is, and then over and beyond that,  
4 if they want to negotiate the county negotiates with  
5 the union? I don't see health benefits listed here.

6 MR. DELUCA: I think that's its part of the  
7 broad discretionary authority that 3-300 grants.  
8 There's another answer to this whole question,  
9 Judges. If the union wanted to bargain directly with  
10 the commissioners, they could try to organize those  
11 employees and then, consistent with 3-300, bargain  
12 with the union directly; as the appointing authority,  
13 that is what makes the most sense. It doesn't make  
14 any sense that a nonemployer - - - the County of  
15 Erie, a nonemployer can negotiate the terms and  
16 conditions of people who are not its employees - - -

17 JUDGE SMITH: Let me ask you again about  
18 this question of why, apparently for all these  
19 decades there's been - - - the election clerks have  
20 been in the collective bargaining agreement? I can  
21 understand this isn't the answer you want to give,  
22 but isn't the possible answer, yeah, we've been doing  
23 something illegal all these years. If that's true,  
24 even if it is, if you've breaking the law for forty  
25 years it's still invalid, isn't it?

1 MR. DELUCA: I think it is still invalid  
2 because it's up to the Elections Commissioners as the  
3 appointing authority and as the sole appointing  
4 authority - - -

5 CHIEF JUDGE LIPPMAN: Let me give you an  
6 example, an analogy that I think at least works for  
7 me. When you say they're not you're employees it's  
8 because you don't hire and fire them. In the court  
9 system we don't hire and fire the people at this  
10 table. I don't think anyone could contest the fact  
11 that those - - - the people are the - - - these  
12 judges are the employees of the Unified Court system  
13 - - -

14 MR. DELUCA: And I don't - - -

15 CHIEF JUDGE LIPPMAN: - - - even though the  
16 Unified Court system can't hire them or fire them.  
17 Why is this different?

18 MR. DELUCA: Because there is an express  
19 appointing authority in 3-300 of the Election Law.

20 CHIEF JUDGE LIPPMAN: The Constitution says  
21 who the appointing authority is of these people who  
22 are sitting in front of you.

23 MR. DELUCA: I understand, Judge.

24 CHIEF JUDGE LIPPMAN: You follow the - - -

25 MR. DELUCA: I do understand, and I think

1           that the issue when you get to elected officials or  
2           appointed judges, it complicates it, and I don't  
3           think, respectfully - - -

4                        CHIEF JUDGE LIPPMAN:   Okay, counsel.

5                        MR. DELUCA:   - - - that Your Honors are  
6           comparative to election clerks at the Board of  
7           Elections.

8                        JUDGE PIGOTT:   No, they get more power.

9                        MR. DELUCA:   Certainly in terms of power.

10                       CHIEF JUDGE LIPPMAN:   Okay, counselor,  
11           thanks.

12                       MR. DELUCA:   Thank you very much, Your  
13           Honor.

14                       CHIEF JUDGE LIPPMAN:   Let's hear your  
15           adversary's rebuttal.

16                       MS. PERRI ROBERTS:   Thank you, Your Honor.  
17           Actually, Your Honor has made many of us - - -

18                       JUDGE CIPARICK:   We're only talking about  
19           six people, right?  I was just looking at the  
20           collective bargaining agreement, just six clerks.

21                       MS. PERRI ROBERTS:   It's not a large  
22           number.  It might be - - - it might actually be more  
23           in Erie County.  It might be a larger number now than  
24           what that number is reflected in - - -

25                       JUDGE READ:   And is your opponent correct

1           that this has really just never been an issue ever  
2           before?

3                       MS. PERRI ROBERTS: I can't say that.  
4           There's nothing in the record, because that didn't  
5           come up below. I think we can't lose the perspective  
6           here of how this matter came up and that is that the  
7           County of Erie - - - not the Board of Elections - - -  
8           the County of Erie came in on a stay motion to stay  
9           arbitration and under CPLR, Article 75, they needed  
10          to show that a valid agreement did not exist in order  
11          to get that stay of arbitration, which is another one  
12          of our points.

13                      CHIEF JUDGE LIPPMAN: Well, I assume they  
14          came in because the board asked them to come in,  
15          right?

16                      MS. PERRI ROBERTS: I'm not sure of that.  
17          I know that we have an affidavit from one of the  
18          commissioners in support of the motion. That's how  
19          it came in, but it was the county, it was not the  
20          Board of the Elections. There has never been any  
21          action taken through PERB or under the Civil Service  
22          Law to remove the election clerks from the certified  
23          bargaining unit.

24                      CHIEF JUDGE LIPPMAN: Is that an official -  
25          - - how would that be done if one wanted to remove

1 the election clerks from the list of covered - - -

2 MS. PERRI ROBERTS: The Civil Service Law  
3 has a provision that the county can make a  
4 determination as to a process to remove - - - as to  
5 resolve any questions about the - - -

6 CHIEF JUDGE LIPPMAN: But if the county  
7 wanted to remove them they have to - - -

8 MS. PERRI ROBERTS: They can - - -

9 CHIEF JUDGE LIPPMAN: - - - go through some  
10 formal protocol?

11 MS. PERRI ROBERTS: Correct. They would  
12 either - - - they would have a process under the  
13 Civil Service Law to do that or it would go through  
14 PERB, because PERB is the one who certified the  
15 bargaining unit.

16 JUDGE PIGOTT: The re - - -

17 MS. PERRI ROBERTS: So you've got a  
18 certified bargaining unit here. The county's never  
19 done anything to remove election clerks from the  
20 scope of coverage of that collective bargaining  
21 agreement.

22 JUDGE GRAFFEO: Generally, is overtime seen  
23 separate from salaries, or is overtime part of the  
24 umbrella of salaries and compensation?

25 MS. PERRI ROBERTS: Well, I can tell you

1           that on the pay - - -

2                   JUDGE GRAFFEO: I'm trying to figure out  
3           the scope of 3-300.

4                   MS. PERRI ROBERTS: I can tell you that on  
5           the paycheck stubs it's all separately listed.  
6           Overtime is not just part of a lump sum of money  
7           that's paid over a two-week period of time. It's all  
8           separately broken out.

9                   JUDGE PIGOTT: The reason you have six here  
10          though is - - - I mean there are a ton of election  
11          clerks, right? I mean, I - - -

12                   MS. PERRI ROBERTS: I believe there are. I  
13          think that perhaps is an old number that carried  
14          over.

15                   JUDGE PIGOTT: Because it was a school  
16          board election, I think, in one town, but if you have  
17          a general election you're talking - - -

18                   MS. PERRI ROBERTS: You're talking  
19          countywide.

20                   JUDGE GRAFFEO: They hire season - - - some  
21          county boards hire seasonally, right? For the  
22          election season they'll put on many - - -

23                   MS. PERRI ROBERTS: They do.

24                   JUDGE GRAFFEO: - - - many election clerks.

25                   MS. PERRI ROBERTS: They do add on, and

1           they appoint additional people to go out and help on  
2           specific election days.

3                   CHIEF JUDGE LIPPMAN:   But what about that  
4           situation?  Why is it that this hasn't come up in,  
5           like, I think your adversary mentioned, every  
6           election?  You know, they're working until all hours,  
7           and they're collecting - - - what happens then?  Are  
8           they paid overtime or do they go according to the  
9           general provisions of the county employees, so they  
10          get no overtime because it's part of their job.  What  
11          happens in the normal course, not this particular  
12          thing that's wound up being litigated?  Do you know?

13                   MS. PERRI ROBERTS:  Well, we don't have  
14          anything specific in the record.

15                   CHIEF JUDGE LIPPMAN:  Do you have a general  
16          understanding of what happens?

17                   MS. PERRI ROBERTS:  I would have to say  
18          that given the proclivity of our membership to file  
19          grievances, if there had been a problem in the past,  
20          and they hadn't gotten paid we would have seen a  
21          grievance filed.

22                   CHIEF JUDGE LIPPMAN:  I mean, you think if  
23          they work until 2 o'clock in the morning, they're  
24          getting overtime?

25                   MS. PERRI ROBERTS:  I think they've gotten

1           paid overtime in the past.

2                   CHIEF JUDGE LIPPMAN: All right.

3                   MS. PERRI ROBERTS: That's my conclusion.

4                   CHIEF JUDGE LIPPMAN: Okay. Thank you

5           both.

6                   MS. PERRI ROBERTS: Thank you.

7                   MR. DELUCA: Thank you, Your Honor.

8                   (Court is adjourned)

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C E R T I F I C A T I O N

I, Jessica B. Cahill, certify that the foregoing transcript of proceedings in the Court of Appeals of In the Matter of County of Erie v. Civil Service Employees Association, Local 815, No. 178 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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