SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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In the Matter of the Application of

HON. ELLEN GESMER, HON. DAVID FRIEDMAN, HON. SHERI S. ROMAN, HON. JOHN M. LEVENTHAL and DANIEL J. TAMBASCO,

Petitioners/Plaintiffs,

For a Judgment under Article 78 of the CPLR

-against-

THE ADMINISTRATIVE BOARD OF THE NEW YORK STATE UNIFIED COURT SYSTEM, JANET DIFIORE, as Chief Judge of the New York State Unified Court System and LAWRENCE K. MARKS, as Chief Administrative Judge of the New York State Unified Court System,

Respondents/Defendants.

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INDEX NO.: 616980/2020
RETURN DATE: 12/16/20
MOTION SEQ. NO.: 001 MG

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ORDERED, ADJUDGED AND DECREED, that the second cause of action in the Verified Article 78 Petition and Complaint dated November 5, 2020, is granted and the determination of the Respondent Administrative Board of the New York State Unified Court System made on September 22, 2020, declining the applications of the Petitioners-Respondents, Justice Ellen Gesmer, Justice David Friedman, Justice Sheri S. Roman, and Justice John M. Leventhal, to serve as certified judges for the years 2021-2022, is hereby annulled as arbitrary and capricious; and it is further

ORDERED, ADJUDGED AND DECREED that the Petitioners are hereby entitled to withdraw, without penalty, any previously filed application(s) to receive pension and/or healthcare benefits in connection with their retirement as Justices of the Supreme Court.

The facts of this controversy are undisputed and the parties agree that the causes of action

in this proceeding/action are ripe for determination on the merits. A verified answer and the certified transcript of the record of the proceedings under consideration were filed on December 16, 2020. Therefore, in reaching its determination, the Court has not considered any papers filed by the parties after December 16, 2020, the submission date of the Petition.

Petitioners-Plaintiffs (hereinafter "Petitioners") commenced this hybrid Article 78 proceeding and action asserting that the determination made by Respondent-Defendant Administrative Board of the New York State Unified Court System (hereinafter "Board") on September 22, 2020, declining to certify 46 of the 49 judges who applied to serve as certified judges for the years 2021-2022 was violative of lawful procedure, arbitrary and capricious, unconstitutional, and discriminatory. Petitioners include 4 of the 46 elected Supreme Court Justices who have reached the mandatory retirement age and have been denied certification under the process set forth in the New York State Constitution, Article VI, §25(b). Petitioners contend, among other things, that this year's process was marred by arbitrary and capricious actions of the Board. Based on the uncontroverted facts, and as a matter of law, this Court agrees with the Petitioners.

Under the above-cited constitutional provision, which was adopted by the voters of New York on November 7, 1961, Supreme Court Justices seeking certification to serve beyond the mandatory retirement age of 70 must apply to the Board. The applicable constitutional provision (Art. 6. §25[b]) is set forth as follows:

> ... Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with the power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the service of such judge or justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office. ...

Therefore, certification is a two-part process, which focuses on two basic questions; 1) whether "the service of such judge or justice are necessary to expedite the business of the court" and 2) whether the applicant "is mentally and physically able and competent to perform the full duties of such office." Once these criteria are met the Board has discretion to grant or deny an application, as there is no entitlement to certification based solely on satisfaction of the two-pronged analysis.

Here, it is conceded that each of the Petitioner Justices satisfied the second criteria. As to the first criteria, the certified transcript of the record of the proceedings under consideration filed by the Respondents lacks any evidence whatsoever to support a finding that the Board complied with its obligation to conduct an individualized review of each Justice applying for certification to determine whether he or she is "necessary to expedite the business of the court." The Court of

Appeals has previously held that such a "two pronged determination" is mandated based upon "an individualized evaluation" that must include, *inter alia*, consideration of the costs of certification, including non-monetary costs, by the Board (*see Marro v Bartlett*, 46 NY2d 674, 680 [1979]; *Matter of Loehr v Administrative Bd. of the Cts. of the State of New York*, 29 NY3d 374, 382 [2017]).

In this case, as in the related proceeding *Matter of Sup. Ct. Justices Assoc. of the City of New York v. The Admin. Bd. of the New York State Unified Ct. Sys.* Suffolk County Index No. 618314/2020), the only document filed by the Respondents as constituting the certified transcript of the Board's proceedings on September 22, 2020, regarding applications for certification is the two-page "Minutes of the Meeting of the Administrative Board, *Revised* ." This heavily redacted document states as follows regarding applications for certification:

> 4. The Board declined to certify 46 of the 49 judges applying for certification, owing to current severe budgetary constraints occasioned by the coronavirus pandemic. Three judges, having specialized additional assignments were certified.

This single entry in the minutes is the entirety of the relevant record presented by Respondents in defense of the petition. The bland assertion contained in those two sentences simply cannot reasonably be viewed as the exercise of the "integrity and collective wisdom of a carefully selected, high level certifying authority endowed with peculiar experience and expertise" to which the Constitution and Judiciary Law entrusts this determination, as was described by the Court of Appeals in *Marro* and reiterated in *Loehr*. Obviously, the Board's determination was based only on "current severe budgetary constraints occasioned by the coronavirus pandemic."

Both *Marro* and *Loehr* require that the Board must collectively and deliberatively exercise the critical responsibility reposed in it by the Constitution and the law and not, in effect, out source that responsibility to "functionaries responsible for the court's docket or budget." (*see Loehr* at 382). Although not part of the certified record, in a separate exhibit attached to their answer the Respondents provide an affidavit from Judge Marks sworn to December 16, 2020 (NYSCEF Doc. 113 Ex. 2) indicating that fiscal information was presented to the Board at the meeting. Certainly, while Respondent Marks as the Chief Administrative Judge of the Courts of the State of New York is no mere "functionary," nevertheless, he is not a member of the Board and thus is unable to vote or to otherwise participate in the Board's exercise of its "collective wisdom." It is apparent that notwithstanding Judge Marks' status and presumed expertise regarding budgetary issues, the Board abdicated its responsibility with regard to each of the Petitioners' applications and failed to "adequately and conscientiously" *(Marro)* discharge their obligations.

Clearly, in denying these petitioners certification, the Board failed to "comply with the

two criteria set forth in the Constitution" (*Loehr v Admin. Bd. of the State of New York*, 29 NY3d 374, 382 (2017). In *Loehr, supra,* the petitioner was seeking to obtain *both* his judicial pension and his judicial salary. The Court of Appeals found the denial of certification to be rationally related to the first prong, that is, not "necessary to expedite the business of the court." In *Loehr, supra,* an Administrative Order, declaring the policy of the Board had previously been adopted. No such Administrative Order, policy or memorandum from the Office of the Chief Administrative Judge clarifying the issue is present in the proceeding before this Court. Here, the petitioners are not seeking to "double-dip" the system, but only trying to fulfill their constitutionally provided-for duty, as set forth in Article VI of the Constitution. Although Respondents correctly argue that Petitioners do not have a property right in continued judicial service, they do have a right to fair treatment and an honest evaluation of their applications under the Constitution and the Judiciary Law. Unlike in *Loehr, supra,* we are not faced with a public policy that strongly disfavors the receipt of state pensions while also receiving state salaries. There is no such "overriding State policy" involved herein. Public prestige of the courts can only be enhanced with the petitioners willingness to continue their service during a pandemic.

The Board failed to conduct "[a]n individualized evaluation ... focused more decisively on the applicant than on the need for judicial services" (*Matter of Marro v Bartlett*, 46 NY2d 674, 680 [1979]). In *Marro, supra,* the constitutional process was followed and other applicants were certificated. However, as to the individual judge in *Marro, supra, at* 681, the Court of Appeals stressed that "the very essences of the responsibility of certification imports necessity to rely in large part on nonobjective evaluations of the individual Judges ..." Such did not occur in the instant proceeding.

To simply argue that the Board has "unfettered discretion" to deny any and all applicants for certification, and that the Board's actions "are beyond judicial review" smacks of such alien concepts as the divine right of kings and papal infallibility. In fact, the record of the proceedings before the Board is devoid of any evidence that supports a finding that the Board employed its discretion at all. The Respondents' position cannot stand as an unquestioned pronouncement, certainly not under our New York State Constitution, which represents the expression of public will from nearly sixty years ago. The "very nearly unfettered discretion in determining whether to grant applications of former Judges for certification ..." (*Marro, supra,* 681), only arises once the Board undertakes the individualized two criteria process - the process cannot be ignored. In both *Loehr, supra,* and *Marro, supra,* the Court of Appeals has noted the Board's discretion arises once "it complies with the two criteria." Such a command must originate from the constitutional provision that utilizes the directive "shall" (... however, that it *shall* be certificated in the manner provided by law... [emphasis added]).

Although Article VI, §25, sub. b, was not involved in the decision, *Maresca v Cuomo* (64 NY2d 242, 251-2 [1984]), the Court of Appeals did note its distinctive importance:

> Due to the complexity and diversity of the judicial grist of Supreme Court (NY Const, art VI, §7), certification of Supreme Court

> Justices and Court of Appeals Judges for service in the Supreme Court is warranted to retain Judges with experience, and to insure an adequate supply of judicial personnel to meet the press of Supreme Court business.

Moreover, evidence provided by the Petitioners, which includes statistics, statements of the Governor and the very programs and policies promulgated by the Chief Judge and the Office of Court Administration (OCA), are overwhelming and unchallenged by the Respondents. The fact that three Justices were certified by the Board implicitly supports the need for the services of the Petitioner Justices to expedite the business of the Court and cannot, standing alone, serve to illustrate that the Board discharged its Constitutional obligations. If there was ever a time for additional experienced judges to address the conceded massively growing backlog of cases occurring in courthouses across the state, now is the time.

The Respondents effectively admit that the Board failed to follow the procedures of the constitutional certification process by making a broad policy determination and not individual choices this year, even though, as noted, 3 of the 49 judges were certificated (*see* NYSCEF Doc. No. 22 [Marks Aff.]). In essence, for the Petitioners in this case, the Board decided that the Constitution does not apply and, instead, *ad hoc* criteria should control its determination. Such action, by its very nature, renders the determination arbitrary and capricious. This *ad hoc* determination, which denied certification on September 22, 2020, is hereby annulled.

The current crisis caused by the pandemic cannot be used to avoid the clear mandate of the Constitution. Unfortunately, that is precisely what was done by the Board at the September 22, 2020, meeting as reflected in the only record of that meeting. During a crisis of the type that New Yorkers are currently enduring, the need for a strict adherence to the Constitution is paramount and the failure do so constitutes arbitrary and capricious conduct by the Board.

The Board is composed of five appellate judges. Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. Similarly, administrative discretion can be abused under an equally arbitrary standard. The failure to consider each applicant-judge individually was improper and arbitrary. The plight of these petitioners must be seen by any and all reasonable persons as arbitrary.

This is not a "substantial evidence" issue made after a hearing (CPLR 7803[4]). But, "an administrative determination is arbitrary and capricious when it exceeds the agency's statutory authority or [is made] in violation of the Constitution or laws of this State.")(internal quotation marks omitted) (*Lipani v. New York State Div. of Human Rights*, 56 A.D.3d 560, 561 [2d Dept 2008]). There is no doubt that the determination was rendered "in violation of lawful procedure" *Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Town of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Blaize v Klein*, 68 AD3d 759 [2d Dept 2009]; *see also* CPLR 7803[3]).

The Petitioners have demonstrated a clear legal right to the relief sought.

Based upon the foregoing, the second cause of action in the petition is granted in its entirety. In light of this determination, the remaining causes of action need not be addressed or are without merit. This constitutes the order and judgment of the Court.

Dated: December 30, 2020

Hon. Paul J. Baisley, Jr.
J.S.C.