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## Panel Upsets OCA Ban On 'Double Dipping' By Certificated Judges

BY JOEL STASHENKO

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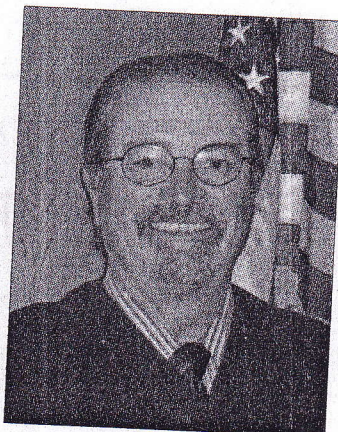
AN ATTEMPT by state court administrators to bar Supreme Court justices from receiving their pensions after they are certificated to stay on the bench past age 70 was unconstitutional, a state appeals court ruled Thursday.

The Appellate Division, Third Department, panel said in a 4-0 decision that the courts were pre-empted from administratively prohibiting the practice commonly known as "double-dipping" by state Retirement and Social Security Law §212.

The statute stipulates that "any retired person may continue as retired and, without loss, suspension or diminution of his or her retirement allowance, earn [an amount not greater than statutorily prescribed] in a position or positions in public service."

Justices of the Supreme Court are among state employees covered by the provisions of the law, the appeals court said in *Matter of Loehr v. Administrative Board of the Courts of the State of New York*, 519568.

"Simply put, respondent's act of adding a condition of recertification that is not included in the [state] Constitution, the Judiciary Law or the Retirement or Social Security Law cannot be sustained," Justice Christine Clark wrote for the court.



Justice Gerald Loehr, lead plaintiff

She said the judges found "unpersuasive" the argument by the court system that the Retirement and Social Security Law "implicitly permits" the Office of Court Administration to prohibit recertificated judges from getting the state pensions they qualify for as they collect their regular salaries.

When §212 of the Retirement and Social Security Law was enacted in 1964, a memo from the sponsor said its legislative intent was to make it "easier for pensioners to supplement their income," Clark wrote. That, she said, » Page 8

### Online

✦ The Third Department decision is posted at [nylj.com](http://nylj.com).

## Off the Front

### Double Dip

« Continued from page 1

makes the court system's policy of withholding pension payments contrary to lawmakers' intent.

The panel also rejected the court's alternative argument that *Matter of Marro v. Bartlett*, 46 NY2d 674 (1979), gives administrators broad discretion to determine eligibility requirements for the certification program for retirement-age judges. Clark wrote that *Marro* concerned an individual judge's challenge to a certification decision, not to a "statewide policy directive" about the program.

"While we can agree that *Marro* allows for unfettered discretion in respondent's individual certification decisions, it does not authorize respondent to change the requirements for certification," Clark said.

Justices William McCarthy, John Egan Jr. and Eugene Devine joined in the ruling.

OCA spokesman David Bookstaver said the court system will appeal. "We believe this case will ultimately be decided by the Court of Appeals," Bookstaver said Thursday.

The lead plaintiff is Supreme Court Justice Gerald Loehr, who has been certificated since January 2014 to serve in Rockland County. He was an elected Supreme Court justice in Westchester County from 2003 to 2013, when he reached the constitutionally mandated retirement age of 70 for state judges.

The other plaintiffs are J. Emmett Murphy, who has been serving on the Westchester Coun-

ty Supreme Court bench since being certificated in 2012, and Brooklyn Supreme Court Justice William Miller. Miller was certificated in 2014.

"We are very pleased that the Appellate Division agreed with us," said attorney Robert Spolzino, a partner at Wilson Elser Moskowitz Edelman & Dicker in White Plains, who represented the plaintiffs.

Spolzino is a former Supreme Court justice who served on the Second Department until his resignation in 2009 (NYLJ, Aug. 4, 2009).

The certification program allows elected Supreme Court justices to apply for extensions to remain on the bench past age 70, for three two-year periods, until age 76.

The administrative board of the courts—composed of the chief judge and of the presiding justices in the four Appellate Divisions—adopted a policy in October 2013 that it would not approve term extensions of Supreme Court justices applying for certification or recertification unless they agreed to defer their pensions until they left the bench for good.

The board's rule said "no judge henceforth certificated for service as a justice of the Supreme Court pursuant to Judiciary Law §115 may receive, concurrent with receipt of a salary for such service, a retirement allowance for prior judicial service within the Unified Court System."

Loehr sued in 2013. He and court administrators reached an agreement at about the same time that his suit would not be held against him as the administrative board considered his application for a first term of certification.

Loehr was granted a two-year extension beginning in 2014.

Loehr said that rule would illegally deprive him of the \$66,576-a-year pension for which he has qualified from his prior service as an assistant district attorney, administrative hearing officer and Westchester County judge (NYLJ, Dec. 23, 2013).

When Loehr's suit was filed, he made \$167,000 a year as Supreme Court justice. The salary for the post has since risen to \$174,000 a year.

Thursday's ruling reversed a May 12, 2014, decision by acting Albany Supreme Court Justice Gerald Connolly, who declared that the OCA's double-dipping policy was neither illegal nor unconstitutional.

OCA lawyer John Sullivan defended the court system.

Court officials said the administrative board's October 2013 rule, and the appellate decision, would have no effect on the judges who remain on the bench and collect their salaries and public pensions. Those judges have yet to reach the retirement age of 70. The recertification program is open only to elected Supreme Court justices.

Bookstaver said the court system does not know how many judges have qualified and are receiving public pensions while they continue to act as judges.

Spolzino said Loehr, Murphy and Miller have continued to collect their pensions and their judicial salaries while the legal dispute has played out.

@ Joel Stashenko can be reached at [jstashenko@alm.com](mailto:jstashenko@alm.com).  
Twitter: @JoelStashenko