

COPY

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CENTER FOR JUDICIAL ACCOUNTABILITY,
INC., and ELENA RUTH SASSOWER,
individually and as Director of the
Center for Judicial Accountability, Inc.,
acting on their own behalf and on
behalf of the People of the State of
New York & the Public Interest

Plaintiffs,

-against-

ANDREW M. CUOMO, in his official capacity
as Governor of the State of New York,
JOHN J. FLANAGAN in his official capacity
as Temporary Senate President, THE NEW
YORK STATE SENATE, CARL E. HEASTIE,
in his official capacity as Assembly
Speaker, THE NEW YORK STATE ASSEMBLY,
ERIC T. SCHNEIDERMAN, in his official
capacity as Attorney General of the State
of New York, THOMAS P. DINAPOLI, in his
official capacity as Comptroller of the
State of New York, and JANET M. DIFIORE,
in her official capacity as Chief Judge of
the State of New York and chief judicial
officer of the Unified Court System,

Defendants.

DECISION AND
JUDGMENT

Index No. 5122-16
RJI No. 01-16-122174

APPEARANCES:

ELENA RUTH SASSOWER
Plaintiff pro se
PO Box 8101
White Plains, New York 10602

ERIC T. SCHNEIDERMAN, ATTORNEY
GENERAL OF THE STATE OF NEW YORK
Adrienne J. Kerwin, AAG, of Counsel
Attorney for Defendants
The Capitol
Albany, New York 12224-0341

Hartman, J.

In this citizen-taxpayer action for declaratory and injunctive relief, pro se plaintiff Elena Ruth Sassower challenges legislation enacted in 2015 that created the Commission on Legislative, Judicial & Executive Compensation (Commission) and budget legislation for the 2016-2017 fiscal year. In its December 21, 2016 Decision and Order, the Court granted in part defendants' pre-answer motion and dismissed nine of ten causes of action, but denied the motion with respect to the cause of action challenging the 2015 legislation. On May 5, 2017, this Court issued a Decision and Order denying plaintiff's application for disqualification and reargument, renewal, and vacatur of the Court's December 21, 2016 Decision and Order. On that same date, the Court issued an Amended Decision and Order correcting the recitation of papers considered in the December 21, 2016 Decision and Order.

Plaintiff now moves, by order to show cause, for disqualification, reargument, renewal, and vacatur of the Court's May 5, 2017 Decision and Order and the May 5, 2017 Amended Decision and Order. Once again plaintiff has failed to establish matters of fact or law that the Court overlooked or misrepresented that would warrant reargument, or new facts that would warrant renewal (*see* CPLR 2221 [d, [e]]). Nor has she established grounds for disqualification and vacatur (*see Matter of Maron v Silver*, 14 NY3d 230, 249 [2010] [Rule of Necessity]; *Pines v State of N.Y.*, 115 AD3d 80, 90-91

[2d Dept 2014] [same], *appeal dismissed* 23 NY3d 982 [2014]). Plaintiff's motion is therefore denied.

Respondents, having answered, cross-move for summary judgment on the sole remaining cause of action, both for lack of standing and on the merits, and for sanctions against plaintiff. Defendants waived their right to raise standing as a defense by failing to raise it in their pre-answer motion to dismiss or answer (see *Matter of Plainview-Old Bethpage Congress of Teachers v NY State Health Ins. Plan*, 140 AD3d 1329, 1330 [3d Dept 2016]; *Schulz v Silver*, 212 AD2d 293, 296 [3d Dept 1995]). In any event, plaintiff has asserted a sufficient nexus to the fiscal activity of the State to confer standing under State Finance Law § 123-b (1) (see *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813–814 [2003]).¹ But because defendants have demonstrated entitlement to judgment as a matter of law and plaintiff has not raised a material issue of fact in opposition, the motion for summary judgment is granted. The motion for sanctions, however, is denied.

Procedural Background

By Decision and Order dated December 21, 2016, as amended on May 5, 2017, the Court dismissed all of the complaint's causes of action but the sixth,

¹ Because plaintiff Sassower is not an attorney, this Court in its December 21, 2016 Decision and Order dismissed causes of action she seeks to assert on behalf of the Center for Judicial Accountability.

which challenged as unconstitutional the 2015 legislation that created the Commission on Legislative, Judicial & Executive Compensation (Commission) (L 2015, ch 60, Part E § 3 [5]; S4610/A6721 2015). In its Decision and Order dated June 26, 2017, the Court denied plaintiff's motion for summary judgment on the sixth cause of action. In that decision, the Court divided the sixth cause of action into six sub-causes, labelled A–E. As the Court held, the law of the case disposes of Sub-Cause E—allegations that the budget bill that created the Commission was procured by fraud and in violation of due process failed to state a cause of action. The remaining sub-causes must also be resolved in favor of defendants.

The issues plaintiff raises must be viewed through the lens of the strong presumption of the constitutionality of legislative enactments. Where, as here, a plaintiff makes a facial challenge to a legislative enactment, that enactment will not be held unconstitutional unless the plaintiff demonstrates with “proof beyond a reasonable doubt” that “no set of circumstances exists under which the [enactment] would be valid” (*Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003] [internal citations and quotation marks omitted]; see *Local Govt. Assistance Corp. v Sales Tax Asset Receivable Corp.*, 2 NY3d 524, 535 [2004]; *Hunter v Bd. of Supervisors*, 21 AD3d 622, 624 [3d Dept 2005]).

Sub-Causes A & B—Improper Delegation of Authority Claims

Plaintiff alleges in Subcauses A and B that the 2015 legislation unconstitutionally delegates legislative authority to the Commission. Although “the Legislature cannot pass on its law-making functions to other bodies[,] there is no constitutional prohibition against the delegation of power, with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature” (*Boreali v Axelrod*, 71 NY2d 1, 10 [1987]).

As defendants argue, the Commission’s enabling legislation contains both standards and reasonable safeguards. The legislation provides a specific task to the Commission and defined guidelines for it to consider in furtherance of that task. It directs the Commission to “examine, evaluate and make recommendations with respect to adequate levels of compensation” for judges and members of the Legislature. The Commission must

“take into account . . . overall economic climate; rates of inflation; changes in public-sector spending; the levels of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government; the levels of compensation and non-salary benefits received by professionals in government, academia and private and nonprofit enterprise; and the State’s ability to fund increases in compensation and non-salary benefits.”

(L 2015, ch 60, Part E § 2 [3]). The Commission must also have access to and use court and agency data (L 2015, ch 60, Part E § 3 [5]). Finally, the legislation gives the Legislature and Governor an opportunity to veto the recommendations before they take on the force of law by following the usual constitutional process for enacting a statute (L 2015, ch 60, Part E § 3 [7]). This constitutes “adequate guidance” (see *Matter of Retired Public Employees Assn. v Cuomo*, 123 AD3d 92, 97 [3d Dept 2014]).

“Enabling statutes even broader than this one have been found constitutional” (*McKinney v Commr. of the N.Y. State Dept. of Health*, 41 AD3d 252, 253 [1st Dept 2007], *lv denied* 9 NY3d 815 [2007], *appeal dismissed* 9 NY3d 891 [2007]; see also e.g. *Shattenkirk v Finnerty*, 62 NY2d 949, 951 [1984]). In short, because “the basic policy decisions underlying the [Commission] have been made and articulated by the Legislature,” the Commission legislation is not an unconstitutional delegation of legislative power (*N.Y. State Health Facilities Assn. v Axelrod*, 77 NY2d 340 [1991]; see *Dalton v Pataki*, 5 NY3d 243, 262–263 [2005]; compare *St. Joseph’s Hospital v Novello*, 43 AD3d 139 [4th Dept 2007] [declining to address constitutionality of delegation of authority that allowed for de facto legislative veto])). Thus, defendants are entitled to judgment as a matter of law on sub-causes A and B.

Sub-Cause C—New York Constitution Article XIII, Section 7

Plaintiff alleges that the State Constitution forbids the increase of judicial and legislative salaries during the term for which the judge or legislator was elected. As the Court noted in its earlier decision, although the Constitution does forbid increases for legislators during the term for which they were elected, it contains no such prohibition against increases in judges' salaries. Rather, the provision that applies to judicial salaries expressly forbids decreases but does not mention increases (*Compare* Article VII, § 7 *with* Article VI, § 25 [a]). Thus, the Court needs to look no further than the plain text of the State Constitution to dispose of plaintiff's argument with respect to the judiciary. And as the Court previously held with respect to legislative raises, plaintiff cannot prove that "no set of circumstances exists under which the Act would be valid" because the Commission has not recommended any pay raise for legislators (*see Moran Towing*, 99 NY2d at 448 [internal quotation marks omitted]).

Sub-Cause D—Article VII, Sections 2, 3, and 6

Plaintiff alleges that the budget bills resulting in the enactment of the law creating the Commission (S4610/A6721 2015) violated New York State Constitution Article VII, Sections 2, 3, and 6. When the Governor submits a budget to the Legislature, he must also submit bills containing all appropriations and proposed legislation (*see* NY Const Art VII, § 3). The

Governor may submit supplemental budget bills and amendments “within thirty days” of submitting the budget and, “with the consent of the legislature, at any time before the adjournment thereof” (*id.*). “No provision shall be embraced in any appropriation bill submitted by the governor or in such supplemental appropriation bill unless it relates specifically to some particular appropriation in the bill” (NY Const Art VII, § 6).

Plaintiff argues that the bill creating the Commission must be invalidated because it was not introduced by the Governor and was not submitted within the prescribed 30-day window. Plaintiff also argues that the bill establishing the Commission violated the requirement that items in appropriation bills relate specifically to an appropriation in the bill.

Assuming without deciding justiciability (*see Pataki v N.Y. State Assembly*, 4 NY3d 75, 97 [2004]; *Saxton v Carey*, 44 NY2d 545, 549-551 [1978]), this sub-cause of action must be denied. With regard to timeliness, Article VII, Section 3 allows the submission of budget bills “at any time” with the consent of the Legislature. Although no formal consent appears in the record, the Legislature’s consideration and passage of the bill is effective consent in itself. In any event, the 30-day timeframe appears to be precatory, not mandatory. Unlike, for instance, Article III, Section 14, which states that “[n]o bill shall be passed or become a law unless it has been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its

final passage,” Article VII, Section 6 contains no such mandatory language (*cf.* *Maybee v State*, 4 NY3d 415, 419-421 [2005] [holding that rationale underlying a Governor’s statement of necessity to allow a bill to be passed without being before Legislature for three days is not susceptible to judicial review]). Nor does the Commission bill violate Article VII, Section 6 of the State Constitution. The creation of the Commission relates specifically to items of appropriation in the 2015 budget for judicial and legislative pay and is not “essentially non-budgetary” (*Pataki*, 4 NY3d at 98-99; *see Schuyler v S. Mall Constructors*, 32 AD2d 454 [3d Dept 1969]).

Prudential considerations further weigh against invading the province of the Governor and Legislature. “[T]he consequences of judicial second-guessing of the Governor’s and the Legislature’s choice” to create the Commission by budget bill outside the 30-day window could be “draconian” (*Maybee*, 4 NY3d at 420; *see Schulz v State*, 81 NY2d 336, 348-349 [1993]). If the Court “accepted plaintiff’s argument here, any statute, no matter how important to the state,” would be subject to invalidation if passed under similar circumstances (*Maybee*, 4 NY3d at 420).

Finally, the particular circumstances of this case also counsel restraint. Plaintiff did not commence this action until September 2016, well after the Commission bill was signed by the Governor in April 2015, the Commission issued its Final Report on Judicial Compensation on December 24, 2015, and

its recommendations took on the force of law on April 1, 2016. While the Court recognizes that invalidation of the Commission and of the raises that followed is precisely the relief plaintiff seeks, the relief she requests in her sixth cause of action must be denied (*see Schulz*, 81 NY2d 336, 348-349 [1993]).

Accordingly, it is

ORDERED that plaintiff's motion for disqualification, reargument, renewal, and vacatur is denied;

ORDERED that defendants' motion for sanctions is denied;

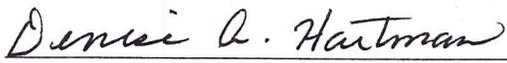
ORDERED that summary judgment is granted in favor of defendants; and

ORDERED AND ADJUDGED AND DECLARED that plaintiff has not demonstrated that the Laws of 2015, ch 60, Part E § 3 [5], which created the Commission on Legislative, Judicial & Executive Compensation, is facially unconstitutional.

This constitutes the Decision and Judgment of the Court. The original Decision and Judgment is being transmitted to defendant's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Judgment does not constitute entry or filing under CPLR 2220 or 5016 and counsel is not relieved from the applicable provisions of those rules

respecting filing and service.

Dated: Albany, New York
November 28, 2017


Denise A. Hartman
Acting Justice of the Supreme Court

Papers Considered

1. Order to Show Cause Dated June 16, 2017 and Moving Affidavit, with Exhibits A-G
2. Defendants' Affirmation in Opposition to Plaintiff's Order to Show Cause and in Support of Defendants' Cross-Motion, with Exhibits A-AA
3. Defendants' Memorandum of Law in Opposition to Plaintiff's Order to Show Cause and in Support of Defendants' Cross-Motion
4. Plaintiff's Letter Dated July 27, 2017
5. Plaintiff's Affidavit in Reply and in Opposition, with Exhibits H-J
6. Plaintiff's Memorandum of Law in Reply and in Further Support