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Few Appellate Judges Apply for Wesley's Seat

John Caher
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ALBANY — Suspecting the deck is stacked in favor the governor's former counsel or possibly an appellate judge in Buffalo, many of the state's top judges have decided against applying for a seat on the Court of Appeals.

Although several dozen candidates applied for Judge Richard C. Wesley's position on New York's highest court, the list of applicants is conspicuously short of Appellate Division justices, according to a source close to the process. In fact, it appears that only one of the approximately 60 justices sitting on New York's second highest court applied for the position on the top tribunal.

Judges and attorneys who had made the final cut in prior selection cycles but did not apply this time said it seems obvious that Governor George E. Pataki will appoint former counsel James M. McGuire, if loyalty and ideology prevail, or perhaps Presiding Justice Eugene F. Pigott Jr., of the Appellate Division, Fourth Department, if geographic balance and concerns over court packing tip the scale toward Western New York. In either case, there is a powerful presumption that the Court of Appeals "merit" selection process is open only to those who have close connections or can rely on special circumstances, such as geography or political demographics.

"Everybody gets word that the [fix] is in and they don't want to apply," said one Appellate Division justice.

In recent years, the Commission on Judicial Nomination, a 12-member body that screens applicants for the Court of Appeals and presents the governor with the list of nominees from which he must choose, has extended application deadlines because it was troubled either with the quantity or quality of the applicants. This time around, officials actively solicited applications. Still, they were apparently able to interest only a handful of judges, and nearly none on the Appellate Division.

"Word in the judiciary is that only one or two potential contenders have any shot at all," complained another Appellate Division judge.

On Tuesday, Mr. Pataki insisted there is no pre-ordained candidate.

"I have made no decision," the governor said. "There is a process that has to be followed. I know that many, many talented individuals have applied and will be going through the screening committee and I will wait until I see the results of that screening process."

Advised that many judges did not apply because they believe the appointment is predetermined, Mr. Pataki said: "I think that is unfortunate. They should have [applied], because no decision has been made. I guarantee you, there is no decision made."

John O'Mara, chairman of the Commission, yesterday said, "We had a number of judges who have applied and I wouldn't want to comment as to why any judge did or didn't. But anyone who suggests there is a foregone conclusion is certainly in error."

Mr. O'Mara declined to comment on why it was necessary to solicit candidates. "I think we have continued to have a good number of applications and I think the resulting lists that have come out for recommendation to the governor, certainly since I have been on the Commission, have been highly qualified," he said.

Exhibit B-2

Although the list of applicants is secret, the Law Journal was able to confirm the names of several applicants, including: Mr. McGuire, now of White & Case in Manhattan; Justice Pigott; Supreme Court Justice Steven W. Fisher of Queens; Supreme Court Justice Helen E. Freedman of Manhattan; Albany County Family Court Judge W. Dennis Duggan; former New York State Bar Association President James C. Moore of Harter, Secrest & Emery in Rochester; Guy Miller Struve of Davis Polk & Wardwell in Manhattan; Albany Law School Professor Michael J. Hutter Jr., who is of counsel to Powers & Santola; Syracuse Law School professor and former dean Daan Braveman; Eastern District Chief Assistant U.S. Attorney Barbara D. Underwood; and Mark C. Zauderer of Solomon, Zauderer, Ellenhorn, Frischer & Sharp in Manhattan.

Unlike his predecessor, Governor Mario M. Cuomo, Mr. Pataki's Court of Appeals picks have been largely predictable.

Mr. Cuomo appointed three Democrats, three Republicans and one independent. The liberal Democrat used his first pick to appoint Richard D. Simons, an upstate conservative. He also named a Republican, Sol Wachtler, chief judge and shocked observers when he appointed now-Chief Judge Judith S. Kaye, who had no judicial experience. With Judge Kaye's appointment, Mr. Cuomo appointed the first woman to the Court. He also appointed the first black to a full term, Fritz W. Alexander, and the first Hispanic, Carmen Beauchamp Ciparick.

In contrast, all of Mr. Pataki's four picks to date were white Republicans — two men and two women.

Three were Appellate Division justices. Three had close political connections to the governor. Mr. Pataki's most recent appointee, Susan Phillips Read, had served in the counsel's office before Mr. Pataki made her presiding judge of the Court of Claims. Another appointee, Victoria A. Graffeo, had worked in the Legislature and as solicitor general before Mr. Pataki appointed her to Supreme Court. Mr. Pataki's first appointee, Judge Wesley, was a long-time friend with whom he had served in the Legislature. Judge Wesley recently left the state panel for a position on the U.S. Court of Appeals for the Second Circuit, and it is his state court position that is open now.

Mr. McGuire would break the Pataki pattern in that he remains an enrolled Democrat, albeit staunchly conservative, particularly on criminal justice matters. And he has no judicial experience, unlike the four judges the governor appointed in the past. Rather, Mr. McGuire was one of the Republican governor's closest, most trusted and most respected advisors from 1995 to 2003.

Brooklyn Law Professor William Hellerstein, a Democrat who made four Court of Appeals lists in the pre-Pataki years and none since, said there is a strong sense that only those with close personal or political connections have a chance. Mr. Hellerstein, who did not apply this time, said there is no indication the Pataki appointees lack merit, but that merit alone is insufficient.

"I think the perception . . . with Cuomo was you didn't have to be close to him politically or personally to have a shot," he said. "I feel, and I think my friends around town feel, that one had a better shot as a non-political person on the merits with Governor Cuomo than they do now, and that is why Leo Milonas, president of the [City] bar, had to circulate an e-mail saying, 'Please apply.' "

Former Chief Administrative Judge Milonas, who is now president of the Association of the Bar of the City of New York and a member of the Commission on Judicial Nomination, actively recruited applicants. In an article in the city bar's newsletter, 44th Street Notes, Mr. Milonas did not refute the perception that only those close to the governor have a chance. Instead, he maintained that receiving the commission's support and making the list of seven recommended candidates is a significant accolade, and one which would enhance "your standing at the bench, or in the bar or in academia, no matter how high it is at present."

Yesterday, Mr. Milonas said he made the public appeal because on prior occasions the commission had to extend the application deadline to garner more applicants.

"We felt that there were not enough applications coming in for such an important position," he said. "Based upon that . . . I made a special appeal to the association members to apply for the position. In fact, members of the commission came and spoke to the association's executive committee and we indicated we would do our best to try to get more people to apply. A lot of people have applied, although I don't know how many."

Mr. Milonas refused to speculate on why the commission has had difficulty attracting candidates. But in his letter he acknowledged that "some have speculated that there is little chance of being nominated to the court as the person who will be selected for a particular vacancy is a foregone conclusion." He stressed, however, that the commission's procedures are designed to ensure fairness and to prevent the governor or anyone else from dominating the process.

Interview Process

But two Appellate Division justices who applied in the past said it became apparent that the interview process was perfunctory when there were no substantive legal, philosophical or jurisprudential questions asked during a 20 to 30 minute session in the conference room of Phillips Nizer Benjamin Krim & Ballon, where Commission Counsel Stuart A. Summit is a partner.

"What you get, to be perfectly candid, is fluff," one justice said. "[Commission Chairman] John O'Mara usually asks the first question, which is why are you interested in the Court of Appeals, and the questions don't get much harder."

Another Appellate Division judge who had been interviewed before said "it was scary how few questions were asked. I got the impression everyone just wanted to go home."

Mr. O'Mara yesterday said that any "suggestion that there is some perfunctoriness about the operation of the Commission is completely without merit. "

Another appellate judge said that even if the process is flawed, the results have been sound and good judges have risen to the Court of Appeals.

"The premise that politics is removed from merit selection is ridiculous," the judge said. "There are politics either way [through an elective or appointive process]. But as much as we can criticize the process, in the end the person who ultimately emerges and is appointed is a great person. In the end, I think they are all really superlative people."

Critics say a McGuire appointment would taint the Court of Appeals, creating a perception that the governor is turning New York's highest legal tribunal into a patronage mill.

They also note that there are several matters working their way to the Court — including a crucial separation of powers showdown focusing on executive versus legislative budgetary authority, the constitutionality of the death penalty and the legality of casino gambling — where Mr. McGuire may have to recuse himself. If Mr. Pataki attempts to stack the Court by appointing Mr. McGuire, the attempt may backfire if Mr. McGuire cannot sit on the cases that matter most to the governor and Chief Judge Kaye then vouches in whomever she pleases as a replacement, they say.

"People are asking: Can the governor really appoint a second person from his staff?" said one litigator who frequently appears before and closely follows the Court of Appeals.

Others, however, say that politics aside, Mr. McGuire is a strong and legitimate candidate, and that while he should not make the list because of his connections to Mr. Pataki, neither should he be denied a rightful spot just because he happens to know the governor. They note his reputation as an extremely bright and capable attorney with a renowned work ethic.

"I don't know what they can say about McGuire," said an Appellate Division judge. "He is really a bright, bright guy. What are they going to say, that there are too many of the governor's cronies on the Court? They can't really say that he doesn't have any [judicial] experience. Neither did Kaye."

Mr. Pataki said this week that Mr. McGuire "would be an excellent judge."

Potential Impediment

One potential impediment to Mr. McGuire, however, is the geographic issue, which could tip the balance toward Justice Pigott, who is not particularly close to the governor.

Currently, there is no one on the Court from west of Albany: no one from Buffalo, Rochester, Syracuse, Utica or Binghamton. In addition, Buffalo, the second-largest city in the state, has not had a representative on the Court since Judge Matthew J. Jasen retired in 1985. That has become a sore point in Western New York, and political and bar leaders from that section of the state are urging the governor to look west. Mr. McGuire lives in Brooklyn Heights. Justice Pigott lives near Buffalo.

"We think we are entitled to representation on that Court, and we think it means a great deal regionally to have someone there — someone you can have contact with on a fairly regular basis," said Michael Flaherty, president of the Erie County Bar Association and a partner in Flaherty & Shea in Buffalo. "I have nothing against McGuire at all. But there is a need to have geographic representation. It means something to us to have someone there who is familiar with this area."

Mr. Flaherty said snubbing Western New York "is more than a mistake, it is unfair. The Court has to represent the

entire state, and right now it doesn't."

Robert Davis, Erie County Republican chairman, said it is high time Western New York had representation on the high court. He said that if asked, he will urge the governor to appoint Justice Pigott.

"I just think you have to look at the state as a whole," he said. "We've got someone who is the presiding justice of the Fourth Department, Gene Pigott, who I think is an outstanding jurist and would be a great addition to the Court of Appeals."

However, some observers say Justice Pigott may have burned his bridges by pulling out at the last minute during the last cycle. He was considered a front-runner for the position that eventually went to Judge Read, but he withdrew because of administrative turmoil in the Fourth Department. When he pulled out, Judge Read was the sole Republican judge on the list.

June M. Castellano of Rochester, president of the Monroe County Bar Association, said there is a strong sentiment in the western quadrant of the state that the replacement for Judge Wesley, who is from the Rochester area, ought to come from that area.

"We speak for diversity in the judiciary, and that does include geographic location," she said. "It is foremost in our minds because we just had Judge Wesley leave the Court of Appeals."

The governor will receive a list of candidates in mid-October, according to Mr. Summit. He must nominate a new judge, subject to Senate confirmation, within 30 days of receiving the slate of up to seven candidates the commission deems qualified.