New York Law Journal

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# Albany Panel Dismisses Judicial Pay Suit

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11-14-2008

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**The decision will be published Wednesday.**

The majority dismissed the remaining two grounds recognized by Acting Supreme Court Justice Thomas J. McNamara (See Profile) last year, that the lack of a raise imperiled judicial independence by driving good judges from the bench and that the refusal to increase judges' salaries was in retaliation for their rulings on controversial issues such as ordering higher school aid for New York City (NYLJ, Dec. 3, 2007).

The majority bought neither argument yesterday.

"Although petitioners' claims regarding an undisclosed number of resignations suggest that judges are experiencing a lamentable personal hardship due to the Legislature's inaction, that claim cannot be equated with an assertion that the Judiciary will not continue to function as in the past," Justice Thomas E. Mercure wrote for the majority.

As for the "highly speculative" contention that the Legislature was holding back on a pay increase because of unpopular rulings from the bench, the appellate panel said there was an absence of affirmative acts by lawmakers "from which we could discern an intent to react to the referenced decisions regarding the separation of powers disputes between the Legislature and Governor, capital punishment, school funding and a case involving the election of a state senator."

The panel continued, "To merely state the existence of this threat, without alleging any support whatsoever for the assertion of displeasure on the part of the Legislature or evidence of any actions taken to reduce judicial salaries, is merely to acknowledge the inherent tension in our tripartite system of government."

The court also reviewed, and rejected, other arguments made by the judges, such as their lack of a raise violating the compensation clause of the state Constitution because of the ground lost to inflation in the past decade and the argument that the judges should get the $69.5 million included in the 2006-07 state budget for raises, even though the Legislature and governor never approved an authorization specifying that the money be spent on the judges.

The money was appropriated but could not be spent unless the governor and lawmakers approved a subsequent chapter amendment to the state budget that was to have spelled out that the funding was for judicial pay. That amendment was never approved.

"If the Legislature had intended the budget to be self-executing regarding compensation adjustment, there would have been no need to reference 'a chapter of the laws of 2006'" in the appropriations portion of the budget, Justice Mercure wrote.

Justices Robert S. Rose, John A. Lahtinen and Anthony T. Kane joined the majority.

Although he permitted the lawsuit to proceed on the judicial independence argument, Justice McNamara suggested that the plaintiffs would face an uphill battle.

"Given that legislators and senior Executive branch officials have also been denied raises [since 1999], plaintiffs face a difficult task in establishing that the failure to provide salary increases is designed to influence the Judiciary," Justice McNamara wrote. "Even showing that political branch benign neglect is destructive of judicial independence presents a difficult task."

However, Justice Karen K. Peters wrote in her Third Department dissent yesterday that judicial independence is compromised by the need to get approval for a raise from the other two branches of government.

She also argued that the majority was requiring the petitioners to meet too strict a burden at this stage of their litigation.

"Since this matter involves a motion to dismiss for failure to state a cause of action . . . we must liberally construe the pleadings, grant petitioners the benefit of each favorable inference, and limit our review to a determination as to whether the facts they allege fall within a knowable legal theory," Justice Peters wrote.

She continued, "Given the early prediscovery phase of this litigation, I agree with Supreme Court that petitioners sufficiently pleaded a viable separation of powers claim."

Justice Peters seemed the most skeptical judge about the state's case when the panel heard oral arguments in September (NYLJ, Sept. 4). At one point, she asked state attorney Richard H. Dolan whether judges could not be held "hostage for decades" by Legislatures and governors unwilling to grant them increases.

Mr. Dolan replied that judges on some state courts, especially the Court of Appeals, have gone decades in the past without pay raises.

The suit before the Third Department yesterday was brought by Nassau County Court Judge Edward A. Maron (See Profile), Supreme Court Justice Arthur Schack of Brooklyn (See Profile) and former Supreme Court Justice Joseph A. DeMaro of Brooklyn.

It is one of three suits brought on behalf of the judiciary seeking higher pay and the first to reach the Appellate Division.

A second suit, *Larabee v. Governor,* 112301/07, is scheduled to be heard by a First Department panel on Tuesday. In that case, Supreme Court Justice Edward H. Lehner (See Profile) ruled that lawmakers and the governor had unconstitutionally linked passage of a judicial pay raise to unrelated public policy issues, such as campaign finance reform or a pay raise for lawmakers themselves (NYLJ, June 11).

A third suit, *Kaye v. Silver,* 400763/08, is also before Justice Lehner in Manhattan. He is considering a motion for summary judgment filed by Chief Judge Judith S. Kaye and motions to dismiss the action from the governor and legislative leaders.

Steven Cohn of Carle Place represented the plaintiffs in *Maron v. Silver,* the Third Department case. "I am very disappointed with the ruling," Mr. Cohn said last night in an interview. "We are definitely going to appeal." He added, "We hope the First Department takes a different view [in *Larabee*]."

Assistant Solicitor General Julie M. Sheridan and Mr. Dolan, of Schlam, Stone & Dolan, argued for the governor and legislative leaders.

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