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DEMOCRATIC CONFERENCE / COUNSEL'S OFFICE

Date: May 15, 2017
To: Senate Democratic Conference Leader Andrea Stewart-Cousins
From: Shontell M. Smith, Esq., Director of Counsel and Finance
Re: Illegality of Allowances to Legislators Not Holding the Stated Positions

FINDINGS

The granting of legislative allowances to Senators who do not hold one of the specifically itemized positions listed in Legislative Law Section 5-A is not permitted by law.

Senate leadership and their staffs may not lawfully file records with the Comptroller that authorize payments to Senators for such allowances unless that specific Senator explicitly holds the position listed in Legislative Law.

BACKGROUND

As has been widely reported, some Senators from the Independent Democratic Conference (IDC) and the Republican Conference (GOP) are being paid allowances (also referred to as "lulus" or "stipends") for positions they do not actually hold and in some cases are already held by other Senators. While these IDC and GOP Senators were appointed as vice-chairs of certain committees (or in one case, deputy vice-chair) or are holding certain leadership positions, they are receiving the allowances reserved for the chairs of those committees or specifically named majority leadership positions.

The legal authorization for legislative allowances comes from Article III, Section 6 of the State Constitution and from Legislative Law Section 5-A, which lists specific positions in each legislative house whose holder is entitled to receive a legislative allowance. According to Section 5-A, an allowance is paid to a member "serving as an officer of his house or in any other special capacity therein or directly connected therewith." Officers to which this applies are listed and include leadership positions held in the majority and minority conferences. "Special capacity" positions include a series of explicitly listed committee chairs and ranking members.

In 1947, the State Constitution was amended to provide specific salary and stipend guidance. This language created the underlying authority for the granting of allowances. Article III, Section 6 included language stating that "[a]ny member, while serving as an officer of his or her house or in any other special capacity therein or directly connected therewith not hereinbefore in this section specified, may also be paid and receive, in addition, any allowance which may be fixed by law for the particular and additional services appertaining to or entailed by such office or special capacity."

LEGAL ANALYSIS

The history of the Constitution and Legislative Law Section 5-A demonstrates that the "directly connected therewith" language is not intended to permit the granting of allowances to Senators who do not hold one of the itemized positions on the theory that those Senators are performing duties "directly connected" with the itemized positions. **Those three words do not mean "directly connected" with the chair position, but rather are intended to authorize allowances for positions that are "directly connected" with a particular house of the legislature even when those positions are not contained within the Senate or Assembly**. There are numerous bicameral commissions whose leaders are entitled to allowances under this clause.

In Article III, Section 6, the Constitution makes reference to positions "directly connected therewith" only after referring to impeachment trials that would be managed by members of both the Senate and Assembly. By bolding the language in the following way, a reader can get a better sense of the language's actual intent: "[a]ny member, while serving as an officer **of his or her house** or in any other special capacity **therein or directly connected therewith** …" When read this way, it becomes clear that "directly connected therewith" properly refers to positions that are directly connected with a particular house of the legislature, but not actually contained therein.

In fact, when Legislative Law 5-A was first enacted in 1976, it did not include the "directly connected therewith" language at all. At that time, the section read, "any member of either house of the legislature serving as an officer of his house or in any other special capacity therein shall be paid an allowance in accordance with the following schedule".[1]

Only in 1984, when the law was amended to include allowances for bi-cameral positions for the first time, did Section 5-A add the "directly connected therewith" language.[2] For example, among the new positions entitled to allowances in the 1984 amendment were the co-chairs of the Administrative Regulations Review Commission and the chairman of the Legislative Commission on Science and Technology, among others. The "directly connected therewith" language was therefore added in 1984 to clarify that service in a bicameral entity also entitled those serving in such a capacity to an allowance. This interpretation also helps avoid the constitutional problem referenced above.

The plain language of the Constitution also indicates that the "directly connected therewith" language is not intended to allow anyone other than the particular committee chair listed to receive an allowance. According to the Constitution, the allowance fixed by law is limited to "additional services appertaining to or entailed by the office or special capacity," not for those holding positions "directly connected" with those responsibilities. In other words, the Constitution does not envision anyone other than the named officer or Senator serving in a specific special capacity (e.g., committee chair) receiving the allowance.

[1] Attachment B

[2] Attachment C

More guidance is found in authoritative contemporary writings indicating the understanding of the parties that allowances would only apply to holders of these positions; for example, the Solicitor General in a 1947 Bar Association publication described the relevant language as providing for authorization to give an "allowance to be paid to any member of either house while servicing as an officer of his house or in any other special capacity therein…this latter provision would include, among others, the Temporary President of the Senate, the Speaker of the Assembly, and chairmen of the various legislative committees…" There is no mention of the "directly connected therewith" language in the Solicitor General's opinion.[3]

Additionally, a New York Times Article from 1957 references an opinion by Attorney General Louis Lefkowitz that argued the constitutional language applied explicitly to the holders of leadership or committee positions, as allowances were allowed only "for service as officers or in a special capacity."[4]

No additional clarity is needed, and yet the law gives us one more. There is one vice-chair position explicitly listed in Legislative Law among those entitled to an allowance: vice-chair of the Legislative Commission on the Development of Rural Resources.[5] **This indicates that the legislature intends to make crystal clear when a vice-chair should be receiving an allowance**. In fact the legislature specifically changed who is entitled to that allowance from the chair to the vice-chair in 1990.[6] If the false GOP-IDC interpretation is accepted, there would be no reason whatsoever to make this change since the vice-chair would be entitled to an allowance as someone holding a position "directly connected" with the chair of the commission.

COURT PRECEDENT

It is well established that a statute which confers upon members of a legislative body the power to fix their own salaries will be strictly construed, and, unless the statutory language is clear and unmistakable, such power will be denied because of its extraordinary character, 4 McQuillin, Municipal Corporations [3d ed], § 12.178.

The highest court in our own state has pointed to the dangers of an unchecked legislature in this regard, citing the need "to forestall the possibility of manipulation of legislators' votes by promises of reward or threats of punishment effectuated through changes in salaries or allowances," NYPIRG v. Steingut, 40 NY2d 250, 258 (1976). The Appellate Division in the NYPIRG case similarly cited the need "to remove … the temptation to put [the legislature's] … personal interests above the public welfare in determining the amount of their salaries." 52 AD2d 100, 103, *citing City Council of Newburyport v Mayor of Newburyport*, 241 Mass 575, 577 *(1922)*.

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[3] Attachment A

[4] https://timesmachine.nytimes.com/timesmachine/1957/04/15/84911533.html?action=click&login=email&pageNumber=31

[5] See Legislative Law 5-A, sub-3.

[6] Attachment D

In the NYPIRG case, the Court of Appeals rejected efforts to deviate from legislative allowances established by pre-existing law when the legislature increased the amount of certain allowances as part of the budget process. The Court of Appeals found that, if the legislature is allowed to have unfettered discretion over allowances, "the possibility of misuse of increases or decreases to influence legislative action would remain unchecked," NYPIRG v. Steingut, 40 NY2d 250, 260 (1976).

Similarly in the present context, allowing the Temporary President of the Senate unfettered discretion to decide who receives statutorily-assigned allowances would effectively subvert the Court's findings in the NYPIRG case and run afoul of the Constitution's Article III prohibition on altering legislative compensation during a term. If the current situation is permitted, the Temporary President of the Senate can alter his determination of which members deserve a chair's allowance at any time during a legislative term, enabling the precise type of manipulation the courts have long warned against.

GOP-IDC ARGUMENT

The GOP and IDC argue that payments of allowances intended for the chairs of certain committees can nevertheless be awarded to newly-created and non-statutory vice-chairs or even deputy vice-chairs. They make this argument in the hopes that the Legislative Law language "directly connected therewith" can be read to include a third category beyond officers or those serving in a specifically listed special capacity, authorizing the payment of allowances to a person who does not hold the position specifically listed so long as the Senator holds a position "directly connected" with the underlying paid position. They argue that vice-chairs or deputy vice-chairs serve in a role "directly connected" with the chair, and are therefore eligible to claim the allowance. As outlined above, this argument is incorrect and nonsensical, and the allowances paid in this case violate state law and the Constitution.

If the GOP-IDC interpretation is permitted to hold water, the entirety of Legislative Law Section 5-A would effectively be erased from the books. The list of officers or "special capacity" roles entitled to allowances would be effortlessly subverted by the appointment of a Senator to a newly-created and non-statutory position related to the committee of relevance. It is important to recognize that vice-chair is not a position required by law. Rather, it is an informal position invented by the Temporary President of the Senate, in this case in a feeble attempt to grant allowances to those not otherwise entitled to them. If this is allowed, what would prevent future appointments of vice-chairs, assistant-chairs, assistants to the vice-chairs, or any other position one can imagine in order to pay allowances to Senators other than the actual chairs on the theory that the new position is "directly connected" with the chair?

The GOP and IDC claim that the payment of allowances to unlisted positions is authorized because of "case law." They generally claim this based on the unrelated holding in Urban Justice Center v. Pataki, 38 A.D.3d 20 (2006), which generally stands for the proposition that unfair treatment of a minority conference by the majority does not state a justiciable claim. Nothing in this decision is relevant to the issue at hand and, tellingly, the GOP and IDC do not provide any sound argument beyond the blanket assertion that this decision justifies its actions.

The Urban Justice Center decision references the principle that the legislature has discretion to allocate internal resources not specifically restricted by law (for example, for staff and office costs), but in no way justifies doing so in a manner contrary to existing law that requires a specific allocation of state tax dollars.

If the GOP-IDC interpretation is applied, there would be no control whatsoever over the legislature's spending other than the whim of the Temporary President of the Senate. This would be an open invitation to further corruption and cannot possibly be allowed to stand. Our laws apply to everyone, including the legislature.

Perhaps most damning of all, **the GOP and IDC took steps to conceal their improper behavior from the State Comptroller by submitting certified documentation listing the various vice-chairs and deputy vice-chair as the actual chairs of their respective committees**. If their actions were above-board, they would have indicated to the Comptroller that these Senators were actually vice-chairs or deputy vice-chairs to whom they were attempting to allot the chair's allowance. This clearly indicates the sender's knowledge that only the statutorily-itemized chair positions are entitled to legislative allowances.

CONCLUSION

The granting of legislative allowances to Senators who do not hold one of the specifically itemized positions listed in Legislative Law Section 5-A is not permitted by law, and Senate leadership and their staffs may not lawfully file records with the Comptroller that authorize payments to Senators for such allowances unless that specific Senator explicitly holds the position listed in Legislative Law.

The "directly connected therewith" language does not provide a catch-all exception to be applied to any newly-created position that is arguably "directly connected" with one of the itemized positions. Rather, it is only intended to provide authority to grant allowances for itemized positions that are not within a legislative house.

The judiciary has long warned against the exact type of manipulation taking place in this case and rejected previous attempts to improperly alter legislative allowances.

Any other reading of these provisions would make a mockery of our laws and open the door to corrupt practices.