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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JAMES COLL,

Plaintiff,

-against-

NYS COMMISSION ON LEGISLATIVE;
JUDICIAL AND EXECUTIVE COMPENSATION;
NYS LEGISLATURE;
NYS GOVERNOR,

Defendants.

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Index # 2598 / 2016

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This action challenges the constitutionality of the State statute that created and empowers the New York State Commission on Legislative, Judicial, and Executive Compensation [L. 2015, ch. 60, Part E ("the Act")]. In brief, plaintiff contends that the Act violates the separation of powers and improper delegation doctrines, and also violates certain provisions of the State Constitution, and for those reasons, it is unconstitutional. It should be dismissed because the plaintiff lacks standing to bring this action, the action is not ripe, and also because it lacks merit.

BACKGROUND

A. THE COMMISSION AND ITS ENABLING STATUTE

The present Commission is the successor to a commission established pursuant to a State statute in 2010 concerning judicial compensation [L. 2010, ch.

567] that has been repealed. In 2015, a State statute was enacted [L. 2015, ch. 60], Part E of which established the present commission: defendant New York State Commission on Legislative, Judicial, & Executive Compensation ("Commission"). A copy of the 2015 statute that establishes the Commission is attached, and will be referred to as "the Act."

The Act created the Commission as an independent body with the authority to examine, evaluate, and make recommendations with respect to compensation for the State's judges, legislative members, and those officials who are named in Executive Law § 169. It is comprised of seven members: five are appointed by elected State officials, and two are appointed by the Chief Judge of the State [ACT, section 3(1)]. Under the Act, the Commission must formulate its recommendations by "examin[ing] the prevailing pay levels and other non-salary benefits received by members" of the Legislature, statewide elected officials, state officers specified in Executive Law § 169, and State-paid judges [Act, section 2(2)(a)]. The Commission must also determine whether present compensation amounts "warrant an increase" [*Id.* section 2(2)(b)]. Finally, the Act provides the standards to be used by the Commission in formulating its recommendation: it "shall take into account all appropriate factors including, but not limited to: the overall economic climate, the levels of compensation and non-salary benefits received by executive branch officials and legislatures 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" [*Id.* section (3)].

The Commission's recommendations have the "force of law" (i.e., take effect) unless modified or abrogated by legislation that must be enacted prior to certain specified dates (i.e., by April first of any year in which a Commission salary recommendation affecting judges is to become effective, and by January first of any year in which a Commission salary recommendation affecting legislative and executive branch personnel is to become effective) [ACT, section 3(7)]. It is this aspect of the ACT that gives rise to plaintiff's contentions. [1/]

B. PLAINTIFF AND HIS ARGUMENTS

Plaintiff identifies himself as a "lifelong citizen of the State of New York," and provides his residence address [Complaint ¶ 1]. He provides no further information about himself. His argument that the ACT is unconstitutional under the improper delegation doctrine is multi-faceted, and begins with the following undisputed facts:

> [a] the Act authorizes the Commission to evaluate and make recommendations concerning compensation for persons holding various

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[1/] The Commission's website (www.nyscommissiononcompensation.org) discloses that by letter dated December 24, 2015, the Commission submitted its recommendations concerning judicial compensation. Those recommendations called for a series of pay adjustments for judges beginning effective April 1, 2016. As to legislative and executive pay, the Act stipulates that Commission recommendations for adjustment must be made by November 15 and that they may not take effect sooner than the following January 1 [Act, section 3(7)].

positions in all three branches of State government (legislature, judicial, and executive);

[b] the Commission reports its recommendations to various State officials [Act, Section 3(7)]; and

[c] the Commission's recommendations have the "force of law" unless they are modified or abrogated "by statute" within certain time periods that are set forth in the Act [Act, Section 3(7)].

Plaintiff's constitutional argument is based upon the Act's provisions that: [a] the Commission's recommendation has "the force of law" and "shall supersede, where appropriate, inconsistent provisions" of specific sections of the Judiciary Law, the Executive Law, and the Legislative Law that set forth compensation-related matters for the three branches of State government [ACT, section 3(7)]; and [b] the "force of law" Commission's recommendation can only be modified or abrogated – within stated time periods — by a statute that modifies or abrogates the Commission's recommendation.

Plaintiff contends that the Act's "force of law" provisions are unconstitutional because:

- the Act delegates, to an unelected body, the power to make law and to set expenditures [Complaint ¶ 9];
- the Act deprives individual State legislators of their ability to approve or disapprove spending public money [Complaint ¶ 11]; and

- the Act deprives the plaintiff of his ability to hold his individual State legislators (who are not Commission members) accountable for their decisions concerning public expenditures [Complaint ¶¶ 11-12].

Plaintiff cannot assert such claims, and in any event his contentions are meritless.

LEGAL ANALYSIS

A. PLAINTIFF LACKS STANDING BECAUSE HE HAS NOT ALLEGED AN INJURY-IN-FACT THAT IS DISTINCT FROM THAT OF THE GENERAL PUBLIC

A person's "deep concern" about an issue, without more, does not give such person standing to sue. *Board of Ed. of Mamaroneck U.F.S.D. v. Attorney General*, 25 A.D.3d 637, 638 (2d Dept. 2006). Rather, standing to sue requires the plaintiff to allege not only that *he* has an injury in fact that is distinct from any injury of the general public, but also, that *he* is within the zone of interests protected by the statute or constitutional provision at issue. *See Roulan v. County of Onondaga*, 21 N.Y.3d 902, 905 (2013); *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773-774 (1991); *Lancaster Dev., Inc. v. McDonald*, 112 A.D.3d 1260, 1261 (3d Dept. 2013), *lv. denied*, 22 N.Y.3d 866 (2014).

"[I]n order to have standing in a particular dispute, [a party] must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. ... A party 'generally has standing only to assert claims on behalf of himself or herself . . . [and] one does not, as a general rule, have standing to assert claims on behalf of another' " *Matter of People v. Christensen*, 77 A.D.3d

174, 185 (2d Dept. 2010) (quoting *Caprer v. Nussbaum*, 36 A.D.3d 176, 182 (2d Dept 2006) (other citations omitted)).

And the injury-in-fact may not be speculative or conjectural. *Matter of Clean Water Advocates of N.Y., Inc. v. New York State Dept. of Environmental Conservation,* 103 A.D.3d 1006, 1008 (3d Dept.), *lv. denied,* 21 N.Y.3d 862 (2013). See also *Urban Justice Ctr. v Pataki*, 38 A.D.3d 20, 24 (1st Dept. 2006) ("There is no allegation that any complained-of practice of the Legislature or the Governor has caused [plaintiff] to expend additional resources in performing its mission").

Plaintiff's purported injury is two-fold. First, he contends that the ACT creates a scenario in which it is possible that the Commission – not the Legislature – will determine the compensation for various State government officials. But this alleged injury is indistinct from any other New Yorker's alleged injury.

Second, he contends that because he does not reside in the election districts of the State Senate's Temporary President or the Assembly's Speaker (two of the seven members of the Commission), he "has effectively lost any and all legislative voice in the 'force of law' the Commission has been prescribed ..." [¶ 12]. But this alleged injury is indistinct from any alleged injury sustained by any New Yorker who resides in in any one of the 149 (out of 150) State Assembly districts, and who resides in any one of the 62 (out of 63) State Senate election districts. [2/] Moreoever, it ignores the fact that the full Legislature, including his State Senator and his member of the Assembly, enjoys complete authority to modify or abrogate any

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[2/] See State Law § 120 ["The assembly shall consist of one hundred fifty members ..."]; State Law § 123 ["The senate shall consist of sixty-three members ..."]).

Commission recommendation. In addition, plaintiff's contention that he no longer has a legislative voice is speculative, because it presumes that: [a] the only legislators who will listen to his views are the particular members of the Assembly and the Senators for whom he can vote; and [2] none of the Legislature's members who are elected from districts in which he does not reside will be receptive to hearing his views. Finally, his contention also incorrectly suggests that he has a constitutional right to have a legislator (whether or not such legislator is in the same election district where the plaintiff resides) not merely listen to plaintiff's views, but to take any steps to implement them.

Plaintiff's allegations are also speculative, because they purport to allege what the Legislature will do (or not do) upon receipt of the Commission's recommendations. See *Schulz v. Cuomo*, 133 A.D.3d 945, 947 (3d Dept. 2015) (plaintiffs lacked standing: "the harm allegedly suffered by plaintiffs in this regard is speculative, as it is predicated upon a series of events that may not come to pass.")

In short, plaintiff's alleged injuries are identical to any alleged injury suffered by the general public, as well as speculative. His "assertions are little more than an attempt to legislate through the courts" (*Rudder v. Pataki*, 93 N.Y.2d 273, 280 [1999]), and must be rejected.

B. PLAINTIFF CANNOT MEET HIS BURDEN

1. PLAINTIFF MUST – BUT CANNOT – SHOW THAT THE STATUTE IS UNCONSTITUTIONAL IN ALL POSSIBLE APPLICATIONS, AND MUST DO SO BEYOND A REASONABLE DOUBT

Plaintiff is contending that the ACT is unconstitutional under any circumstance or, in other words, that there is no facial scenario in which the ACT might be constitutional. This is a facial challenge to the statute. "A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment." *Matter of Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (internal quotes omitted).

2. THE ACT IS PRESUMED TO BE CONSTITUTIONAL, AND THE PERSON WHO CONTESTS A STATUTE'S CONSTITUTIONALITY MUST SHOW ITS UNCONSTITUTIONALITY BEYOND A REASONABLE DOUBT

"A party contesting the constitutionality of a statute must overcome a very heavy initial burden by proving that the invalidity of the law is beyond a reasonable doubt. It is well settled that '[l]egislative enactments enjoy a strong presumption of constitutionality' (*LaValle v. Hayden*, 98 N.Y.2d 155, 161 [2002]). "A party contesting the constitutionality of a statute must overcome a very heavy initial burden by proving that the invalidity of the law is beyond a reasonable doubt" (*Matter of New York Charter Schools, Assn. v. DiNapoli*, 13 N.Y.3d 120, 130 [2009]). This action must be dismissed because plaintiff has not satisfied this rigorous standard.

3. THE ACT DOES NOT IMPROPERLY DELEGATE LEGISLATIVE AUTHORITY

The improper delegation doctrine refers to the circumstances under which a legislative body may authorize another entity to exercise powers belonging to the legislative body. In upholding the federal sentencing guidelines (which were promulgated by an independent body created and authorized by Congress to issue the guidelines; see 28 U.S.C. § 991), the Supreme Court in *Mistretta v United States*, 488 U.S. 361, 372 (1988), held that the courts must have "a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, [a legislative body] simply cannot do its job absent an ability to delegate power under broad general directives." To be constitutionally valid, the legislative body must clearly delineate[ ] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id.*, 488 U.S. at 372-373.

"[T]he principle that the legislative branch may not delegate all its law-making powers to the executive branch has been applied with the utmost reluctance ..." *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). But even though the Legislature cannot permissibly delegate all of 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." *Matter of Levine v. Whalen*, 39 N.Y.2d 510, 515 (1976). Indeed, the Legislature "has considerable latitude in determining the reasonable and practicable point of generality in adopting a standard for administrative action and,

thus, 'a reasonable amount of discretion may be delegated to the administrative officials.'" *Matter of Big Apple Food Vendors Assn. v. Street Vendor Review Panel*, 90 N.Y.2d 402, 407 (1997) (*quoting Matter of Levine*, 39 N.Y.2d at 515-516). See also *Raffellini v. State Farm Mut. Auto. Ins. Co.*, 9 N.Y.3d 196, 201 (2007) (holding that a duly promulgated agency regulation has the "force of law" where the Legislature has authorized the agency to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation, and where the agency has adopted regulations that go beyond the text of that legislation and are not inconsistent with the statutory language or its underlying purposes [quotation marks and citations omitted]).

In our case, the ACT not only authorized the Commission to make recommendations, but also prescribed the manner by which the Commission was to arrive at its recommendations, and the relevant factors for the Commission to examine.

Construing a statute to be unconstitutional because, as here, it contains a "catch-all" provision ("the commission shall take into account all appropriate factors, including but not limited to ...") is a construction "to be avoided, if at all possible" (*Brightonian Nursing Home v. Daines*, 21 N.Y.3d 570, 578 [2013]).

The Court of Appeals has observed that the improper delegation doctrine has fallen into disrepute (*Boreali v. Axelrod*, 71 N.Y.2d 1, 10 note 1 [1987]):

> For a brief period in the 1930's, the Supreme Court dusted off the "nondelegation" principle and breathed new life into it by using the doctrine as a basis for striking down certain New Deal legislation (*see, Schechter Corp. v United States*, 295 US 495; *Panana Ref. Co v Ryan*,

> 293 US 388). Our court also invoked the doctrine on several occasions to invalidate legislation giving an executive officer or administrative agency what was deemed to be overly broad discretion to establish policy (*see e.g., Packer Col. Inst. v University of State of N.Y.*, 298 NY 184, 189-192; *Matter of Small v Ross*, 279 NY 288; *People v Klinck Packing Co.*, 214 NY 121, 138-139). However, the *Schechter-Panama* line of cases has, quite rightfully, fallen into disrepute.

In our case, the ACT has a fall-safe mechanism: if the Legislature disagrees with the Commission's recommendations, it can modify or even abrogate them, by statute. This is a statutory paradigm that the Legislature has employed successfully in the past. [3/] Thus, it is inaccurate to contend that the Commission has been authorized to take action that is properly to be taken by the Legislature.

4. THE SPECIFIC CONSTITUTIONAL PROVISIONS CITED BY PLAINTIFF DO NOT SUPPORT HIS CONTENTIONS

Plaintiff relies upon three provisions of the State Constitution: Article 3, §§ 6, 14, and 23 [¶¶ 10, 15-16]. His reliance is unavailing.

First, he cites § 23 (the Constitution requires that "any action which ... makes ... any appropriation of public ... money ... the question shall be taken by yeas and nays ..." [¶ 10]). This provision is inapposite. It requires the affirmative vote of the Legislature to support enactment of *legislation making an appropriation of public money*. Chapter 60, albeit part of the 2016 package of enacted budget legislation, is not technically a bill appropriating public money. It is an Article VII bill containing exclusively non-appropriation legislation recommended by the

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[3/] *See* [former] Judiciary Law § 229, which authorized the State's Judicial Conference to recommend changes in the rules portion of the CPLR: changes that would become effective the following September first if not sooner disapproved by the Legislature.

Governor as part of his Executive Budget [NY Const, Art . VII, § 3]. This aside, section 23 describes the manner in which each legislator's vote is to be taken. Plaintiff fails to allege that this provision had not been followed when the Act was passed.

Second, he cites § 6 (the Constitution requires that "[e]ach member of the legislature shall receive for his or her services a like annual salary to be fixed by law" [¶ 15]). In *Cohen v. State*, 94 N.Y.2d 1 (1999), the Court of Appeals upheld the constitutionality of a statute against a § 6 challenge. In that action, the Legislature had passed and the Governor had approved a statute that imposed a withholding of legislator salary if the State budget had not been promulgated within a specified time. The Court noted that since one legislature could prospectively increase legislative salaries without running afoul of § 6, a reduction could not violate § 6 either. 94 N.Y.2d at 11-12. *Cohen* merely addresses whether the "fixed by law" requirement could be satisfied where future events might trigger a change in the amount of the legislators' salaries.

Finally, he cites § 14 (the Constitution requires that no bill shall pass into law "except by an assent of a majority of the members elected to each branch of the legislature ..." [¶ 16]). The bill in question here is the one that the Legislature voted to approve, in 2015, when the Budget was passed, by a vote of 58-4 in the Senate on March 31, 2015, and by a 99-47 vote in the Assembly the following day. [4] Plaintiff

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[4] Source: see http://public.legalinfo.state.ny.us

appears to confuse the approval of the bill with the manner in which the Commission's recommendation will or will not be approved.

5. OTHER STATES' SIMILAR COMPENSATION STATUTES HAVE BEEN UPHOLD

New York is not the only State that uses a recommending body to change compensation for public officials. The Supreme Court has affirmed, without opinion, a federal statute that established a Commission on Executive, Legislative and Judicial Salaries, whose recommendations become effective "unless other rates have been enacted by law, or one House of Congress specifically disapproves all or part of the recommendations." *Pressler v. Simon*, 428 F.Supp. 302, 303 (D.D.C. 1976), *vacated*, 431 U.S. 169 (1977), *affirmed upon remand*, 434 U.S. 1028 (1978). See also *Humphrey v. Baker*, 848 F.2d 211 (D.C.Cir.) (upholding similar statutory provision with respect to Congressional compensation), *cert. denied*, 488 U.S. 966 (1988); *Quinn v. Donnewald*, 107 Ill.2d 179, 483 N.E.2d 216 (1985) (same). Other States also have similar statutory provisions. E.g., Delaware Compensation Commission Act (29 Del. Code § 3304 [the Commission's recommendations "shall take effect and have the force and effect of law as of July 1 following submission, unless the General Assembly shall by joint resolution reject the report in its entirety within 30 days following the commencement of its session.")

CONCLUSION

Defendants respectfully submit that the Court should grant their motion, and dismiss this action.

Respectfully submitted,

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by: _____ May 27, 2016
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