

CENTER for JUDICIAL ACCOUNTABILITY, INC.*

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January 15, 2016

TO: Temporary Senate President John Flanagan
Assembly Speaker Carl Heastie

FROM: Elena Ruth Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: IMMEDIATE OVERSIGHT REQUIRED:

(1) The Commission on Legislative, Judicial and Executive Compensation and its statute-repudiating, fraudulent, and unconstitutional December 24, 2015 Report with “force of law” judicial salary recommendations;

(2) The Senate Judiciary Committee’s January 20, 2016 public hearing to confirm the nomination of Westchester District Attorney Janet DiFiore as New York’s Chief Judge – and the deceptive public notice concealing that oral testimony is restricted to the nominee and bar associations

The Center for Judicial Accountability, Inc. (CJA) commends you on your powerful words last week as you opened the 239th session of the Legislature, particularly those of Assembly Speaker Heastie about restoring the People’s faith in government through accountability, transparency, and ethics. Doubtless you will be most concerned to learn that your appointees to the Commission on Legislative, Judicial and Executive Compensation – former Senate Judiciary Committee Chairman James Lack and Roman Hedges, formerly Deputy Secretary of the Assembly Ways and Means Committee – were lead players in the flagrant violation of ethical rules, statutory duty, and the public’s trust by the seven-member Commission.

On December 24, 2015, the Commission presented you, Governor Cuomo, and then Chief Judge Lippman with a “Final Report”, purporting it to be on “judicial compensation” and “Pursuant to chapter 60 of the Laws of 2015”. In fact, the December 24, 2015 Report knowingly violates the statute and is a criminal fraud that could easily support felony prosecutions under such penal law provisions as “offering a false instrument for filing in the first degree” (§175.35), “grand larceny in the first degree” (§155.42), “scheme to defraud in the first degree” (§190.65), “defrauding the government” (§195.20), and “corrupting the government” (§496). This is particularized by my December 31, 2015 letter to Chief Judge Nominee/Westchester District Attorney Janet DeFiore

* **Center for Judicial Accountability, Inc. (CJA)** is a national, non-partisan, non-profit citizens’ organization, working to ensure that the processes of judicial selection and discipline are effective and meaningful.

entitled “So, You Want to Be New York’s Chief Judge? – Here’s Your Test: Will You Safeguard the People of the State of New York – & the Public Fisc?...” A copy is enclosed.¹

Last week, Senate Judiciary Committee Chairman John Bonacic scheduled the hearing on nominee DiFiore’s confirmation as Chief Judge for January 20, 2016. Notwithstanding the public notice of the hearing states “ORAL TESTIMONY BY INVITATION ONLY”, Chairman Bonacic is not permitting anyone to testify, except for nominee DiFiore and the bar associations which rated her. Reflecting this is my January 11, 2016 e-mail to Chairman Bonacic’s counsel, requesting to testify based on my December 31, 2015 letter. A copy of that e-mail, which I furnished on January 12th to nominee DiFiore and on January 13th to the bar associations is enclosed.

Temporary Senate President Flanagan, do you believe that it is constitutional or even proper that at the Senate Judiciary Committee’s hearing to confirm New York’s highest state judge, your appointed chair should restrict oral testimony to the nominee and bar associations? And, if it is constitutional and proper, why does the Committee’s hearing notice deceive the public into believing that the Committee will entertain their requests to orally testify when it will not.

By copy of this letter to Senator Andrew Lanza, who you have appointed as Deputy Majority Leader for Government Oversight and Accountability, I request that he also address the matter. He is particularly well positioned to do so, as he is a member of the Senate Judiciary Committee, in addition to being a member of the Senate Ethics Committee and Co-Chair of the Legislative Ethics Commission. He is also your appointed Chairman of the Senate Committee on Investigations and Government Operations, which, as his website identifies, “serves as the Senate’s primary legislative and governmental oversight committee”.

Senate Rule VIII, §4(c)² and Assembly Rule IV, §1(d)³ require legislative committees to engage in oversight. The most expeditious way for the Legislature to discharge its oversight duties with respect to the Commission on Legislative, Judicial and Executive Compensation’s December 24,

¹ As reflected by the letter (at p. 4), I have created a webpage for it on CJA’s website, www.judgewatch.org, posting all referred-to substantiating evidence. The link to that substantiating webpage will be posted on the webpage for this letter, accessible from the prominent homepage link: “NO PAY RAISES FOR NEW YORK’S CORRUPT PUBLIC OFFICERS: The Money Belongs to their Victims!”

² “c. Committee oversight function. Each standing committee is required to conduct oversight of the administration of laws and programs by agencies within its jurisdiction.

d. Each standing committee is required to file with the secretary of the senate an annual report, detailing its legislative and oversight activities.”

³ “...Each standing committee shall propose legislative action and conduct such studies and investigations as may relate to matter within their jurisdiction. Each standing committee shall, furthermore, devote substantial efforts to the oversight and analysis of the activities, including but not limited to the implementation and administration of programs, of departments, agencies, divisions, authorities, boards, commissions, public benefit corporations and other entities within its jurisdiction.”

2015 Report is by the Senate Judiciary Committee in the context of nominee DiFiore's confirmation to be Chief Judge. Especially is this appropriate as among nominee DiFiore's immediate tasks, should she be confirmed as Chief Judge, will be submission of a supplemental Judiciary budget to fund the Report's judicial pay raise recommendation to increase judicial salaries a whopping 11% in fiscal year 2016-2017. This recommendation, which will have "the force of law" on April 1, 2016 unless overridden by the Legislature before then, was made by the Commission in the complete absence of ANY evidence that current levels of judicial "compensation and non-salary benefits" are inadequate, and, indeed, by NOT examining "non-salary benefits" or "compensation" other than salary, in willful defiance of the express and repeated mandate of the statute.

There is, of course, no shortage of legislative committees with oversight jurisdiction over the Commission on Legislative, Judicial and Executive Compensation and its December 24, 2015 Report. Apart from the Senate Judiciary Committee, chaired by Senator Bonacic, there is, in the Senate:

- the Senate Committee on Investigations and Government Operations, chaired by Senator Lanza; and
- the Senate Finance Committee, chaired by Senator Catharine Young.

In the Assembly, there is:

- the Assembly Judiciary Committee, chaired by Assemblywoman Helene Weinstein;
- the Assembly Committee on Governmental Operations, chaired by Assemblywoman Crystal Peoples-Stokes;
- the Assembly Committee on Oversight, Analysis and Investigation, chaired by Assemblywoman Ellen Jaffee; and
- the Assembly Ways and Means Committee, chaired by Assemblyman Herman Farrell, Jr.

Needless to say, the chairs and members of these committees are all afflicted by conflicts of interest, born of their friendships with Messrs. Lack and Hedges and their dependence on you, who appointed Messrs. Lack and Hedges. This, in addition to their financial interest in hiked judicial salaries resulting from the correspondence between judicial and legislative salaries in a system of three-co-equal government branches. Such must be acknowledged and overcome – and the only way to overcome it is by findings of fact and conclusions of law with respect to the evidence my December 31, 2015 letter to nominee DiFiore furnished, *to wit*, my testimony and submissions to the Commission on Legislative, Judicial and Executive Compensation:

- my November 30, 2015 written testimony, with its attached exhibits;
- my December 2, 2015 supplemental statement; and
- my December 21, 2015 further statement.

On the subject of legislative pay raises, which, together with executive branch pay raises, is next on the agenda of the Commission on Legislative, Judicial and Executive Compensation, the corruption of Messrs. Lack and Hedges and their five fellow commissioners, established by the face of their December 24, 2015 Report and the record underlying it, requires that the Commission be decommissioned by repeal of the Commission statute – Part E of Chapter 60 of the Laws of 2015.

An appropriate vehicle for repeal would be Assembly Bill #7997, first introduced on June 3, 2015 to amend the statute⁴. Enclosed is a copy of A7997, together with its extraordinary, if not unprecedented, sponsors’ memo. Over and beyond its description of Part E of Chapter 60 of the Laws of 2015 as “a devious and underhanded means” for legislators to obtain “a salary increase without accepting any responsibility therefor” – and of the circumstances and timing of its introduction and passage – the sponsors’ memo specifies, in seven different respects, the unconstitutionality of its provision giving Commission salary recommendations “the force of law”⁵. Last week, with the start of the new session, A7997 was recommitted to the Assembly Committee on Governmental Operations. This is where it had sat since being introduced last session – and now, because of the passage of over seven months, it will need to be amended. This must be done – and broadened to provide for the statute’s repeal, with a corresponding bill introduced on the Senate side.

That Part E of Chapter 60 of the Laws of 2015 must be repealed is beyond question. Its premise was that the three-branch compensation commission it created would apolitically and objectively do what

⁴ Assembly Bill #7997 was introduced by Assemblyman Andy Goodell, with the co-sponsorship of Assemblyman Peter Lopez, Assemblywoman Janet Duprey, Assemblyman Bill Nojay, and with Assemblyman Mark Johns as a multi-sponsor.

⁵ Such “force of law” provision, in the context of a prior commission statute, this pertaining to hospital closures, was described by the New York City Bar Association, in an *amicus* brief, as follows: ‘a process of lawmaking never before seen in the State of New York’; a ‘novel form of legislation...in direct conflict with representative democracy [that] cannot stand constitutional scrutiny’; a ‘gross violation of the State Constitution’s separation-of-powers and...the centuries-old constitutional mandate that the Legislature, and no other entity, make New York State’s laws’; ‘most unusual [in its]...self-executing mechanism by which recommendations formulated by an unelected commission automatically become law...without any legislative action’; unlike ‘any other known law’; ‘a dangerous precedent’ that ‘will set the stage for the arbitrary handling of public resources under the guise of future temporary commissions that are not subject to any public scrutiny or accountability. See, Exhibit 4 to my November 30, 2015 written testimony to the Commission on Legislative, Judicial and Executive Compensation (at pp. 24-25), which (at pp. 20-21) also reflects other grounds upon which Part E of Chapter 60 of the Law of 2015 is unconstitutional, *as written*, arising from its material replication of Chapter 567 of the Laws of 2010.

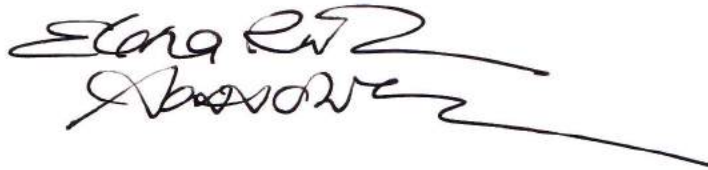
its §2 proscribed: “examine and evaluate...adequate levels of compensation and non-salary benefits” and “make recommendations” with respect thereto, taking into account “all appropriate factors”. Such premise has been blown to smithereens by how this Commission has operated – a carbon copy of how the predecessor Commission on Judicial Compensation operated under a largely identical statute. The evidentiary proof includes the videos of the hearings and meetings of both Commissions – and the written submissions they received. These establish that the commissioners made no pretense to being fair and impartial and that they demonstrated their actual bias and self-interest by utterly disregarding their sacred duty to make careful policy decisions and recommendations based on probative evidence addressed to their statutory charge. Indeed, because the citizen-opposition to the judicial pay raises was an “appropriate factor” for these Commissions’ consideration – and because such opposition from citizens was founded on their fidelity to the very statutory charge that the commissioners were hell-bent on ignoring to achieve their pre-fixed judicial pay raise goals, both Commissions disregarded the citizen opposition, as if it did not exist, thereby disposing of having to reveal its basis and determining its legitimacy by findings of fact and conclusions of law. And just as neither the December 24, 2015 Report of the Commission on Legislative, Judicial and Executive Compensation, nor the August 29, 2011 Report of the Commission on Judicial Compensation disclose the existence of any opposition to judicial pay raises, so, at their meetings, not a single Commissioner discussed the opposition, presented by hearing testimony and written submission, in their headlong, unanimous pile-on to raise judicial pay.

With Part E of Chapter 60 of the Laws of 2015 repealed, the Legislature’s outsourcing will come to an end *vis-à-vis* determining the salaries of the constitutional officers of our three government branches and Executive Law §169 state officers. The jurisdiction to develop legislation and policy with respect thereto will be returned to where it belongs: the appropriate legislative committees, presumably, the Senate Committee on Investigations and Government Operations and the Assembly Committee on Governmental Operations. If they engage in legitimate legislative process, *to wit*, holding hearings on salary and non-salary-benefits, taking testimony, and drafting bills based thereon, confronting and resolving issues honestly, by debates and votes in committee and on the Senate and Assembly floor, with amendments also being debated and voted upon, these committees and the Legislature as a whole will discover that the public has no objection to adequate and appropriate compensation levels for public officers discharging their duties. The public wants government to work – and it knows the difference between sham and real.

Perhaps it is your expectation that the above relevant Senate and Assembly committees will undertake oversight of the December 24, 2015 Report of their own initiative. Since last week, I have been contacting the offices of their chairs and ranking members, requesting their committee oversight. While I do so now again, by copy of this letter to them – with an additional request that they furnish this letter to all of their committee members – there can be no doubt that oversight will be more assured by your making an appropriate direction, consistent with your leadership positions. For this reason, I am also sending this letter to Senate Minority Leader Andrea Stewart-Cousins and Assembly Minority Leader Brian Kolb, for their direction, as well.

To further assist you, them, and Court of Appeals Nominee/Westchester District Attorney DiFiore – to whom this letter is also being furnished – enclosed is a supplemental statement of further particulars in support of legislative override of the Commission’s judicial pay raise recommendations, repeal of the Commission statute, etc. Time permitting, more will be forthcoming.

Finally, for the convenience of all, this letter, its enclosures and the referred-to proof are all posted on CJA’s website, www.judgewatch.org, accessible *via* the prominent homepage link: “NO PAY RAISES FOR NEW YORK’S CORRUPT PUBLIC OFFICERS: The Money Belongs to their Victims!”

A handwritten signature in black ink, appearing to read "Steven R. DiFiore". The signature is stylized and includes a long horizontal flourish extending to the right.

Enclosures: (1) December 31, 2015 letter to Chief Judge Nominee/Westchester D.A. DiFiore
(2) January 11, 2016 e-mail to Senate Judiciary Committee counsel
(3) Assembly Bill #7997 & sponsors’ memo
(4) Statement of Particulars in Further Support of Legislative Override, Repeal, Etc.

cc: next page

cc: Court of Appeals Nominee/Westchester District Attorney Janet DiFiore
Deputy Senate Majority Leader for Government Oversight & Accountability Andrew Lanza
Senate Minority Leader Andrea Stewart-Cousins
Assembly Minority Leader Brian Kolb

Senate Judiciary Committee

Chair: Senator John Bonacic

Ranking Member: Senator Ruth Hassell-Thompson

Senate Committee on Investigations and Government Operations

Chair: Senator Andrew Lanza

Ranking Member: Senator Brad Hoylman

Senate Finance Committee

Chair: Senator Catharine Young

Ranking Member: Senator Liz Krueger

Assembly Judiciary Committee

Chair: Assemblywoman Helene Weinstein

Ranking Member: Assemblyman Michael Montesano

Assembly Committee on Government Operations

Chair: Assemblywoman Crystal Peoples-Stokes

Ranking Member: Assemblywoman Janet Duprey

Assembly Committee on Oversight, Analysis and Investigation

Chair: Assemblywoman Ellen Jaffee

Ranking Member: Assemblyman Peter Lawrence

Assembly Ways and Means Committee

Chair: Assemblyman Herman Farrell, Jr.

Ranking Member: Assemblyman Bob Oaks

Sponsors of Assembly Bill #7997

Assemblyman Andy Goodell

Assemblyman Peter Lopez

Assemblywoman Janet Duprey

Assemblyman Bill Nojay

Assemblyman Mark Johns