New York Law Journal

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Judges Bridle at Claim They Lack Raise Power

Richard H. Dolan faced sharp questioning yesterday from skeptical members of the Court of Appeals as he argued that the state Legislature has not violated the constitutional rights of judges by denying them a pay raise for more than a decade. "The basic structure, the basic framework of our government is tripartite, three equal branches of government," Judge Carmen Beauchamp Ciparick said. "With your proposition here, it would relegate the judicial branch to such an ineffective branch. How does it serve the public's interest in a competent, diverse and effective judiciary to take that stand?"

Joel Stashenko

01-13-2010

ALBANY - An attorney who argued that the state Legislature has not violated the constitutional rights of judges by denying them a pay raise for more than a decade faced sharp questioning yesterday from skeptical members of the Court of Appeals.

Richard H. Dolan contended that the negotiating process that has resulted in a pay raise bill being stalled for years in the Legislature is nothing more than the usual give-and-take that has been employed for generations to decide what bills and appropriations win passage and what measures fail.

The state Constitution contains no provisions that would allow the courts to impose their will and compel the first judicial pay increase since 1999, Mr. Dolan contended.

Mr. Dolan argued for the Legislature and the governor in all three cases before the Court yesterday: *Maron v. Silver*, 16, *Larabee v. Governor*, 17, and *Chief Judge v. Governor*, 18. Several Court members took him to task.

"The basic structure, the basic framework of our government is tripartite, three equal branches of government," Judge Carmen Beauchamp Ciparick said. "With your proposition here, it would relegate the judicial branch to such an ineffective branch. It could be mischief. How does it serve the public's interest in a competent, diverse and effective judiciary to take that stand?"

Judge Victoria A. Graffeo asked at what point are judicial salaries so "ridiculously low" as to be universally recognized as compromising the independence of the judiciary.

In the Event of a Tie

As a plaintiff in one of the pay raise cases before the Court of Appeals, Chief Judge Jonathan Lippman did not take part in yesterday's oral arguments. With only six judges considering the issue, a 3-3 tie is possible.

In that event, Article VI, §2(a) of the state Constitution provides that a Supreme Court justice could temporarily be designated to serve on the Court or "vouch in."

Historically, the possibility of a tie has not been recognized by Court members until after arguments have been heard. In the past, such judges have been asked to "vouch in" on the Court when members sought to form a necessary five-judge quorum to hear cases or a four-judge plurality for the Court to render rulings.

If a seventh judge is deemed necessary in this case, re-arguments could be requested or the temporary judge could decide the case on the papers and the record of oral arguments.

Due to recusals, absences and vacancies, it is not unusual for six judges to decide a case. Judge Lippman, for instance, did not participate in the review of decisions reached by the Appellate Division, First Department, while he was that court's presiding justice.

Court officials said yesterday the most recent "vouch in" of a judge appears to have been that of Justice Miriam J. Altman of the Second Department in a 2003 case, *Ulster Home Care v. Vacco*.

—Joel Stashenko

"It's rather sad that we're all sitting here talking about this after 10 years and that our bench is put in this position of having to deal with

this issue of the constitutionality of judicial salaries," Judge Graffeo said. "Is there never a time when inadequate compensation for the judiciary becomes an issue of constitutional dimension?"

Among other arguments, all three suits contend the due process rights of judges have been violated by the way passage of judicial pay raise bills have come to be linked to passage of unrelated legislation, especially a pay increase for state lawmakers themselves (NYLJ, Jan. 4).

Judge Eugene F. Pigott Jr. said the situation had become analogous to the "Peanuts" comic strip where judges, in the form of Charlie Brown, have again and again had the football pulled out from under them at the last second by legislators with other agendas.

"At some point what we're grappling for here...is that there is a constitutional right to have a judiciary and the judiciary has a right to be adequately compensated and the Legislature agrees with that," Judge Pigott said. "Everybody in the room agrees that the judges deserve a raise and for some reason we can't get the Legislature to leave the football there and I am missing something there. And the reason is, it seems to me, is that there is linkage, that they refuse to recognize the independence of the judiciary and vote up or down on a judicial raise."

By not finding a constitutional violation in the treatment of the judges, Judge Pigott said Mr. Dolan was relegating the judiciary to the status of a state agency such as the Department of Motor Vehicles that is completely at the mercy of lawmakers for funding rather than an independent, co-equal branch of government.

"What is striking to me is that rather than say there can be a constitutional issue here, you're saying. 'There isn't. It doesn't make any difference what the Legislature does. They can do what they damn well please. There's nothing that the judiciary can do.' I find that absolutely stunning," Judge Pigott said.

While longer than many previous judicial pay increase droughts, Mr. Dolan said the 11 years that have passed since the last round of raises is not unprecedented for the judiciary in New York history. Ultimately, the Legislature has come through with raises for judges, according to Mr. Dolan.

"Will that happen in this case? Absolutely," Mr. Dolan said. "At some point the legislative process will deal with this."

"But when?" Judge Pigott asked.

"Judge, I wish I knew," Mr. Dolan responded.

"Then don't say it if you don't know it," the judge shot back, irritation rising in his voice.

Judges' Lawyers

Attorneys for the plaintiff-judges in the three cases received gentler treatment from the Court.

Thomas Bezanson of Cohen & Gresser argued for the *Larabee* plaintiffs that in addition to the constitutional violation represented by linkage, a "dramatic and intolerable" diminishment in judges' buying power has occurred over the past 11 years that is prohibited by the compensation clause of the Constitution.

Pay Raise Rulings
Before The Court of Appeals

• *Maron v. Silver*, 58 AD3d 102 (3rd Dept. 2008): Nothing in the Constitution forbids legislators from "engaging in politics" by linking judges' pay to unrelated issues. Moreover, the Compensation Clause, which bars diminishment of judges' wages, does not protect against the erosion of judicial salaries due to inflation.

• *Larabee v. Governor*, 65 AD3d 74 (1st Dept. 2009): Accepts the Third Department view that there has been no Compensation Clause violation. However, making judges' salary increases contingent on a legislative pay increase relegates the courts to an "inferior government entity" and violates the doctrine of separation of powers.

• *Chief Judge v. Governor*, 25 Misc.3d 268 (St. Sup. Ct. 2009): Follows *Larabee*, holding that the governor and legislative leaders have unconstitutionally abused their power through the practice of linkage. Judges' Compensation Clause argument rejected.

• A fourth suit, *Silverman v. Silver*, 117058/2008, has been filed but no decision has been reached, and it is not before the Court.

Bernard Nussbaum of Wachtell, Lipton, Rosen & Katz contended on behalf of Chief Judge Jonathan Lippman that when their salaries are matched against several gauges—federal judges, judges in other states, court clerks and first-year associates at large New York City law firms—pay for state judges has become inadequate.

The attorney for the plaintiffs in *Maron*, Steven Cohn of Carle Place, contended that a 2006 appropriation in the state budget of $69.5 million for raises is valid and that the Court should simply direct the state comptroller to disperse the money to judges. The state has argued that the Legislature never approved a provision authorizing the release of the money during the 2006-07 state budget and that the money was rightly not appropriated.

George Bundy Smith, a former Court of Appeals judge, is teaming with Mr. Bezanson in pro bono representation of the *Larabee* plaintiffs. Mr. Smith is with Chadbourne & Parke, Mr. Bezanson's former firm.

Judge Lippman took no part in yesterday's arguments. He said in previous interviews that he would recuse himself from the pay raise cases because he is a plaintiff in one of the actions.

Judge Lippman took over the *Chief Judge* case, which was originally titled *Kaye v. Silver*, when Chief Judge Judith S. Kaye left the Court at the end of 2008 due to mandatory retirement rules.

The rest of the Court is hearing the matter under the rarely invoked "rule of necessity." It allows judges who would otherwise be required to recuse themselves from actions that affect them personally to sit in cases if there are no other courts with jurisdiction to decide the matters.

The Court has mainly invoked the rule in matters involving administration of the courts, such as *Maresca v. Cuomo*, 64 NY2d 242 (1984), in which the Court upheld the constitutionality of state mandatory retirement rules for judges.

Other plaintiffs in the cases heard by the Court yesterday are Manhattan Family Court Judge Susan Larabee (See Profile); Cattaraugus County Family Court Judge Michael Nenno (See Profile); Manhattan Civil Court Judge Geoffrey Wright (See Profile) and Manhattan Criminal Court Judge Patricia Nunez (See Profile) in *Larabee*.

The plaintiffs in *Maron* are Supreme Court Justice Edward A. Maron of Nassau County (See Profile), Supreme Court Justice Arthur Schack of Brooklyn (See Profile) and former Supreme Court Justice Joseph A. DeMaro of Brooklyn.

The Court is expected to decide the cases it heard yesterday within a month or two.

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