

MEMORANDUM

To: John J. Flanagan, Majority Leader and Temporary President

From: David L. Lewis, Counsel to the Majority Leader

I have been asked to review the relevant documents, including years of documentation that have followed the same practice, the certifications, the news coverage and the law regarding the payment of monies pursuant to Legislative Law Section 5-A.

I have concluded that the papers submitted to the State Comptroller authorizing and certifying payments to vice chairs, and payments attributed on accounting documents to Senators not serving specifically as chairs are proper under the authority of the New York State Constitution. The Legislature's allocation of institutional resources to its own members, a classic example of internal administrative prerogatives is properly left to the Legislature to make, in furtherance of the duties particular to that body, without interference from the other two branches of government. See, *Urban Justice Center v. Pataki*, 38 A.D.3d 20 (1st Dept. 2006).

Because such payments are constitutionally permissible, it therefore follows that any documents related to such payments are not false and therefore there has been no basis to claim that certifications filed with the Comptroller are false filings so as to sustain a charge of Filing a False Instrument.

FACTS

The Legislature is restricted in how it can pay out monies. It requires specific invoices for goods, contracts for outside services, and a specific designation for payment to members for the particular and additional services pertaining to or entailed by such office or special capacity.

Senator Flanagan's letter to the Secretary of the Senate reflects that he has made the following "designations for the sole purpose of compliance with Legislative Law 5-A." These designations are reflected in hand ups, delivered to the Senate Desk for entering in the Senate Journal during the session of the Legislature, and accepted with unanimous consent given there is no objection to the hand up.

The Senate's certification to the Comptroller states the statutory title under which the payment amount is to be set and the recipient of the payment, it is clear that this entry is the only means by which allowance amounts can be designated and the only basis for the Comptroller to pay such amounts.

The paperwork are the accounting papers prepared subsequent to a member declining a special allowance for a committee chair and reflect that another member will take on a portion of the responsibilities of the committee such that the member is now serving in a special capacity in the

Senate and directly connected with the Senate's business as set out in Article III Section 6. Because the accounting documents to the Comptroller to authorize payment require an ascription to an office, the practice has been to assign to the member the statutory title to identify the amount to be paid and not to assert that the member holds the specific office.

The certifications certify that these persons are to receive the special allowances. The document reflects a statutory title under Legislative Law Sec. 5-A's schedule for the purpose of identifying the amount of monies attributable to and allocated to the Senator by President of the Senate. Specifically Legislative Law Sec. 5-A does not limit what offices may be created by the Senate. Those Senators serving in a special capacity or "directly in connection therewith" shall be paid an allowance in accordance with a schedule listing certain special capacities and amounts for such service in such capacities. It does not specifically require that the Senator hold that office but only that he or she acts directly in connection therewith of that office, as determined by the Temporary President.

THE LAW

THE STATE CONSTITUTION

Article III Section 6 of the New York State Constitution provides that each house shall choose its own officers and that the Senate shall choose a temporary president. Article III Section 6 further provides that any member while serving "in any special capacity therein or directly connected therewith" the Senate, in this case, may also be paid and receive in addition any allowance that may be fixed by law for the particular and additional services appertaining to or entailed by such office or special capacity.¹

The creation of the special capacity and the additional services provided by Vice Chairs as well as the designation of particular monies for such services to other members related to their committee work is within the sole discretion of the Temporary President. There is no impediment to the Temporary President designating other Senators to perform in whole or in part the powers and duties of another Senate officer or chair. The Attorney General has opined that because under Article III §9, the Assembly in this case is empowered to choose its own officers, there is no impediment to the Assembly appointing an Interim Speaker to perform the duties and exercise the powers of the Speaker during his physical inability even though the law is otherwise. Op.Atty.Gen. 94 F-1.

THE LEGISLATIVE LAW 5-A

¹ Article III Section 6: Any member, while serving as an officer of his or her house or in any other special capacity therein or directly connected therewith not hereinbefore in this section specified, may also be paid and receive, in addition, any allowance which may be fixed by law for the particular and additional services appertaining to or entailed by such office or special capacity.

Given that there is no impediment to the Senate picking its own officers including its Chairs, the issue then becomes how Legislative Law Sec. 5-A is administered. Section 5A of the Legislative law uses the same language as the Constitution, provides that any Senator serving in any other special capacity therein or directly connected therewith shall be paid an allowance in accordance with a schedule listing certain special capacities and amounts for such service in such capacities. Members are allowed additional compensation for service rendered in any of a number of special capacities identified by law. See, *Schultz v New York State Legislature*, 252 A.D.2d 896 (3d Dept. 1998). Key to the determination is the services rendered in the special capacities identified by law.

THE CONSTITUTION CONTROLS

Under the Constitution Article III Section 6, Senators are eligible for the allowance. Section 5-A provides a schedule of amounts. The schedule only sets and restricts the amount that can be the allowance. It does not prevent the payment of the amount fixed by law for the particular and additional services provided by another Senator appertaining to or entailed by that special capacity. The Constitution controls the interpretation of Legislative Law Sec. 5-A. The Constitution allows members of the Senate by virtue of their office or special capacity to "be paid and receive, in addition, any allowance which may be fixed by law for the particular and additional services appertaining to or entailed by such office or special capacity". Thus, a Senator shall receive a salary, and may receive the special monies fixed by law. In the instant matter, the Senators have received an amount fixed by law. The purpose of Legislative Law 5-A is fix the amounts to be received. It limits what can be paid for the particular and additional services.

PARTICULAR AND ADDITIONAL SERVICES

Where the Senator holds a leadership spot and a Chair, the law forbids the receipt of both special allowances. In that case, the Vice Chair or another Senator may receive those monies for particular and additional services because they appertain to and entail the special capacity. The determination is wholly within the determination of the Temporary President. Because the member ordinarily entitled to the monies by virtue of the chairmanship has refused the monies, the payment to the Vice Chair is properly for "the particular and additional services appertaining to or entailed by such office or special capacity".

The certifications are the statement to the Comptroller to pay the statutory amount to such Senator for the particular and additional services appertaining to the special capacity. The documents are not assertion that the Senator holds the office but that the Senator has been designated by the Temporary President to receive that payment for his or her services in special capacity.

THE STATEMENTS FILED WITH THE COMPTROLLER ARE ACCURATE