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Governor, Legislature Ordered To Raise Pay of State's Judges

Manhattan Supreme Court Justice Edward H. Lehner yesterday gave the Legislature and Governor David A. Paterson 90 days to adjust the pay of the state's 1,300 judges to reflect the rise in the cost of living since their last raise nearly 10 years ago. Justice Lehner found that the Legislature and the governor had "unconstitutionally abused their power" by neglecting to raise judicial pay.

Daniel Wise

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Manhattan Supreme Court Justice Edward H. Lehner (See Profile) yesterday gave the Legislature and Governor David A. Paterson 90 days to adjust the pay of the state's 1,300 judges to reflect the rise in the cost of living since their last raise nearly 10 years ago.

Justice Lehner found that the Legislature and the governor had "unconstitutionally abused their power" by neglecting to raise judicial pay. He concluded in *Larabee v. Governor*, 112301/07, that the executive and legislative branches had violated the separation of powers doctrine by linking judicial pay to extraneous legislative issues such as raises for the legislators themselves and campaign finance reform.

The decision will be published Tuesday.

While the lawsuit was brought by individual judges and is not a class action, Justice Lehner noted that "it has at all times been recognized by the parties that the issue with respect to constitutionality affects all members of the judiciary who are part of the Unified Court System."

Justice Lehner also ordered the defendants to include "an appropriate provision for retroactivity." The Legislature and governor are to proceed in "good faith," he wrote, inviting the four judges who brought the lawsuit to seek additional relief if an adequate remedy is not in place within 90 days.

June Duffy, the head of the Attorney General's New York City litigation bureau, said the governor and the Legislature have not made any decision concerning an appeal. Ms. Duffy declined to say whether the defendants would be entitled, by statute, to a stay of the ruling in the event of an appeal.

Thomas E. Bezanson, of Chadbourne & Parke, the lead attorney for the four judges who sued to compel a raise, said that if an automatic stay is applicable, "we are hopeful that the First Department will rescind it because the defendants had 10 years to do the right thing."

Mr. Bezanson called the ruling "precedent setting" because it represents "the first time the linking of judicial pay to that of legislators has been found unconstitutional."

The ruling provided the state's judges with a sweeping victory. The four plaintiffs, with the support of their judicial associations, had contended that the cost of living has increased 30 percent since the state's judges received their last pay raise in January 1999. According to data they submitted, the pay of state Supreme Court justices would have had to be boosted to \$175,264 in 2007 to keep pace with inflation. They now receive \$136,700.

The four *Larabee* plaintiffs - Manhattan Family Court Judge Susan Larabee (See Profile), Cattaraugus County Family Court Judge Michael Nenzo (See Profile), Manhattan Civil Court Judge Geoffrey Wright (See Profile), and Brooklyn Criminal Court Judge Patricia Nunez (See Profile) - claim that a retroactivity award would entitle them collectively to \$651,000.

Chief Judge Judith S. Kaye has filed a separate lawsuit seeking to compel a pay raise to make the salaries of state judges comparable to those paid to federal district court judges, retroactive to April 1, 2005, at a total cost of \$148 million. Under that formulation, the salaries of Supreme Court justices would be raised to \$169,300 a year and the salaries of judges sitting in other courts would be adjusted proportionately.

Chief Judge Kaye's suit, *Kaye v. Silver*, 40076/08, also has been assigned to Justice Lehner. On Tuesday, the Legislature and governor filed a motion to dismiss that case using many of the same arguments as the attorney general's office used against the claims in *Larabee*. (See related article)

Bernard Nussbaum, of Wachtell, Lipton, Rosen & Katz, who represents the chief judge in her lawsuit, said, "we are pleased with Justice Lehner's thoughtful decision and now trust that the governor and the Legislature will do the right thing." The Unified Court System is also a plaintiff in the chief judge's action.

A third pay action, *Maron v. Silver*, 4108/07, is pending in the Appellate Division, Third Department.

New York's judges have gone longer without a pay raise than the judges in any other state in the nation. Since 1999, the level of their salaries, when cost-of-living is taken into account, has slipped to 49th in the nation.

Finds Constitutional Violation

Justice Lehner issued a declaratory judgment finding a separation-of-powers violation because "the political branches of our state Government have used the issue of judicial pay as a pawn in dealing with the unresolved political issue of legislative compensation."

In fashioning relief, Justice Lehner wrote, "I direct that defendants, within 90 days" proceed "in good faith to adjust the compensation payable to members of the judiciary" to reflect the increase in the cost of living since the last pay raise was enacted in 1998.

The defendants are the governor, the Assembly, the Senate and the state itself.

By linking the pay of judges to that of legislators, Justice Lehner wrote, the defendants have abused their power and unconstitutionally interfered with the independence of the judiciary.

Such interference "not only adversely affects the judges, but is repugnant to our tripartite form of government and the liberties intended to be secured thereby," he said.

Neither the Legislature nor the governor contested the "widely recognized" fact that a judicial pay increase had been linked to pay for legislators and other issues, Justice Lehner wrote.

He described the handling of a pay raise for judges by the two political branches in 2007 as creating a situation that was tantamount to gridlock.

The Senate had passed a bill providing for raises for both the judges and legislators, but former Governor Eliot Spitzer had threatened to veto it without the Senate's agreement on a campaign finance bill. Meanwhile the Assembly refused to act on the pay raise measure until an agreement was reached on campaign finance between the governor and the Senate that would eliminate the threat of a veto on pay raises.

There was "no open policy issue," Justice Lehner said, because all sides agree that "the judiciary is entitled to an adjustment and the amount thereof." Assistant Attorney General Joel Graber, who represented the defendants, had stated in open court that the pay of the state's judges should be on a par with federal judges.

Justice Lehner also cited two Appellate Division rulings in which actions taken by town boards to reduce judges' salaries had been found to violate the separation-of-powers doctrines. Those decisions were issued by the Third Department in *Kelch v. Town Board of Davenport*, 36 AD3d 1110 (2007) and the Fourth Department in *Catanise v. Town of Fayette*, 148 AD2d 210 (1989).

Justice Joseph G. Golia (See Profile), the president of the Association of State Supreme Court Justices of the State of New York, said the ruling was "very welcome as a long needed adjustment" in the state judge's pay.

"I hope," he added, those judges contemplating leaving the bench "will re-adjust their thinking because the state needs judges with their background and experience."

Although the New York State Bar Association has a policy of not commenting on pending litigation, its president, Bernice K. Leber, said the association has worked "tirelessly in support of a fair judicial pay increase and it remains our top legislative priority."

"With the legislative session winding down," she added, "The governor, Senate and Assembly need to come together and provide our judges with the long overdue pay raise they deserve."

Mr. Paterson's office said in an e-mail statement that Justice Lehner's ruling "flies in the face of the state Constitution which makes clear that only the Legislature has the power to set judicial salaries."

"The governor has long supported salary increases for judges," the statement noted, but "the governor's office is now exploring its legal options."

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