

Tenth Cause of Action - September 2, 2016
verified complaint
CUA v. Cuomo - second
citizen taxpayer action
Albany #
15122-
2016

AS AND FOR AN NINTH CAUSE OF ACTION

**Three-Men-in-a-Room Budget Dealing-Making is Unconstitutional,
As Unwritten and As Applied**

81. Plaintiffs repeat, reiterate, and reallege ¶¶ 1-80 herein with the same force and effect as if more fully set forth.

82. Plaintiffs' ninth cause of action herein is the sixteenth cause of action of their March 23, 2016 verified second supplemental complaint in their prior citizen-taxpayer action, Exhibit A: ¶¶458-470. It is accurate, true, and correct in all material respects.

A. **Three-Men-in-a-Room Budget Deal-Making is Unconstitutional, As Unwritten**

83. Plaintiffs' showing is set forth by the incorporated Exhibit A: ¶¶459-466. It is accurate, true, and correct in all material respects.

B. **Three-Men-in-a-Room Budget Deal-Making is Unconstitutional, As Applied**

84. Plaintiffs' showing is set forth by the incorporated Exhibit A: ¶¶467-470. It is accurate, true, and correct in all material respects.



AS AND FOR A TENTH CAUSE OF ACTION

**The Appropriation Item Entitled "For grants to counties for district attorney salaries",
in the Division of Criminal Justice Services' Budget, Contained in Aid for Localities
Budget Bill #S.6403-d/A.9003-d, Does Not Authorize Disbursements
for Fiscal Year 2016-2017 and is Otherwise Unlawful and Unconstitutional.
Reappropriation Items are also Improper, if not Unlawful**

85. Plaintiffs repeat, reiterate, and reallege ¶¶ 1-84 herein with the same force and effect as if more fully set forth.

86. Defendant CUOMO's Aid to Localities budget bill for fiscal year 2016-2017, #S.6403/A.9003, was over 900 pages. In addition to the first two amendments to the Aid to

Localities budget bill – and to seven other budget bills – recounted at ¶¶354-382 of plaintiffs’ March 23, 2016 verified second supplemental complaint – the Aid to Localities budget bill was amended twice on March 31, 2016 following the three-men-in-a-room budget deal-making by defendants CUOMO, FLANAGAN, and HEASTIE. The second time, the Aid to Localities budget bill, now designated #S.6403-d/A.9003-d, was 1,212 pages.

87. The amending of the bill on March 31, 2016, as likewise on March 11/12, 2016, was completely opaque, not reflected by any votes of legislators introducing and approving the amendments.

88. Within the massive bill, which defendants SENATE and ASSEMBLY passed on March 31-April 1, 2016, on a “message of necessity”, is the Division of Criminal Justice Services’ budget, at pages 72-130. It begins with a tally of the appropriations, whose “All Funds” total is \$205,775,000, and a tally of the reappropriations, whose “All Funds” total is \$299,384,451 (Exhibit H, at p. 72).

89. The \$205,775,000 in appropriations is itemized by the first 14 pages of the Division of Criminal Justice Services’ nearly 60-page budget. Among the items is one entitled “For grants to counties for district attorney salaries”, appropriating \$4,212,000. It reads, as follows:

“Notwithstanding the provisions of subdivisions 10 and 11 of section 700 of the county law or any other law to the contrary, for state fiscal year 2014-15 the state reimbursement to counties for district attorney salaries shall be equal to the amount received by a county for such purpose in 2013-14 and 100 percent of the difference between the minimum salary for a full-time district attorney established pursuant to section 183-a of the judiciary law prior to April 1, 2014, [and] the minimum salary on or after April 1, 2014. For those counties whose salaries are not covered by section 183-a of the judiciary law, the state reimbursement for these counties will be pursuant to a plan prepared by the commissioner of criminal justice services and approved by the director of the budget (20244).” (Exhibit H: pp. 72-73, bold and underlining added)

90. So little scrutiny is given to the disbursement of state money to the counties for district attorney salaries, that no one noticed – or no one cared – that the above item of appropriation is erroneous, *on its face*. Apart from its omission of the word “and”, without which it makes no sense, it also makes no sense because it provides for reimbursement “for state fiscal year 2014-15”. Indeed, this *verbatim* identical item, excepting the “(20244)”, was originally in defendant CUOMO’s Aid to Localities Budget Bill for state fiscal year 2014-2015 – and replicated in last year’s Aid to Localities bill, without any updating of the fiscal year to 2015-2016.

91. Consequently, *as written*, there is NO item in Aid to Localities Budget Bill #S.6403-d/A.9003-d authorizing disbursements of state money to the counties for district attorney salaries for this fiscal year – not \$4,212,000 or any other sum.

92. Yet, apart from this obvious error, repeating the same obvious error as was in last year’s Aid to Localities budget bill, the aforesaid “grants to counties for district attorney salaries” is both unlawful and unconstitutional, *as written*:

(a) it violates and overrides three specific statutory provisions: “subdivision 10 and 11 of section 700 of the county law”; AND “section 183-a of the judiciary law” – and does so without any stated explanation or justification;

(b) it violates and overrides “any other law to the contrary” – which, apart from being unconstitutionally vague, would include the New York State and United States Constitutions, which it cannot constitutionally supersede;

(c) it unconstitutionally rests on “the amount received by a county for such purpose in 2013-14” – without specifying the amount each county received “for such purpose in 2013-14” or the document containing that straight-forward information;

(d) it unconstitutionally rests on “a plan prepared by the commissioner of criminal justice services and approved by the director of the budget” – seemingly not then existent.

93. The “grants to counties for district attorney salaries” item is also unlawful and unconstitutional, *as applied* – as the information as to how much state aid each county received for

district attorney salary in fiscal year 2013-14 and how much each county is slated to receive in fiscal year 2016-17 – which should be readily available – is not.

94. Indeed, upon plaintiffs' July 13, 2016 FOIL request to defendant Comptroller for such information (Exhibit I-1), based on his statutory duty under County Law §700.11(c), which states:

“...the comptroller shall annually determine the amount of state aid payable to each county pursuant to paragraphs (a) and (b) hereof for each calendar year and shall pay such amount on his audit and warrant to the chief fiscal officer of each such county during the month of September in each such year. Where a county first becomes entitled to state aid pursuant to paragraphs (a) and (b) hereof on a day other than January first, nineteen hundred ninety-nine or January first of any other year thereafter, the amount of state aid payable to such county in the year it first becomes entitled to such state aid shall be prorated accordingly”,

his response, on July 22, 2016, was that “after a diligent search, [the Comptroller is] unable to locate any records” (Exhibit I-3).

95. Likewise upon plaintiffs' July 11, 2016 FOIL requests to the Division of Criminal Justice Services and Division of the Budget for the referred-to “plan prepared by the commissioner of criminal justice services and approved by the director of the budget” (Exhibit J-1), their responses were to defer production to the end of October (Exhibits J-2, J-3).

96. The only thing clear about the appropriation is that for counties covered by Judiciary Law §183-a, whatever they get includes:

“100 percent of the difference between the minimum salary for a full-time district attorney established pursuant to section 183-a of the judiciary law prior to April 1, 2014 [and] the minimum salary on or after April 1, 2014.”

97. April 1, 2014 is the date on which the third and final phase of the judicial salary increases recommended by the Commission on Judicial Compensation's August 29, 2011 report took effect. Consequently, the meaning is that the state is paying for the FULL “100 percent” increase in

district attorney salaries resulting from the Commission on Judicial Compensation's August 29, 2011 report.

98. Whether and by how much the counties should be reimbursed for the district attorney salary increases that took effect on April 1, 2014, April 1, 2013, and April 1, 2012 because of the Commission on Judicial Compensation's August 29, 2011 report are POLICY DETERMINATIONS. They do not belong in a budget bill, but, rather, in the statute governing state aid for district attorney salaries: County Law §700.10 and §700.11.

99. When district attorney salaries were previously increased in 1999 as a result of the increase in judicial salaries, County Law §700.11 was amended to reflect the aid the state would be providing the counties based thereon. The amendment, County Law §700.11(b), reads as follows:

“(b) In addition to the state aid provided in paragraph (a) of this subdivision, each county, the salary of the district attorney of which is determined pursuant to section one hundred eighty-three-a of the judiciary law, shall be entitled to receive state aid in the amount of forty-one percent of the difference between the amount required to be paid to such district attorney pursuant to section one hundred eighty-three-a of the judiciary law on and after January first, nineteen hundred ninety-nine and the amount required to be paid pursuant to such section immediately prior to such date, except that in the county of Dutchess the amount shall be forty-two percent of such difference in the county of Putnam the amount shall be forty percent of such difference in the county of Monroe the amount shall be thirty-nine percent of such difference and in the counties of Erie, Nassau, Suffolk and Westchester the amount shall be thirty-six percent of such difference.” (underlining added).

100. In other words, for the prior district attorney salary increase resulting from the increase in judicial salaries, the state did not pick up the full 100% tab, but, rather between 36-42%.

101. County Law §700.11 controls – and it does not authorize state aid “after January first, nineteen hundred ninety-nine” at a rate beyond 36-42%.

102. Moreover, the predicate for state aid under County Law §700.11 is that a county is covered by Judiciary Law §183-a. Absent amendment to Judiciary Law §183-a or to County Law

§700.8 which it incorporates, it is unlawful for the state to provide aid to a county not within the purview of these two statutes.

103. The unspecified counties not covered by Judiciary Law §183-a are counties with populations of less than 40,000. Nothing in Judiciary Law §183-a or County Law §700.8 dictates the salaries of the district attorneys of those counties, irrespective of whether their district attorneys are part-time or full-time. Their boards of supervisors are free to set the salaries of their full-time district attorneys at whatever levels they deem appropriate to the county budgets and local conditions. Consequently, there is no basis for the state to reimburse those counties for their district attorney salaries.

104. The state budget has become a backdoor to securing what should be, but, apparently, cannot be, secured through normal legislative channels – in this case, 100% reimbursement to the counties for the district attorney increases resulting from the Commission on Judicial Compensation’s August 29, 2011 report and inclusion of counties of less than 40,000 in state aid for district attorney salaries.

105. The budget is also a slush fund – particularly by its reappropriations – and most of the Division of Criminal Justice Services budget in Aid for Localities Budget Bill #S.6403-d/A.9003-d is reappropriations (pp. 86-130).

106. New York’s Division of Budget website has a “Citizen’s Guide”: <https://www.budget.ny.gov/citizen/index.html>, with a glossary of “Financial Terminology”. Its definition of “reappropriation”, for which it also furnishes an example, is as follows:

“A reappropriation is a legislative enactment that continues all or part of the undisbursed balance of an [appropriation](#) that would otherwise lapse (see [lapsed appropriation](#)). Reappropriations are commonly used in the case of federally funded programs and capital projects, where the funding amount is intended to support activities that may span several fiscal years.

For example, funds for capital projects are customarily recommended and appropriated in amounts sufficient to cover the total estimated cost of each phase of a specific project (such as land acquisition, design, construction and equipping). As contracts within each phase are established, portions of the capital construction appropriation are allocated. However, [disbursements](#) are made only to meet the actual costs incurred as each phase of the project progresses. In ensuing years, the balances not disbursed are reappropriated to cover the costs of subsequent construction phases in the project.”

107. The hyper-linked definition of “lapsed appropriation” is as follows:

“A lapsed appropriation is an [appropriation](#) which has expired and against which [obligations](#) can no longer be incurred, nor payment made. An appropriation lapses, and is no longer available to authorize any [encumbrance](#) or cash payments, on June 30 for State operations and on September 15 for aid to localities, capital projects, and debt service.”

108. Based upon these definitions, it appears that a substantial number of reappropriation items in the Division of Criminal Justice Services budget should have lapsed. Among them:

“By chapter 53, section 1, of the laws of 2013:

“For grants to counties for district attorney salaries. Notwithstanding the provisions of subdivisions 10 and 11 of section 700 of the county law or any other law to the contrary, for state fiscal year 2012-13 the state reimbursement to counties for district attorney salaries shall be equal to the amount received by a county for such purpose in 2011-12 and 100 percent of the difference between the minimum salary for a full-time district attorney established pursuant to section 183-a of the judiciary law prior to April 1, 2012, and the minimum salary on or after April 1, 2013.\$3,862,000.....(re. \$56,000)”
(Exhibit H: at p. 94).

“By chapter 53, section 1, of the laws of 2012:

...

For additional grants to counties for district attorney salaries. Notwithstanding the provisions of subdivisions 10 and 11 of section 700 of the county law or any other law to the contrary, for state fiscal year 2012-13 the state reimbursement to counties for district attorney salaries shall be equal to the amount received by a county for such purpose in 2011-12 and 100 percent of the difference between the minimum salary for a full-time district attorney established pursuant to section 183-a of the judiciary law prior to April 1, 2012, and the

minimum salary on or after April 1, 2013.
.....\$700,000.....(re. \$56,000)”
(Exhibit H: at pp. 96-97).

“By chapter 50, section 1, of the laws of 2008, as amended by chapter 53,
section 3, of the laws of 2008:

For additional grants to counties for district attorney salaries pursuant
to subdivisions 10 and 11 of section 700 of the county law.

Notwithstanding the provisions of any other law to the contrary, for
state fiscal year 2008-2009 the liability of the state and the amount to
be distributed or otherwise expended by the state pursuant to
subdivisions 10 and 11 of section 700 of the county law shall be
determined by first calculating the amount of the expenditure or other
liability pursuant to such law, and then reducing the amount so
calculated by two percent of such amount
.....2,869,000.....(re. \$113,000)”
(Exhibit H: at p. 100).

“By chapter 50, section 1, of the laws of 2008:

For recruitment and retention of district attorneys in counties located
outside a city of a population of 1,000,000 or more persons to be
distributed in accordance with a formula based upon the population of
each county receiving a grant of a portion of such funds, provided that
no county shall receive an award of less than \$4,000
1,500,000.....(re. \$550,000)” (Exhibit
H: at p. 124)

“By chapter 50, section 1, of the laws of 2007, as amended by chapter 50,
section 1, of the laws of 2008:

For services and expenses related to the district attorney loan
forgiveness program and the recruitment and retention of district
attorneys, pursuant to the following sub-schedule:

sub-schedule

For recruitment and retention of district attorneys in counties located
outside a city of a population of 1,000,000 or more persons 11 to be
distributed in accordance with a formula based upon the population of
each county receiving a grant of a portion of such funds, provided that
no county shall receive an award of less than \$4,000
1,500,000(re. \$55,000)”
(Exhibit H: at p. 125).

109. The very outset of Aid to Localities Budget Bill #S.6403-d/A.9003-d, states as follows in its section 1, paragraph d:

“No moneys appropriated by this chapter shall be available for payment until a certificate of approval has been issued by the director of the budget, who shall file such certificate with the department of audit and control, the chairperson of the senate finance committee and the chairperson of the assembly ways and means committee.” (Exhibit H: at p. 2).

110. Plaintiffs September 1, 2016 FOIL request for such filed certificate of approval from the director of the budget for the Division of Criminal Justice Services’ budget for fiscal year 2016-2017– and for any certification of the Division of Criminal Justice Services’ budget by the Division of Criminal Justice Services itself – is annexed (Exhibit K).