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State Judges Go to Battle for Retroactive Pay

BY JOEL STASHENKO

STATE JUDGES are entitled to raises retroactive to between 2005 and 2009 under a provision in the 2009-2010 state budget, a lawyer argued Wednesday before a Brooklyn-based appellate panel.

Steven Cohn of Carle Place, who represents six plaintiff judges, urged four justices of the Appellate Division, Second Department, to ignore the state's argument that the appropriation of $51 million for "adjustments" in judicial pay was not valid because legislative leaders disavowed the raise after the fact, and that a 2010 state Court of Appeals ruling seemed to call the validity of the 2009 appropriation into question.

"I believe the salaries were set by law the moment the governor signed that bill," Cohn said during oral arguments in *Pines v. State of New York*, 2011-02821. "Once it's a statute, you can't take it away. They can't say, 'Oops, we made a mistake.' They are responsible for what they did."

Customarily, budget bills contain the phrase that spending is to be "pursuant to" authorization contained elsewhere in the spending plan, but the phrase was missing from the legislation that became Chapter 51 of the laws of 2009 when it was signed by then-governor David Paterson.

The state maintains that without that authorizing language, the appropriation is invalid. The plaintiff judges contend the appropriation was self-executing and that no other authorization was needed for their raises to become law.

The 2009 provision on raises was never acted on while the issue was disputed in court.

Judges did receive raises beginning in April 2012 under the recommendation of a judicial compensation commission.

Second Department Justices Robert Miller and Mark Dillon wondered during Wednesday's arguments if the court's validation now of the $51 million appropriation would be handing Chief Judge Jonathan Lippman and Chief Administrative Judge A. Gail Prudenti a blank check to supplement judicial salaries even further.

But since the compensation commission did not recommend any retroactive raises, many judges have pinned their hopes on the *Pines* litigation to provide some retroactivity for the 13-year period between 1999 and 2012 they went without a salary increase.

What would prevent Lippman and Prudenti from "cutting up" the money for judicial raises as they see fit? Miller asked.

"Nothing," said Assistant Solicitor General Julie Sheridan, arguing against the 2009 judicial pay raise. "That is part of the problem."

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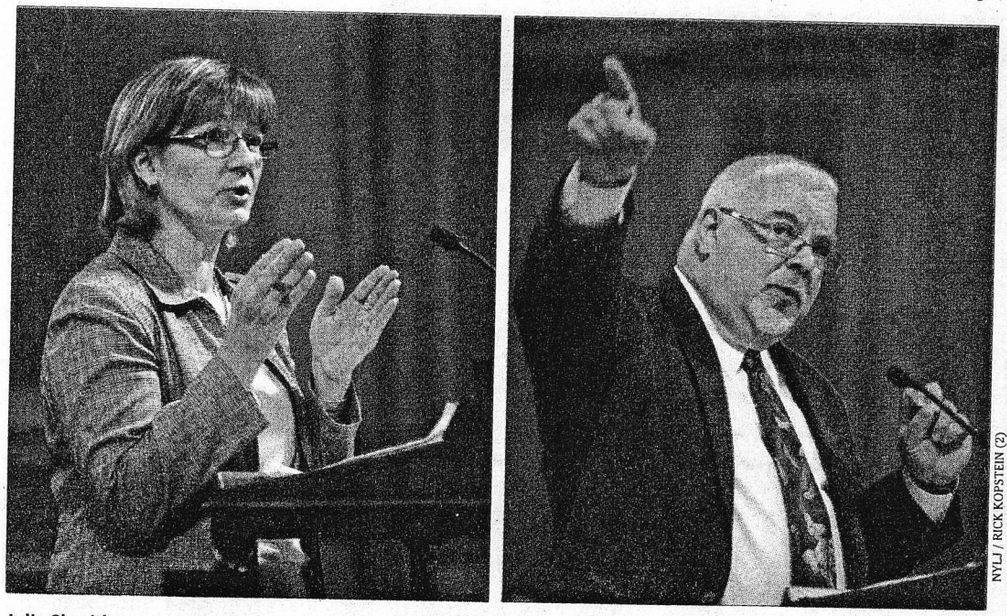

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Julie Sheridan, assistant solicitor general, and **Steven Cohn** of Carle Place argue Wednesday before the Appellate Division, Second Department.

Pay Raises

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Cohn said court administrators, if given authorization to spend the $51 million at this late date, are bound by a schedule for raises laid out by the Judiciary when it proposed the appropriation in the 2009-2010 budget.

Legislative leaders such as Dennis Farrell Jr., D-Manhattan, chair of the Assembly Ways and Means Committee, made disclaimers soon after the budget passed in 2009 that the appropriation for judicial salaries "certainly does not authorize" a pay raise (NYLJ, April 3, 2009).

But disavowing the salary increase does nothing to relieve the Legislature of its responsibility for raises, Cohn contended.

He also said that the Court of Appeals' ruling in *Maron v. Silver,* 14 NY3d 230 (2010), does not prove that the 2009 appropriation lacked the force of law. *Maron* found that a 2006 pay bill was invalid because its appropriation contained money for raises and a "pursuant to" clause. But no other bill authorizing the spending passed that year.

Sheridan said *Maron* showed that an appropriation bill is not valid without a companion bill spelling out details of how the money would be spent.

"The lump sum does not establish an adjustment of judicial compensation," Sheridan said.

The attorney for the state said it remains something of a mystery why the "pursuant to" phrase was taken out of the appropriations bill in 2009—the language used by the Legislature was adopted from the Judiciary's own budget proposal.

"Do you believe it was inadvertent that that section was stricken out?" Justice Jeffrey Cohen asked Sheridan. "Was it a mistake? Or was it intentional? Does it make a difference?"

"There is nothing in the law to establish that that was a drafting mistake," Sheridan said. "It is possible."

The fourth member of the panel was Justice Plummer Lott.

According to the executive summary of the Judiciary's budget for the 2009-2010 fiscal year, the appropriation of $51 million in Chapter 51 was based on retroactive raises of 27 percent between April 1, 2005, and April 1, 2009.

As then outlined by the Judiciary, the raises would have increased in four steps from the then $136,770-a-year salary for Supreme Court justices to $174,000 between April 2005 and April 2009.

In her 2011 ruling in *Pines,* Nassau County Supreme Court Justice Karen Murphy accepted the plaintiffs' argument that the Legislature's appropriation of $51 million was sufficient to make the raises legal.

Murphy said the appropriation met the requirement that has been in the state Constitution since the 1920s that judicial pay raises be "established by law" (NYLJ, Feb. 14, 2011).

"The State Constitution does not mandate a specific format for judicial salaries, and consequently, Chapter 51 is enforceable as it stands," Murphy wrote in *Pines v. State of New York,* 13518/10.

The lead plaintiff is Suffolk County Supreme Court Justice Emily Pines. Other plaintiffs are Supreme Court Justice David Demarest in St. Lawrence County, Acting Queens Supreme Court Justice Jeffrey Lebowitz, Supreme Court Justice Stephen Ferradino in Saratoga County, Supreme Court Justice Ralph Boniello in Niagara County and Nassau County Court Judge Joseph Calabrese.

In an amicus curiae brief before the Second Department in support of the judges, a coalition of judicial associations argued that it is the duty of the appeals judges to look at what the Legislature did through their 2009 appropriation, not what legislators after the fact said they did not mean to do.

"It is not the place of the Court to examine extrinsic evidence to discover legislative intent, where the legislative language is clear," Joseph Forstadt of Stroock & Stroock & Lavan wrote for the judicial associations.

The Association of Justices of the Supreme Court of the State of New York, the Supreme Court Justices Association of the City of New York and the New York State Association of City Court Judges joined in the amicus curiae.

Also in the *Maron* ruling, the Court of Appeals decided that governors and the Legislature had linked consideration of judges' pay increases to unrelated public policy issues, such as improvements in government ethics laws in violation of the separation of powers doctrine of the state Constitution.

The *Maron* ruling, however, provided no remedy for judges except to direct that the governor and Legislature consider the judicial pay issue on its own merits without legislative horse-trading on other issues (NYLJ, Feb. 24, 2010). The court established no sanctions if its directive was not followed.

Lippman, who was the plaintiff in one of three judicial pay bills decided in the *Maron* ruling, maintained that the litigation by the judges helped compel the Legislature and Paterson to establish the Commission on Judicial Compensation in 2010.

The commission in 2011 agreed on a three-year schedule of raises for all judges totaling 27 percent. The first two years of the raises, which have increased the annual salaries of Supreme Court justices, for example, to $167,000 from $136,700, have gone into effect.

A third-year increase is scheduled to boost pay for judges at the Supreme Court level to $174,000 a year beginning April 1, 2014.

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