Appellate Division — Third Department Case No. 529556

New York Supreme Court

APPELLATE DIVISION—THIRD DEPARTMENT

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

Plaintiffs-Appellants,

—against—

STATE OF NEW YORK and THOMAS DINAPOLI,
in his official capacity as New York State Comptroller,

Defendants-Respondents.

BRIEF OF AMICUS CURIAE ANDREA STEWART-COUSINS, INDIVIDUALLY AND IN HER CAPACITY AS MAJORITY LEADER OF THE NEW YORK STATE SENATE

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Proposed amicus curiae Andrea Stewart-Cousins, both individually and in her official capacity as the Majority Leader of the New York Senate, respectfully submits this brief in support of Defendants-Respondents the State of New York and Thomas DiNapoli. The Majority Leader supports, joins in, and hereby incorporates by reference all of the arguments presented by proposed amici curiae Assembly Speaker Carl Heastie and Governor Andrew Cuomo. We write separately to offer these brief additional comments.

INTEREST OF PROPOSED AMICUS CURIAE

The New York Senate is one of the two houses of New York's bicameral State Legislature. Its members are elected to two-year terms. The Majority Leader is elected by the majority of the members of the Senate. Proposed amicus curiae Andrea Stewart-Cousins was first elected to the Senate in 2006. She became Minority Leader in 2012 and Majority Leader in 2019. As such, she has deep experience and a particular understanding of and interest in issues surrounding the delegation of legislative power.

This action, which concerns the pay of public servants in the Legislature, involves a matter of significant public importance. The 2019 legislative pay increase that is at issue is long overdue. Salaries have not increased since 1999, failing to keep pace with the rate of inflation, much less the cost-of-living increases in categories like health care, child care, and transportation. The Legislature's

decision to delegate its pay-setting authority to the Committee on Legislative and Executive Compensation ("Committee") also has implications for the Legislature's authority to delegate in other areas and contexts.

ARGUMENT

In this increasingly complicated world, it is more important than ever that the Legislature be able to delegate authority to expert outside bodies to promulgate rules and regulations or, as in this case, to make recommendations about changes to existing law. To be sure, it also remains imperative that such delegations provide clear principles that cabin an agency or committee's discretion; that the Legislature remain accountable for what the agency or committee does; and that there be an opportunity for meaningful judicial review to ensure that the agency or committee has not run amok. Those requirements have been satisfied here.

This case is nothing like *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), or any of the other cases in which courts have occasionally held that an agency exceeded its delegated powers. In *Boreali*, the Legislature simply did not delegate *any* authority to regulate smoking in public. The statute that created the Public Health Council said nothing whatsoever about regulating smoking in public. It certainly did not provide any guidance about how to balance the competing concerns of nonsmokers, smokers, businesses, and the general public. The agency regulated smoking in public based on nothing more than a general statutory mandate to "deal

with any matters affecting the . . . public health." *Id*. at 9 (citing Public Health Law § 225(5)(a)). The Legislature never directed the agency to regulate smoking in public, much less did the Legislature articulate any principles that would guide and cabin the agency's discretion in doing so. The agency's actions were entirely *ultra vires* because it acted "without any legislative guidance" and engaged in "its own assessment of what public policy ought to be" in an effort "to correct whatever societal evils it perceive[d]." *Id*.

This case is entirely different. Here, the Legislature created the Committee for the specific purpose of "examin[ing], evaluat[ing] and mak[ing] recommendations with respect to adequate levels of compensation, non-salary benefits, and allowances" for members of the Legislature. Part HHH, § 1. The Legislature expressly directed the Committee to examine and consider:

> 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 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.

Id. § 2(3). Far from ignoring these clear principles, the Committee faithfully followed them in recommending the 2019 legislative pay increase – thoroughly analyzing the nature and degree of its statutory mandate, and expressly tying its recommendation to that mandate. R. 51-63 (Committee Report at 7-19). The record here – which evidences the Legislature's detailed and specific delegation of authority, and the Committee's careful exercise of its defined and limited authority to act – is a far cry from what happened in *Boreali*.

Instead, this case plainly is on all fours with this Court's recent decision in *Center for Judicial Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406, 1411 (3d Dep't 2018), *appeal dismissed*, 33 N.Y.3d 993 (2019), *leave to appeal denied*, 34 N.Y.3d 961 (2019). As with Part HHH, the enabling statute in that case directed the Commission on Legislative, Judicial and Executive Compensation "to examine . . . the prevailing adequacy of judicial compensation and to make recommendations regarding whether such compensation warrants adjustment." *Id*. at 1410. That statute required that Commission to consider virtually the exact same factors that Part HHH mandated the Committee to consider in this case. *Id*. at 1410-11. This Court concluded that "the factors established by the Legislature

provide adequate standards and guidance for the exercise of discretion by the Commission," and that the statute therefore "does not unconstitutionally delegate legislative power to the Commission." *Id*. at 1411. Plaintiffs-Appellants do not and cannot distinguish *Center for Judicial Accountability*, which is controlling authority that this Court should follow. *See*, *e.g*., *Matter of Schulz v. State of New York*, 241 A.D.2d 806, 807-08 (3rd Dep't 1997) ("Once this Court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision under the doctrine of stare decisis, which recognizes that legal questions, once resolved, should not be reexamined every time they are presented.") (quotation omitted).

There is no failure of accountability here. The Committee did exactly what the Legislature and the Governor directed it to do. The Committee faithfully applied the specific principles that were prescribed in the statute and drew reasoned conclusions about appropriate outcomes. The Legislature reserved the right to review and, if necessary, abrogate what the Committee did; the Legislature reviewed what the Committee did; and the Legislature concluded that no action was necessary because the Committee acted appropriately. In so doing, the Legislature gave its imprimatur to the Committee's actions and, like any principal that has delegated authority to an agent, became and remains responsible to the electorate for the outcome.

The 2019 pay increase at issue in this case is long overdue. It is critical to attracting and retaining talented people to perform the vital legislative functions at issue. The Committee carefully considered and applied the factors that the Legislature and Governor prescribed. The Committee found that "New York ranks fourth in the country in terms of population and second in the country in terms of operating budget"; that "[t]he overall gross product produced by New York ranks third in the country with over $1.5 trillion earned annually"; that "[t]he output of New York State and the needs of its population dwarf those of many countries worldwide"; and that "[t]he duties and responsibilities of the . . . Legislature are amongst the most complex in the world." R. 54 (Committee Report at 10). The Committee further found that "[b]y any economic measure, the compensation of New York's . . . Legislative branch officials has failed to keep pace with the rate of inflation since 1999 when the last pay increase became effective," observing that "measur[ing] simply by the Consumer Price Index," the "actual purchasing power" of Legislators' salaries had decreased markedly. R. 54-55 (Committee Report at 10-11). The Committee further found that "[w]hile the median household income in New York is up 67% during the past two decades, the $79,500 base salary for lawmakers" that was in place before 2019 only had "a purchasing power of $51,401" compared with the purchasing power it had when it was enacted in 1998. R. 55 (Committee Report at 11). The Committee further found that "the cost of

living in every category – health care, child care, transportation, etc." had "far outpaced" the 1999 salary, and that as a result Legislators had been "seeking positions in New York City government or the Executive branch at a much greater rate than in past years." *Id*. The Committee analyzed private sector wage growth over the same two decades, finding that Legislators were not being compensated appropriately in the "context of the broader labor market in which the State competes for talented individuals." *Id*. After carefully considering all of the record evidence it had adduced, the Committee concluded that there was "a compelling case" that there had been an untenable "erosion of the legislators' salaries" and that the 2019 increase from $79,500 to $110,000 per year was warranted. *Id*.

Surely these detailed findings and conclusions were eminently rational, and surely they fell squarely within the Committee's express statutory mandate. The Legislature reviewed the Committee's work and found no reason to reject what the Committee did. This is an example of good government working effectively, not the kind of lawlessness that could justify the extraordinary relief Plaintiffs-Appellants seek.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Dated: September 14, 2020

Respectfully submitted,

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