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Preliminary Appeal Statement
Pursuant to section 500.9 of the Rules of the Court of Appeals

1. CAPTION OF CASE (as the parties should be denominated in the Court of Appeals):

STATE OF NEW YORK COURT OF APPEALS

ROXANNE DELGADO, MICHAEL FITZPATRICK,
ROBERT ARRIGO, and DAVID BUCHYN,

Appellants,

-against-

STATE OF NEW YORK and THOMAS P. DINAPOLI,
In His Capacity as Comptroller of the State of New York,

Respondents.

2. Name of court or tribunal where case originated, including county, if applicable:
Albany County Supreme Court

3. Civil index number, criminal indictment number or other number assigned to the matter in the court or tribunal of original instance: 907537-18

4. Docket number assigned to the matter at the Appellate Division or other intermediate appellate court: None

5. Jurisdictional basis for this appeal:
____Leave to appeal granted by the Court of Appeals or a Judge of the Court of Appeals
____Leave to appeal granted by the Appellate Division or a Justice of the Appellate Division
____CPLR 5601(a): dissents on the law at the Appellate Division
____CPLR 5601(b)(1): constitutional ground (Appellate Division order)
__✓__CPLR 5601(b)(2): constitutional ground (judgment of court of original instance)
____CPLR 5601(c): Appellate Division order granting a new trial or hearing, upon stipulation for judgment absolute
____CPLR 5601(d): from a final judgment, order, determination or award, seeking review of a prior nonfinal Appellate Division order
____Other (specify)

6. How this appeal was taken to the Court of Appeals (choose one) (see CPLR 5515[1]):

NOTICE OF APPEAL Date filed: August 9, 2019
Clerk's office where filed: Albany County

ORDER GRANTING LEAVE TO APPEAL (civil case):
Court that issued order: _____
Date of order: _____

CERTIFICATE OR ORDER GRANTING LEAVE TO APPEAL (criminal case):
Justice or Judge who issued order: _____
Court: _____
Date of order: _____

7. Demonstration of timeliness of appeal in civil case (CPLR 5513, 5514):
Was appellant served by its adversary with a copy of the order, judgment or determination appealed from and notice of its entry? ✓ yes ___ no
If yes, date on which appellant was served (if known, or discernable from the papers served): July 15, 2019
If yes, method by which appellant was served: ___ personal delivery
___ regular mail
___ overnight courier
✓ other (describe NYSCEF)

Did the Appellate Division grant or deny a motion for leave to appeal to this Court in this case? ___ yes ✓ no
If yes, fill in the following information:
a. date appellant served the motion for leave to appeal made at the Appellate Division: _____
b. date on which appellant was served with the Appellate Division order granting or denying such motion with notice of the order's entry: _____, and
c. method by which appellant was served with the Appellate Division order granting or denying such motion:
_____ personal service
_____ _____ regular mail
_____ _____ overnight courier
_____ _____ other (describe _____)

8. Party Information:

Instructions: Fill in the name of each party to the action or proceeding, one name per line. Indicate the status of the party in the court of original instance and the party's status in this Court, if any. Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, third-party plaintiff, third-party defendant, intervenor. Examples of a party's Court of Appeals status include: appellant, respondent, appellant-respondent, respondent-appellant, intervenor-appellant.

No.	Party Name	Original Status	Court of Appeals Status
1	Roxanne Delgado	Plaintiff	Appellant
2	Michael Fitzpatrick	Plaintiff	Appellant
3	Robert Arrigo	Plaintiff	Appellant
4	David Buchyn	Plaintiff	Appellant
5	State of New York	Defendant	Respondent
6	Thomas P. DiNapoli	Defendant	Respondent
7			
8			
9			
10			

9. Attorney information:

Instructions: For each party listed above, fill in the name of the one law firm and responsible attorney who will act as counsel of record, if the party is represented. Where a litigant is self-represented, fill in that party's data in section 10 below.

For Party No. 1- above:
Law Firm Name: Government Justice Center, Inc.
Responsible Attorney: Cameron J. Macdonald
Street Address: P.O. Box 7113
City: Albany State: NY Zip: 12224
Telephone No: 518-434-3125 Ext. _____ Fax: _____
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

For Party No. 2 above:
Law Firm Name: Government Justice Center, Inc.
Responsible Attorney: Cameron J. Macdonald
Street Address: P.O. Box 7113
City: Albany State: NY Zip: 12224
Telephone No: 518-434-3125 Ext. _____ Fax: _____
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

For Party No. 3 above:
Law Firm Name: Government Justice Center, Inc.
Responsible Attorney: Cameron J. Macdonald
Street Address: P.O. Box 7113
City: Albany State: NY Zip: 12224
Telephone No: _____ Ext. _____ Fax: _____
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

For Party No. 4 above:
Law Firm Name: Government Justice Center, Inc.
Responsible Attorney: Cameron J. Macdonald, Esq.
Street Address: P.O. Box 7113
City: Albany State: NY Zip: 12224
Telephone No: _____ Ext. _____ Fax: _____
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

For Party No. 5 above:
Law Firm Name: Attorney General of the State of New York
Responsible Attorney: Letitia James and Helena Lynch
Street Address: The Capitol
City: Albany State: NY Zip: 12224
Telephone No: 518-776-2580 Ext. _____ Fax: _____
If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

(Use additional sheets if necessary)

10. Self-Represented Litigant information:

For Party No. ___ above:
Party's Name: _____
Street Address: _____
City: _____ State: _____ Zip: _____
Telephone No.: _____ Ext. _____ Fax: _____

For Party No. ___ above:
Party's Name: _____
Street Address: _____
City: _____ State: _____ Zip: _____
Telephone No.: _____ Ext. _____ Fax: _____

11. Related motions and applications:

Does any party to the appeal have any motions or applications related to this appeal pending in the Court of Appeals? ___yes ✓ no
If yes, specify:

a. the party who filed the motion or application: _____
b. the return date of the motion: _____
c. the relief sought: _____

Does any party to the appeal have any motions or applications in this case currently pending in the court from which the appeal is taken? ____yes ____no

9. (cont'd)

Law Firm Name: Attorney General of the State of New York

Responsible Attorney: Letitia James and Helena Lynch

Street Address: The Capitol

City: Albany State: NY Zip: 12224

Telephone No: 518-776-2580 Ext. Fax:

If appearing Pro Hac Vice, has attorney satisfied requirements of section 500.4 of the Rules of the Court of Appeals? ___yes ____no

If yes, specify:

a. the party who filed the motion or application:_____
b. the return date of the motion: _____
c. the relief sought:_____

Are there any other pending motions or ongoing proceedings in this case? If yes, please describe briefly the nature and the status of such motions or proceedings:_____

_____

_____

_____

12. Set forth, in point-heading form, issues proposed to be raised on appeal (this is a nonbinding designation, for preliminary issue identification purposes only):

1. Whether Part HHH of Chapter 59 of the Laws of 2018 is unconstitutional under the New York State Constitution.

(use additional sheet, if necessary)

13. Does appellant request that this appeal be considered for resolution pursuant to section 500.11 of the Rules of the Court of Appeals (Alternative Procedure for Selected Appeals)?

_____yes ✓ no

If yes, set forth a concise statement why appellant believes that consideration pursuant to section 500.11 is appropriate (see section 500.11[b]):_____(Fill in on lines below)

_____

_____

_____

14. Notice to the Attorney General.

Is any party to the appeal asserting that a statute is unconstitutional? ✓ yes _____no

If yes, has appellant met the requirement of notice to the Attorney General in section 500.9(b) of the Rules of the Court of Appeals? ✓ yes _____no

15. **ITEMS REQUIRED TO BE ATTACHED TO EACH COPY OF THIS STATEMENT:**

A. A copy of the filed notice of appeal to the Court of Appeals (with proof of service), a copy of the order granting leave to appeal to the Court of Appeals (civil case), or a copy of the certificate granting leave to appeal to the Court of Appeals (criminal case), whichever is applicable;

B. A copy of the signed order, judgment or determination appealed from to this Court (use document issued by the court, not internet version);

C. A signed copy of any order, judgment or determination which is the subject of the order appealed from, or which is otherwise brought up for review (use document issued by the court, not internet version);

D. Copies of all decisions or opinions relating to the orders set forth in subsections B and C above (use documents issued by the court, not internet versions); and

E. If required, a copy of the notice sent to the Attorney General pursuant to section 500.9(b) of the Rules of the Court of Appeals.

F. If required, a disclosure statement pursuant to section 500.1(f) of the Rules of the Court of Appeals.

Date: August 20, 2019

Submitted by: Government Justice Center, Inc.
(Name of law firm)

(Signature of responsible attorney)
Cameron J. Macdonald
(Typed name of responsible attorney)

Attorneys for appellant Delgado, et al.
(Name of party)

-or-

Date: _____

Submitted by _____, pro se
(Signature of appellant)

_____
(Typed/printed name of self-represented appellant)

EFFECTIVE 12/08/10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

ROXANNE DELGADO, et al.,

Plaintiffs,

v.

STATE OF NEW YORK, et al.,

Defendants.

Index No. 907537-18

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiffs, under Article 6, Section 3(b)(2) of the New York Constitution and CPLR § 5601(b)(2), hereby appeal to the Court of Appeals from the Decision/Judgment of the Honorable Christina L. Ryba, dated June 7, 2019 and entered in the Office of the Clerk of Albany County on June 7, 2019 [Docket No. 96]. This appeal deals solely with the constitutionality of Part HHH of Chapter 59 of the Laws of 2018.

Dated: Albany, New York
August 9, 2019

Respectfully submitted,

Cameron J. Macdonald
Government Justice Center
P.O. Box 7113
Albany, New York 12224
(518) 434-3125
cam@govjustice.org
Counsel for Plaintiffs

TO: Letitia James
Attorney General of the State of New York
Helena Lynch
Assistant Attorney General
Counsel for Defendants
The Capital
Albany, New York 12224

NYSCEF - Albany County Supreme Court

Confirmation Notice

The NYSCEF website has received an electronic filing on 08/09/2019 04:54 PM. Please keep this notice as a confirmation of this filing.

907537-18

Roxanne Delgado et al v. State of New York et al

Assigned Judge: Christina L Ryba

Documents Received on 08/09/2019 04:54 PM

Doc #	Document Type
105	NOTICE OF APPEAL - COURT OF APPEALS

Filing User

Cameron James Macdonald | cam@govjustice.org
Po Box 7113, Albany, NY 12224

E-mail Notifications

An email regarding this filing has been sent to the following on 08/09/2019 04:54 PM:
COLLEEN D. GALLIGAN - colleen.galligan@ag.ny.gov

HELENA A. LYNCH - helena.lynch@ag.ny.gov

CAMERON J. MACDONALD - cam@govjustice.org

ANDREW D. SILVERMAN - asilverman@orrick.com

NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of

Hon. Bruce A. Hidley, Albany County Clerk - countyclerk@albanycounty.com
Phone: 518.487.5100 Fax: 518.487.5099 (fax) Website:
http://www.albanycounty.com/Government/Departments/CountyClerk.aspx

NYSCEF Resource Center, EFile@nycourts.gov

Phone: (646) 386-3033 | Fax: (212) 401-9146 | Website: www.nycourts.gov/efile

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ROXANNE DELGADO, MICHAEL FITZPATRICK, ROBERT ARRIGO, and DAVID BUCHYN,
Plaintiffs,

-against-

STATE OF NEW YORK and THOMAS P. DINAPOLI, In His Capacity As Comptroller Of The State Of New York,
Defendants.

CARL HEASTIE, Individually and in his Capacity as Speaker of the New York State Assembly,
Amicus Curiae.

DECISION/JUDGMENT

Index No. 907537-18
RJI No. 01-18-130384

APPEARANCES:

Cameron J. Macdonald, Esq.
Government Justice Center, Inc.
For Plaintiffs
P.O. Box 7133
Albany, New York 12224

Letitia James, Esq.
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Andrew D. Silverman, Esq.
Attorney for Carl E. Heastie,
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51 West 52nd Street
New York, New York 10019-6142

RYBA, J.,

I. INTRODUCTION

Plaintiffs Roxanne Delgado, Michael Fitzpatrick, Robert Arrigo, and David Buchyn commenced this declaratory judgment action against defendants Thomas P. Dinapoli and the State of New York, seeking (1) a declaration that Part HHH of Chapter 59 of the Laws of 2018 ("Part

HHH") is unlawful, invalid, and unenforceable as an unlawful delegation of legislative power under the New York State Constitution; (2) a declaration that the report dated December 10, 2018, by the Committee on Legislative and Executive Compensation ("the Committee") unlawfully usurps the legislative power of the New York Senate and Assembly; (3) a declaration under State Finance Law § 123 that any disbursement of state funds under Part HHH is unconstitutional and illegal; (4) a declaration under Public Officers Law § 107 that the Committee report dated December 10, 2018, is void; and (5) an order enjoining defendants from disbursing state funds in accordance with the above declarations.[1]

By order to show cause signed on December 21, 2018, plaintiffs moved for a temporary restraining order seeking to enjoin defendants from transferring or disbursing state funds under Part HHH to the officers and officials in Executive Law § 169. After oral argument on that date, the Court denied plaintiffs' request for the temporary restraining order pending determination of the application for a preliminary injunction. Plaintiffs then moved by order to show cause for a preliminary injunction to again enjoin defendants from transferring or disbursing state funds at the increased compensation level determined by the Committee. Defendants opposed the motion, and oral argument took place on January 11, 2018.[2] After considering the parties' oral arguments and written submissions, the Court found that plaintiffs failed to establish irreparable harm or the

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[1] Notably, plaintiffs have not alleged in their amended complaint that either Part HHH or the Committee's recommendations violate the United States Constitution. Accordingly, any issues relating to the validity of Part HHH and the Committee's recommendations under the United States Constitution will not be addressed herein.

[2] Oral argument was also held on that day regarding an application by Carl Heastie, Speaker of the New York State Assembly, for leave to submit an amicus brief in response to plaintiffs' motion for a preliminary injunction. By decision and order dated January 25, 2018, Heastie's application was granted and the proposed brief was accepted.

balance of equities in their favor, and accordingly, denied their application for a preliminary injunction.

Defendants next moved for an order dismissing the complaint pursuant to CPLR 3211(a) (7), on the ground that plaintiffs failed to state a claim on which relief may be granted. The Court thereafter granted a motion by Carl Heastie, Speaker of the New York State Assembly, to submit an amicus curiae brief in connection with defendants' motion to dismiss. After the motion to dismiss was fully submitted, the Court provided the parties with written notice that pursuant to CPLR 3211(c), it would treat the motion as one for summary judgment. Accordingly, the Court extended the return date of the motion to allow the parties an opportunity to submit additional evidence to develop an appropriate record (see, Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]). However, rather than submitting additional evidence, plaintiffs served an amended complaint and thereby rendered the defendants' motion to dismiss the original complaint moot.

Defendants thereafter filed a second motion pursuant to CPLR 3211(a) (7), seeking dismissal of the amended complaint for failure to state a cause of action. In support of its motion to dismiss, defendants contend that Part HHH was not an unconstitutional delegation of legislative power, that the Committee's determinations and recommendations did not exceed its legislative mandate, that plaintiffs lack standing, and that the complaint fails to state a claim for a violation of the Open Meetings Law and the State Administrative Proceedings Act ("SAPA"). Heastie has submitted a letter requesting that his previously filed amicus brief be considered in connection with defendants' motion, and the Court in its discretion hereby grants that request. Notably, the arguments advanced in Heastie's amicus curiae brief are virtually identical to those set forth in defendants' motion. However, Heastie also advances the alternative argument that in the event the Court invalidates the Committee's recommendations relating to non-salary items, it should sever the invalid

recommendations and uphold the remaining recommendations relating to salary increases. Plaintiffs oppose the motion to dismiss, and the matter is now ripe for determination.

II. BACKGROUND

As part of the 2018 budget, the Legislature passed an act that created a Committee on Legislative and Executive Compensation, and gave it authority to "examine, evaluate, and make recommendations with respect to adequate levels of compensation, non-salary benefits, and allowances" and charged it with "determin[ing] whether, on January 1, 2019, the annual salary and allowances of members of the legislature, statewide elected officials, and salaries of state officers referred to in section 169 of the Executive Law, warrant an increase" (L. 2018, ch. 59, Part HHH § 1, 2.2). When discharging these duties, Part HHH instructs the Committee to:

> take into account all appropriate factors including, but not limited to: the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities; the overall economic climate; rates of inflation; changes in public-sector spending; the levels of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government; the levels of compensation and non-salary benefits received by comparable professionals in government, academia and private and nonprofit enterprise; the ability to attract talent in competition with comparable private sector positions; and the state's ability to fund increases in compensation and non-salary benefits
> (L. 2018, ch. 59, Part HHH § 2.3).

The Committee held four public meetings, on November 13, 2018, November 28, 2018, November 30, 2018, and December 6, 2018, respectively. The recommendations that were ultimately made included a phased in increase in base pay for various state officials under Executive Law § 169; the elimination of all but 15 stipends under Legislative Law § 5-a; a cap on outside income for legislators set at 15% of their base salary, and a ban on outside income from employment where the legislator has a fiduciary duty (see, Report of Committee on Legislative and Executive

Compensation at 14-18 [Dec. 10, 2018]).

Part HHH provides that the recommendations made by the Committee "shall have the force of law, . . . **unless modified or abrogated by statute prior to January first of the year as to which such determination applies to legislative and executive compensation**" (L. 2018, ch. 59, Part HHH § 4.2) (emphasis added). As the Legislature failed to abrogate or modify the Committee's recommendations by January 1, 2019, the Legislature gave the recommendations the force of law. As a result, the first of the payments made pursuant to the Committee's recommendations were disbursed on January 9, 2019.

III. DISCUSSION

A. Standard

It is well established that a motion pursuant to CPLR 3211 (a) (7) may be utilized to dispose of an action in which the plaintiff has not stated a cognizable cause of action, or in which the plaintiff identifies a cognizable cause of action but has failed to assert the facts necessary to support it (see, Guggenheimer v Ginzberg, 43 NY2d 268, 275 [1977]; Fourth Branch Assoc. Mechanicville v Niagara Mohawk Power Corp., 235 AD2d 962, 964 [1997]). Where dismissal is sought as to a well-pleaded but factually unsupported claim, the Court of Appeals has made clear that the Court may consider evidence outside the four corners of the complaint (see, Rovello v Orofino Realty Co. Inc., 40 NY2d 633 [1976]; Guggenheimer v Ginzberg, 43 NY2d 268, 275 [1977]; see also, Board of Managers of Fairways at N. Hills Condominium v Fairways at N. Hills, 150 AD2d 32 [2d Dept 1989]). In this situation, the standard on a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7) "morphs from whether the plaintiff stated a cause of action to whether it has one" (Basis Yield Alpha Fund v Goldman Sachs Group Inc., 115 AD3d 128, 135 [2014] [citation omitted]). Thus, if the defendants' submissions establish that plaintiffs have no cause of

action, dismissal would be appropriate under CPLR 3211 (a) (7) (see, Basis Yield Alpha Fund (Master) v Goldman Sachs Grp., Inc., 115 AD3d 128, 134–35 [2014]; Constructamax, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP, 109 AD3d 574 [2013]; Rabos v R&R Bagels & Bakery, Inc., 100 AD3d 849, 851-852 [2012]; Skillgames, LLC v Brody, 1 AD3d 247, 250 [2003]).

However, in cases where the Court determines that a complaint asserts a properly pleaded cause of action for a declaratory judgment and therefore survives a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (7), the Court's inquiry need not end. While as a general rule a pre-answer motion to dismiss a declaratory judgment action does not permit the Court to consider the underlying merits of a claim for declaratory relief(see, North Oyster Bay Baymen's Assn. v Town of Oyster Bay, 130 AD3d 885, 890 [2015]; Matter of Dashnaw v Town of Peru, 111 AD3d 1222, 1225 [2013]), an exception to this rule exists. Where "no questions of facts are presented by the controversy" in question, the Court may reach the merits of a properly pleaded claim for a declaratory judgment in the context of a pre-answer motion to dismiss under CPLR 3211 (a) (7) (see, Metro Enterprises Corp. v Dep't of Taxation & Fin., 171 AD3d 1377, 1378–79 [2019] [internal citation omitted]; see, Matter of Dashnaw v Town of Peru, 111 AD3d at 1225 [2013]; Matter of Tilcon NY, Inc. v Town of Poughkeepsie, 87 AD3d 1148, 1150 [2011]). Finally, it is well settled that "a query concerning the scope and interpretation of a statute or a challenge to its constitutional validity" is a pure question of law and therefore does not entail consideration of questions of fact (In re 381 Search Warrants Directed to Facebook, Inc., 29 NY3d 231, 270 [2017]; Cayuga Indian Nation of NY v Gould, 14 NY3d 614 [2010]).

B. Plaintiffs' Standing

Under State Finance Law, "a citizen taxpayer . . . may maintain an action for equitable or

declaratory relief, or both, against an officer . . . [who] has caused . . . a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property" (N.Y. State Fin. Law § 123-b). It is well settled that a plaintiff may not bring this type of action to scrutinize nonfiscal activities, and the Court of Appeals has cautioned courts against reading section 123-b too broadly lest standing be given to challenge virtually all governmental acts (see, Rudder v Pataki, 93 NY2d 273, 281 [1999]). Defendants allege that the activities being challenged here are nonfiscal because they save the State money, rather than disbursing it as section 123-b requires. However, the Court finds that plaintiffs' challenge to Part HHH and the Committee's recommendation, both which address the compensation of state officials, have "a sufficient nexus to fiscal activities of the State to allow for section 123–b standing" (Rudder v Pataki, 93 NY2d at 281 [1999]). The Court therefore finds that plaintiffs have standing to bring this action.

C. Open Meetings Law

Under New York State's Open Meetings Law, decisions and other relevant business conducted by public bodies should be made publicly "to assure the public's right to be informed" (MCI Telcoms. Corp. v PSC, 231 AD2d 284, 290-91 [1997]; see, Public Officers Law, §§ 95-106). While courts are empowered to declare void, upon a showing of good cause, any action taken by a public body that violates the Open Meetings Law, it is also clear that courts retain their discretion in this matter and that "not every breach of the 'Open Meetings Law' automatically triggers its enforcement sanctions" (N.Y. Univ. v Whalen, 46 NY2d 734, 735 [1978]). Plaintiffs allege a number of violations of Open Meetings Law, including (1) not providing the audio-visual recording of the November 28, 2018, meeting; (2) deciding to retain council, and meeting with said council, outside of a public meeting; (3) starting a meeting late, which plaintiffs allege was "presumably"

because they had met in an executive session, (4) the final written report issued by the Committee was not on the table to be voted on for the fourth and final public meeting, and (5) several details of the implementation found in the final report were not fully discussed and voted on during the public meetings.

Even if the Court credits these technical violations as true, the Court would still find that plaintiffs have failed to meet their burden of demonstrating good cause warranting the exercise of the Court's discretionary power. The Committee held four public meetings in which they extensively explained their positions and public opinion was sought (and received), and plaintiffs have further failed to provide any compelling evidence that the Committee acted intentionally when it allegedly violated the Open Meetings Law. Accordingly, the Court finds that plaintiffs have failed to demonstrate sufficient good cause to warrant nullification of the Committee's recommendations with regard to Open Meetings Law (see, Matter of Harvey v Zoning Bd. of Appeals of The City of Kingston, 166 AD3d 1149, 1151 [2018]; Matter of Frigault v Town of Richfield Planning Bd., 107 AD3d 1347, 1352 [2013]; MCI Telcoms. Corp. v PSC, 231 AD2d at 291 [1997]).

D. State Administrative Procedure Act

Plaintiffs allege that the determinations and recommendations set forth in the Committee's report are invalid because the Committee failed to adhere to the rule-making requirements of Article 2 of the State Administrative Procedure Act ("SAPA"). SAPA § 202 (1) (a) states, in relevant part, that "[p]rior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule." A "rule" is defined in pertinent part as "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers" (Matter of Roman Catholic Diocese

of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985]). In addition, SAPA defines an "agency" as "any * * * committee * * *at least one of whose members is appointed by the governor, authorized by law to make rules or to make final decisions in adjudicatory proceedings" (SAPA § 102 [1]).

Here, inasmuch as the Committee was not authorized by Part HHH to make rules or final decisions in any adjudicatory proceedings, the Committee cannot be considered an "agency" subject to the administrative requirements of SAPA. Nor can the recommendations set forth in its report be considered "rules" under SAPA because they do not establish standards that could alter the outcome of future agency adjudications, but "merely implement, explain or interpret" an already existing requirement (see, Matter of Council fo the City of New York v Department of Homeless Servs. of the City of NY, 22 NY3d 150, 156 [2013]). For these reasons, the Court concludes that the Committee's report does not violate the administrative requirements set forth in SAPA (see, Matter of Roman Catholic Diocese of Albany, 66 NY2d 948, 951 [1985]).

E. Delegation of Legislative Power

Plaintiffs contend that Legislature improperly delegated its lawmaking authority by conferring upon the Committee the power to issue regulations that may be given the force of law. While Article III of the New York State Constitution vests legislative powers in the Senate and Assembly, "there is no constitutional prohibition against the delegation of power to an agency or commission to administer the laws promulgated by the Legislature, provided that power is circumscribed by reasonable safeguards and standards" (Center for Jud. Accountability, Inc. v Cuomo, 167 AD3d 1406, 1410 [2018]; see, Boreali v Axelrod, 71 NY2d 1, 10 [1987]; Matter of Retired Pub. Empls. Assn., Inc. v Cuomo, 123 AD3d 92, 97 [2014]). Courts have upheld the Legislature's delegation of authority even where they have been "circumscribed in only the most

general of terms" (Boreali v Axelrod, 71 NY2d 1, 10 [1987]). The specificity of the standards to be set forth by the Legislature to limit the authority of the agency or commission are "relative to the nature of [the] program" (Sleepy Hollow Lake, Inc. v Pub. Serv. Com., 43 AD2d 439, 443 [1974]).

In Center for Judicial Accountability, Inc. v Cuomo, wherein a similar enabling statute, Part E of Chapter 60 of the Laws of 2015 ("Part E"), created a commission to examine and make recommendations on judicial salaries, the determination faced similar constitutional challenges (Center for Jud. Accountability, Inc. v Cuomo, 167 AD3d 1406 [2018]). The Court there found that the policy determinations and factors given by the Legislature in Part E provided "adequate standards and guidance for the exercise of discretion by the Commission" (Center for Jud. Accountability, Inc. v Cuomo, 167 AD3d at 1411 [2018]). The language and factors found in Part HHH are nearly identical to the language and factors found in Part E, except that in Part HHH the Legislature actually provided two additional factors in addition to those found in Part E: "the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities" and "the ability to attract talent in competition with comparable private sector positions" (compare L. 2018, ch. 59, Part HHH § 2.3 with L. 2015, ch. 60, Part E § 2.3). The Court in Center for Judicial Accountability, Inc. v Cuomo also notes the safeguard built into Part E, which requires the Commission to report its recommendations to the Legislature, who in turn could exercise its ability to accept or reject these recommendations, which is again nearly identical to the one found in Part HHH (compare L. 2018, ch. 59, Part HHH § 4.2 with L. 2015, ch. 60, Part E § 3.7; see, Center for Jud. Accountability, Inc. v Cuomo, 167 AD3d at 1411 [2018]).

Here, similar to Center for Jud. Accountability, Inc. v Cuomo, the Legislature established the Committee to "to examine, evaluate and make recommendations with respect to adequate levels of compensation, non-salary benefits, and allowances pursuant to section 5-a of the legislative law,

for members of the legislature, statewide elected officials, and those state officers referred to in section 169 of the executive law" and to determine whether "the annual salary and allowances of members of the legislature, statewide elected officials, and salaries of state officers referred to in section 169 of the executive law, warrant an increase" (L. 2018, ch. 59, Part HHH § 1, 2.2). The Legislature provided the Committee with guidance in completing this task by asking them to take into account:

> **all appropriate factors including, but not limited to**: the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities; the overall economic climate; rates of inflation; changes in public-sector spending; the levels of compensation and non-salary benefits received by executive branch officials and legislators of other states and of the federal government; the levels of compensation and non-salary benefits received by comparable professionals in government, academia and private and nonprofit enterprise; the ability to attract talent in competition with comparable private sector positions; and the state's ability to fund increases in compensation and non-salary benefits
> (L. 2018, ch. 59, Part HHH § 2.3) [emphasis added]).

Section 4.2 of Part HHH, which sets forth the process by which the Committee's recommendations become law, states that:

> **[e]ach recommendation made to implement a determination pursuant to section two of this act shall have the force of law, and shall supersede, where appropriate, inconsistent provisions of section 169 of the executive law, and sections 5 and 5-a of the legislative law,** unless modified or abrogated by statute prior to January first of the year as to which such determination applies to legislative and executive compensation.
> (L. 2018, ch. 59, Part HHH § 4.2)(emphasis added).

Notably this section does not task the Committee with making recommendations related to ethical rules. If this section intended to grant the Committee authority to amend or revise ethical rules, Part HHH would have set forth that the Committee's recommendations, where appropriate, shall supersede relevant sections of Public Officers Law. (See Public Officers Law §§ 73, 73-a, and 74).

While the Appellate Division has established that the Legislature's delegation of authority

to make recommendations for pay raises is constitutional (see, Center for Jud. Accountability, Inc. v Cuomo, 167 AD3d at 1411 [2018]), here the Court finds that the Committee exceeded the authority granted. Initially, the Court notes that the relevant facts underlying this issue are not in dispute, and that the inquiry into the scope, interpretation and constitutionality of Part HHH and the Committee's report involve pure questions of law (see generally, In re 381 Search Warrants Directed to Facebook, Inc., 29 NY3d at 270 [2017]). Under these circumstances, the Court in its discretion deems it appropriate to reach the merits of plaintiffs' ultimate request for a declaration as to the validity of the Committee's recommendations.

Here, the Court finds that the Committee's recommendations on prohibited activities and limitations on outside earned income exceeded the delegation of authority given. While Part HHH Section 2, sets forth what the Committee may consider in making a determination as to salaries, it failed to set appropriate limits, thus leaving the Committee with unfettered discretion to make recommendations that are not consistent with Public Officers Law. As a result, the recommendations related to prohibited activities and limitations on outside earned income lack enforcement by The Legislative Ethics Commission (see, Legislative Law § 80 [providing enforcement of the provisions of Public Officers Law §§ 73, 73-a, and 74 for members and employees of the legislature and candidates for state legislative office]).

The Committee's recommendations relating to salary increases effective January 1, 2020 impose limitations on outside income and activities that are not contemplated by the ethical rules set forth in the Public Officers Law. The relevant sections are set forth in Part A of the Committee's report as follows (emphasis added):

> Effective January 1, 2020 the salary of a member of the legislature shall be $120,000.

Further all stipends pursuant to Legislative Law Section 5-a shall be folded into the base salary and set at $0, except for in the Assembly the Speaker of the Assembly, the Majority Leader of the Assembly, Speaker Pro Tempore of the Assembly, the Chair of the Ways and Means Committee, Chair of the Codes Committee, as well as the Minority Leader, Minority Leader Pro Tempore, and Ranking Members of the Ways and Means Committee and the Codes Committee; and in the Senate the stipends for the Temporary President, Deputy Majority Leader and the Chair of the Finance Committee, as well as the Minority Leader, Deputy Minority Leader, and Ranking Member on the Senate Finance Committee. These stipends shall remain unchanged from current levels.

The Committee further finds that the continuation of unrestricted receipt of outside income runs counter to, as Speaker Heastie testified, the fulltime nature of legislative responsibilities, risks actual and perceived conflicts of interest, and thus creates difficulty in setting levels of compensation. The Committee was charged with reviewing other mechanisms of compensation nationally and in other states. This Committee finds that the Congressional model employed to limit outside earned income and potential conflicts of interest is best. **New York shall limit receipt of outside earned income to eliminate both the perception of and any actual conflicts of interest amongst the membership of the two houses and shall completely eliminate outside earned income where there is a fiduciary relationship including service on a board of a company whether for-profit or not-for-profit, to serve as an attorney, financial advisor, consultant or in any other capacity where the public could question whether the employer or the citizens of this state are being properly served. In all cases, where employment is not prohibited, a hard cap of 15% of legislative base salary shall be imposed on outside earned income to ensure that the primary source of earned income is from the state.**

- **Specifically, the prohibited activities are:**
- receiving compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity that provides professional services involving a fiduciary relationship, except for the practice of medicine;
- permitting their name to be used by such a firm, partnership, association, corporation, or other entity;
- receiving compensation for practicing a profession that involves a fiduciary relationship except for the practice of medicine;
- receiving compensation as an officer or member of the board of an association, corporation or other entity;
- receiving compensation for teaching, without prior notification to and approval from the legislative ethics commission;

- receiving advance payments on copyright royalties, fees, and their functional equivalents.

The limitation on outside earned income shall be $18,000.

- Outside earned income shall mean wages, salaries, fees, and other forms of compensation for services actually rendered. It shall not include any:

1) salary, benefits, and allowances paid by New York state;
2) income attributable to service with the military reserves or national guard;
3) income from pensions and other continuing benefits attributable to previous employment or services;
4) income from investment activities, where the member's services are not a material factor in the production of income (5) income from a trade or business in which the member or their family holds a controlling interest, where the member's services are not a material factor in the production of income;
5) income from a trade or business in which the member or their family holds a controlling interest, where the member's services are not a material factor in the production of income;
6) copyright royalties, fees, and their functional equivalent, from the use or sale of copyright, patent and similar forms of intellectual property rights, when received from established users or purchasers of those rights; and
7) compensation for services actually rendered prior to January first, two thousand twenty, or prior to being sworn in as a member of the legislature.
* Existing guidance and information interpreting the Congressional rules may be relied upon for guidance in implementation. **The Legislative Ethics Commission may continue to offer guidance and opinions as to permissible outside activities for Legislators.**

Effective January 1, 2021 the salary of a member of the legislature shall be $130,000.

Further all stipends pursuant to Legislative Law Section 5-a shall be folded into the base salary and set at $0, except for in the Assembly the Speaker of the Assembly, the Majority Leader of the Assembly, Speaker Pro Tempore of the Assembly, the Chair of the Ways and Means Committee, Chair of the Codes Committee, as well as the Minority Leader, Minority Leader Pro

> Tempore, and Ranking Members of the Ways and Means Committee and the Codes Committee; and in the Senate the stipends for the Temporary President, Deputy Majority Leader and the Chair of the Finance Committee, as well as the Minority Leader, Deputy Minority Leader, and Ranking Member on the Senate Finance Committee. These stipends shall remain unchanged from current levels.
>
> All outside earned income shall be limited to 15% of base salary, $19,500, with prohibitions on outside earned income in certain professions as stated above.

As the Committee was not granted the authority to make recommendations that expand or conflict with Public Officers Law, the Court finds that the Committee exceeded its authority. Accordingly, the recommendations effective January 1, 2020 and beyond are null and void. Likewise, "determinations" implemented by those impermissible "recommendations" effective January 1, 2020 and beyond, that contemplate prohibited activities and limitations on outside earned income as outlined above, are also null and void. As a result, the Court hereby severs the 2019 legislative pay raise determination and underlying recommendations from the remaining recommendations made for subsequent years. The Committee's "recommendations" and the determinations related thereto for the year 2020 and thereafter are null and void. However, the recommendations related to legislative salaries and stipends implemented on January 1, 2019 shall remain and have the force of law. The upheld recommendations of the legislative pay raise are as follows:

> Effective January 1, 2019 the salary of a member of the legislature shall be $110,000.
>
> Further all stipends pursuant to Legislative Law Section 5-a shall be folded into the base salary and set at $0, except for in the Assembly the Speaker of the Assembly, the Majority Leader of the Assembly, Speaker Pro Tempore of the Assembly, the Chair of the Ways and Means Committee, Chair of the Codes Committee, as well as the Minority Leader, Minority Leader Pro Tempore, and Ranking Members of the Ways and Means Committee and the

> Codes Committee; and in the Senate the stipends for the Temporary President, Deputy Majority Leader and the Chair of the Finance Committee, as well as the Minority Leader, Deputy Minority Leader, and Ranking Member on the Senate Finance Committee. These stipends shall remain unchanged from current levels.

The Court also finds that the remaining determinations and recommendations made by the Committee as to statewide Elected Officials, set forth in Part B of the report, and as to Commissioners, set forth in Part C of the report, do not exceed the authority given by HHH and have the force of law.

F. Limits on the Grant of Authority Given to the Committee

Plaintiffs have alleged that the entirety of the Committee's recommendations are unconstitutional and unlawful because they fell outside the grant of authority given by the Legislature under Part HHH to determine "whether, on January 1, 2019, the annual salary and allowances of members of the legislature, statewide elected officials, and salaries of state officers referred to in section 169 of the executive law, warrant an increase" (L. 2018, ch. 59, Part HHH § 2.2). Specifically, plaintiffs allege that when it recommended: (1) salary increases based on a determination that legislators should be compensated for full time service, (2) the elimination of some allowances, (3) limitations on outside income, (4) a regrouping of Salaries under Executive Law § 169, and (5) delegating to the Governor discretion to determine salary amounts for some of the state officers referred to in section 169 of the Executive Law.

As set forth above, the Court finds that the Committee exceeded its scope of authority when it recommended salary increases related to prohibited activities and limitations on outside earned income. However, the Committee's recommendations that do not relate to prohibited activities and limitations on outside earned income were within its scope authority. Furthermore, the Court finds no merit to plaintiffs' argument that it is impermissible for the Committee to make any

determination or recommendation while relying on the idea that Legislators should be compensated for full-time service. Plaintiffs cite a variety of sources dating back to the Constitutional Convention of 1915 for the proposition that the legislative position has traditionally been considered part-time, but it is not the role of the Court to second-guess the Committee's determinations or substitute its own judgment for the conclusions the Committee has reached that are within its scope of authority (see, e.g., In re Barnes, 204 NY 108, 125 [1912]; City of New York v State, 31 NY2d 804, 805 [1972]).

Part HHH specifically allows the Committee to take into account a number of factors that would necessarily involve making determinations on the workload and nature of the position, including "the prevailing adequacy of pay levels [and] allowances," "the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities," and "the ability to attract talent in competition with comparable private sector positions," just to name a few. The Committee was tasked with examining the nature of the position as part of its recommendation, and the fact that it concluded that the position was similar to a full-time job does not invalidate certain recommendations. Therefore, the Court finds that the recommendations related to 2019 as outlined above are permissible, and are within the grant of authority given to it by the Legislature under Part HHH. However, the recommendations for 2020 and beyond - that contemplate prohibited activities and limitations on outside earned income - are impermissible.

G. Severability

The Court finds that Heastie's alternative argument for severability has merit here. The test for severability is "whether the Legislature 'would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether" (see NY State Superfund Coalition, Inc. v NY State

Dept of Envtl Conservation, 75 NY2d 88, 94) (citations omitted). Here, the enabling statute set forth a severability clause (Part UUU, § 2 of Chapter 59 of the Laws of 2018 ("Part UUU"). This clause raises a presumption that the Legislature intended the act to be severable. Therefore as outlined above, the recommendations that became law on January 1, 2019 related to salary increases for 2019 continue to have the force of law. The recommendations that contemplate prohibited activities and limitations on outside earned income commencing January 1, 2020 and beyond are null and void.

IV. CONCLUSION

Based upon the foregoing the Court finds that the recommendations related to Legislative salaries and stipends implemented on January 1, 2019 shall remain and have the force of law. The Court also finds that the determinations and recommendations made by the Committee as to statewide Elected Officials, set forth in Part B of the report, and as to Commissioners, set forth in Part C of the report, do not exceed the authority given by HHH and have the force of law. However, the "recommendations" effective January 1, 2020 and beyond that contemplate prohibited activities and limitations on outside earned income are null and void. As a result, the Court hereby severs the legislative pay raise. Lastly, this Court's decision does not preclude the New York State Commission on Legislative, Judicial and Executive Compensation from making its own recommendations related to legislative compensation effective January 1, 2020 or thereafter.

For the foregoing reasons, it is hereby

ORDERED that defendants' motion is granted in part, without costs, and it is further

ORDERED that the first, third and fourth causes of action in the amended complaint are dismissed in their entirety, and it is further

NEW YORK STATE
COURT OF APPEALS

Roxanne Delgado, *et al.*,

Appellants,

v.

Albany County Supreme Court
Index No. 907537-18

State of New York, *et al.*,

Respondents.

AFFIDAVIT OF SERVICE

I, Cameron J. Macdonald, hereby certify that on August 20, 2018, I served:

Appellant's Preliminary Appeal Statement

by depositing it enclosed in a first-class postpaid wrapper, addressed to counsel for the respondents:

Letitia James
Attorney General
The Capitol
Albany, New York 12224

copy to:

Solicitor General
Department of Law
The Capitol
Albany, New York 12224

in a post office under the exclusive care and custody of the United States Postal Service within the United States.

Cameron Macdonald