

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF LOEHR,

Respondent,

-against-

NO. 37

ADMINISTRATIVE BOARD OF THE COURTS OF
NEW YORK STATE,

Appellant.

20 Eagle Street
Albany, New York
March 21, 2017

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

LEE ALAN ADLERSTEIN, ESQ.
NEW YORK STATE OFFICE OF COURT ADMINISTRATION
Attorney for Appellant
25 Beaver Street, 11th Floor
New York, NY 10004

ROBERT A. SPOLZINO, ESQ.
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
Attorney for Respondent
1133 Westchester Avenue
White Plains, NY 10604

Sara Winkeljohn
Official Court Transcriber

1 JUDGE RIVERA: Next case on the calendar, Matter
2 - - - Matter of Loehr v. Administrative Board of the Courts
3 of New York State.

4 MR. ADLERSTEIN: May it please the court, Lee
5 Adlerstein on behalf of the Office of Counsel Court
6 Administration on behalf of the Administrative Board. And
7 if I may have two minutes rebuttal?

8 JUDGE RIVERA: Yes, counsel.

9 MR. ADLERSTEIN: Thank you. The Administrative
10 Board in this instance acted in a manner in which it
11 believes to be in the best interests of the court system as
12 a whole, exercising a unique and what this court in the
13 Marro case has termed "nearly unfettered discretion."

14 JUDGE RIVERA: But - - - but isn't that case
15 about individual determinations, and here what you have is
16 a policy that you apply across the board regardless of any
17 individual circumstances of any individual applicant for
18 certification?

19 MR. ADLERSTEIN: The specific issue in Marro
20 dealt with supposed individual criteria, but the court
21 spoke much more broadly than that in setting out in the
22 Marro case what the certification process is all about.
23 The court in Marro made it very clear that what is
24 happening when somebody applies, after reaching the age of
25 seventy and mandatory retirement as a judge, for further

1 certification, it constitutes the application of a retired
2 person. Some judges retire - - -

3 JUDGE RIVERA: Well, what - - - what's the
4 criteria? What's the criteria that guides the board
5 constitutionally, statutorily?

6 MR. ADLERSTEIN: The criteria - - -

7 JUDGE RIVERA: What is it?

8 MR. ADLERSTEIN: Yes. The criteria are two-fold.
9 One is that the person be mentally and physically fit for
10 the job.

11 JUDGE RIVERA: Which is not at issue here.

12 MR. ADLERSTEIN: No. It is not.

13 JUDGE RIVERA: Not in dispute.

14 MR. ADLERSTEIN: That is not an issue here. It
15 could be an issue - - -

16 JUDGE RIVERA: Yes. I understand.

17 MR. ADLERSTEIN: - - - in individual cases. And
18 the second one is that the board makes a decision and makes
19 a determination based on what is necessary to expedite the
20 business of the courts.

21 JUDGE ABDUS-SALAAM: Is there any - - -

22 JUDGE RIVERA: That - - - that's where I have, I
23 think, the greatest challenge in understanding the
24 argument. Isn't that - - - that criteria about human
25 resources?

1 MR. ADLERSTEIN: Not just human resources, Your
2 Honor. We don't think it's that limited. The Marro case
3 made it clear that the board has, as I stated, nearly
4 unfettered discretion.

5 JUDGE ABDUS-SALAAM: Is there any definition,
6 counsel, of necessity or what is necessary in that
7 guideline?

8 MR. ADLERSTEIN: No. The - - - there is no - - -

9 JUDGE ABDUS-SALAAM: So it's basically up to the
10 Administrative Board to determine what necessary means?

11 MR. ADLERSTEIN: Yes, Your Honor. The
12 legislative history doesn't seem to point to anything if
13 one looks at legislative history. If one uses the word
14 necessary it's still up to the board about - - -

15 JUDGE STEIN: Could - - - could the board - - -

16 MR. ADLERSTEIN: - - - what is necessary.

17 JUDGE STEIN: Could the board waive this policy
18 in individual cases? For example, have an - - - have an
19 overriding policy that it is not necessary for judges who
20 are collecting their judicial pension to be certificated.
21 Could - - - could the board find in - - - in one or more
22 individual instances that it was necessary so allow certain
23 judges who are collecting their pensions to be
24 certificated?

25 MR. ADLERSTEIN: The answer to that is perhaps.

1 This decision on the part of the board was enunciated in an
2 administrative order, and I don't believe that the board
3 would not follow its administrative order in all instances.
4 What Your Honor is probably talking about is the
5 Administrative Board needing to issue another
6 administrative order specifically tailored to - - -

7 JUDGE STEIN: Well, more - - - I'm talking about
8 more like - - -

9 MR. ADLERSTEIN: - - - a specific situation.

10 JUDGE STEIN: - - - a waiver of - - -

11 MR. ADLERSTEIN: Right.

12 JUDGE STEIN: You know, there are various
13 situations in which all kinds of - - - of policies and
14 procedures are waived. Could it be waived in individual
15 cases that - - -

16 MR. ADLERSTEIN: The answer to that is perhaps.
17 It's certainly not the situation that we have in front of
18 us today.

19 JUDGE FAHEY: Can we take a step back for a
20 second? It - - - what's commonly referred to as double-
21 dipping is, in point of fact, legal in New York; isn't it?

22 MR. ADLERSTEIN: It's legal - - -

23 JUDGE FAHEY: There are a numb - - - there are a
24 number of judges, to my own knowledge, who - - - who retire
25 early or usually they retire about three days before

1 they're sworn in again, and they collect their judicial
2 pensions, and then they also continue to collect their
3 salary as judge after they've collected a pension. Or it
4 could - - - I say judicial, but it could be from being a
5 police officer or anything else. But nonetheless, it's
6 relatively common.

7 MR. ADLERSTEIN: It - - - it does happen in some
8 instances. It's not prevalent.

9 JUDGE FAHEY: My - - - my understanding - - - so
10 it - - - it has happened, and it is legal. So I guess the
11 question is then is the action - - - it's not the legality
12 of the action but whether or not the criterion is a - - -
13 is a rational exercise of your power. And that pushes me
14 towards an argument that I think wasn't - - - may or may
15 not have been properly preserved by the petitioners, but
16 I'd just like to ask you to respond to it. And that's the
17 argument that really the Court of Appeals has to rule on
18 this case and not just the board. That seems to be - - -
19 well, it was poorly preserved, but it - - - it may be a
20 powerful argument. What do you have to say to that?

21 MR. ADLERSTEIN: Well, it wasn't preserved. And
22 - - - and - - -

23 JUDGE FAHEY: Okay. But let's assume it was.
24 Answer it.

25 MR. ADLERSTEIN: And there's - - - there's

1 nothing in the record as to what kinds of consultations may
2 have taken place. So that - - - that is a factor.

3 JUDGE FAHEY: Yeah.

4 MR. ADLERSTEIN: And at the same time, if one
5 looks at the provision itself in the Constitution and the
6 provision in the Judiciary Law 115, the Administrative
7 Board is given this unique power.

8 JUDGE FAHEY: Well, listen - - -

9 MR. ADLERSTEIN: The Marro case talks about it.

10 JUDGE FAHEY: Let - - - yeah. But take a step
11 back. You - - - you yourself said this is a statewide
12 policy. The statute refers to the Court of Appeals
13 approving any statewide policy. How - - - how does it not
14 apply?

15 MR. ADLERSTEIN: This is a unique power on the
16 part of the Administrative Board.

17 JUDGE FAHEY: So you're - - - you're saying that
18 the Statute 211 is, in essence, ignored or overruled? Tell
19 me what your - - - tell me what the basis of your argument
20 is.

21 MR. ADLERSTEIN: It's not applicable here because
22 we're talking about an appointive process. The court in
23 Marro said that when the Administrative Board makes a
24 decision on who to certificate as a judge, it's basically
25 making an appointment which is, essentially, the equivalent

1 of an executive appointment of a person to what the court
2 characterized as one of the highest offices - - -

3 JUDGE RIVERA: Yes. But to that point - - -

4 MR. ADLERSTEIN: - - - in the state.

5 JUDGE RIVERA: But to that point - - -

6 MR. ADLERSTEIN: Yes.

7 JUDGE RIVERA: - - - Marro's analysis is based on
8 - - - on what the court there articulated as the way "of
9 what must be personal if not private considerations." This
10 is about what are these unique pers - - - assessments of
11 the personnel of the individual applicant. In this case,
12 you just have a blanket rule that is ignoring the
13 qualifications of the individual.

14 MR. ADLERSTEIN: Well - - -

15 JUDGE RIVERA: It looks to me like it's an
16 additional criteria that's not set out in the Constitution,
17 not set out in the statute.

18 MR. ADLERSTEIN: Well, what the Administrative
19 Board was doing here is it was enunciating openly a
20 criteria which it felt it needed to have in place because
21 of the best interest of the court system.

22 JUDGE FAHEY: Let's say we agree - - -

23 MR. ADLERSTEIN: Taking - - - taking the court
24 system as a whole - - -

25 JUDGE FAHEY: Let's say we agree with that. I -

1 - - it seems like a rational policy.

2 MR. ADLERSTEIN: And it - - -

3 JUDGE FAHEY: I'm not - - - slow down. Slow down
4 a second.

5 MR. ADLERSTEIN: I'm sorry.

6 JUDGE FAHEY: It seems like a rational policy,
7 but the only question really is is was it properly put into
8 place. I think that's the question for us.

9 JUDGE STEIN: But aren't - - - aren't you saying
10 that if it had been properly preserved you would have at
11 least had the opportunity to make this argument before the
12 lower courts?

13 MR. ADLERSTEIN: That's correct. And there is
14 nothing in the record to indicate what kind of consultation
15 had taken place between the members of the Administrative
16 Board and the members of the court in that connection. And
17 also, one should bear in mind, I think, that the policy has
18 not yet been promulgated. We're in front of this court.

19 JUDGE RIVERA: No. Isn't - - - isn't the issue
20 what the word necessity means and whether or not, as the
21 board has defined it, we are in agreement with that
22 interpretation of the statute and the Constitution? Isn't
23 that what this boils down to? There are only two criteria.
24 One is not at all relevant, there's only this other
25 criteria.

1 MR. ADLERSTEIN: I think what we're talking
2 about, Your Honor, is the question of whether this was a
3 rational decision, and I think that it's already been
4 established that - - -

5 JUDGE RIVERA: Yeah. But - - - all right. I'll
6 go with that. But - - -

7 MR. ADLERSTEIN: - - - that's consistent. Yes.

8 JUDGE RIVERA: But doesn't that turn on whether
9 or not it's rational based on what we say is the definition
10 of necessity?

11 MR. ADLERSTEIN: Yes.

12 JUDGE RIVERA: Can it be rational if it doesn't
13 meet the definition?

14 MR. ADLERSTEIN: Yes. What is necessary is
15 something for the Administrative Board to weigh. It is not
16 a word of limitation. The court in Marro said that there's
17 no right to appointment, that the Administrative Board has
18 discretion here.

19 JUDGE RIVERA: Okay. So then what's the line in
20 the sand? I understand your point about Marro said the - -
21 - the board has this unfettered discretion, right. Is
22 there no line in the sand? Is there no point at which
23 there is a judicial interpretation of what is necessary, so
24 it's whatever the board says is necessary?

25 MR. ADLERSTEIN: Well, what the court in Marro

1 said is that the board's decision is not subject to
2 judicial review "Except for claims of substance that there
3 had been a violation of a statutory prescription or
4 promotion of a constitutionally impermissible purpose
5 unrelated to the certification process."

6 JUDGE RIVERA: But then what would be the - - -
7 what would be the point of this particular criteria in the
8 Constitution and the statute if - - - if, truly, there's
9 the kind of unfettered discretion that you're talking
10 about? Which is I can decide - - - the board can decide
11 whether or not to certificate someone on whatever grounds
12 is basically what you're saying. So what would be the
13 point, then, of this criteria as it is expressed "necessary
14 to expedite the business of the court"? It doesn't say
15 necessary to the integrity of the court, necessary to the
16 business, even that to expedite the matters of the court.

17 MR. ADLERSTEIN: Well, the word - - -

18 JUDGE RIVERA: Doesn't it - - - doesn't the
19 language itself suggest you're talking about human
20 resources? Do we need this person to do some particular
21 job?

22 JUDGE GARCIA: But isn't - - - I'm sorry. Isn't
23 always necessary in the hiring sense have an economic
24 component to it? I mean anything could be necessary to
25 expedite, and the more bodies you throw at anything the

1 more it's going to be expedited. So isn't there implic - -
2 - implicit in this necessary clause an econom - - - I know
3 it's New York, but even here that we have an economic
4 concern as to what's the balance between more bodies and
5 efficient functioning of the court?

6 MR. ADLERSTEIN: Well, if Marro stands for
7 anything, it stands for the fact that the board has to look
8 at situations as they come. In this situation, the board
9 was looking at the fact that there were certain pressure on
10 the court system that was real and that was tangible. It
11 came against the background in which the courts had
12 recently had to engage in a lot of layoffs. It came under
13 a budget pressure. It came under a situation in which the
14 practice of what's called double-dipping had been
15 increasing. It came as, happily, judges were starting - -
16 -

17 JUDGE RIVERA: Isn't that then a question for the
18 legislature?

19 MR. ADLERSTEIN: It - - - it may be - - -

20 JUDGE RIVERA: Not the board?

21 MR. ADLERSTEIN: It may be a question of the
22 legislature, but the board is given discretion - - -

23 JUDGE RIVERA: But as Judge Fahey said it - - -
24 it's legal.

25 MR. ADLERSTEIN: The court has given discretion

1 to weigh that. And that are prescriptions on double-
2 dipping under New York Law. It - - -

3 JUDGE RIVERA: But not in this case, right?

4 MR. ADLERSTEIN: Not in this - - -

5 JUDGE RIVERA: It's totally legal here.

6 MR. ADLERSTEIN: It - - - it is permissible. If
7 the board had wished to continue a situation where double-
8 dipping was permissible and it would certificate judges in
9 the face of it, yes. That would be legal. However, it's
10 also legal - - -

11 JUDGE STEIN: The question is is whether it's
12 required.

13 MR. ADLERSTEIN: That's right. And - - -

14 JUDGE FAHEY: And isn't - - - isn't your strong -
15 - - maybe I'm missing it. But it seems to me your - - -
16 your strongest argument, which I'd ask the other side to
17 address, is this isn't a question of double-dipping. It's
18 a question of the right to certification. Isn't - - -
19 isn't that really what we're - - - we boil down to here?

20 MR. ADLERSTEIN: I think - - - I think that's
21 very much true. And I think that here we're talking about
22 some very tough decisions that the Administrative Board has
23 to - - - has to make.

24 JUDGE RIVERA: Was it the right to certification
25 - - -

1 MR. ADLERSTEIN: And the fact that is has the - -
2 -

3 JUDGE RIVERA: - - - or to an employer to require
4 an employee to give up what they're legally entitled to get
5 if they want?

6 MR. ADLERSTEIN: Well, they're not asking the
7 court - - - anybody to give up anything. That - - - what's
8 happening here is that judges are given a choice between
9 accepting the position as a certificated judge or deferring
10 their pensions.

11 JUDGE RIVERA: What - - - what if the board said,
12 you know, you complained about a rule we passed a year ago,
13 we're not going to certificate you? What if that was their
14 rule? If you complain about anything we do, you can't get
15 certificated. Could they pass that kind of a rule, and
16 could they impose that kind of a rule?

17 MR. ADLERSTEIN: Well, then we get into a
18 question of - - -

19 JUDGE RIVERA: But I mean is that - - - isn't
20 that about necessity, we don't want people who are
21 objecting to our rules, it undermines our authority?

22 MR. ADLERSTEIN: That would get into possible
23 First Amendment - - -

24 JUDGE RIVERA: Yeah. But this is - - -

25 MR. ADLERSTEIN: - - - tests.

1 JUDGE RIVERA: - - - Constitution. They're
2 arguing that they have a constitutional right and a
3 statutory right to this too.

4 MR. ADLERSTEIN: But they don't have a
5 constitutional right to be certificated. That's the point.

6 JUDGE RIVERA: No. But they have a right to get
7 their pension while they're working in this position.

8 MR. ADLERSTEIN: But they also - - -

9 JUDGE RIVERA: That's what they're being asked to
10 forfeit, right, to give up?

11 MR. ADLERSTEIN: They're asked - - - they're
12 being asked to make a choice. It's - - - that's the way it
13 lies. And the board had to weigh what was in the best
14 interests of the court system as a whole.

15 JUDGE RIVERA: Thank you, counsel.

16 MR. ADLERSTEIN: Okay.

17 MR. SPOLZINO: Good afternoon, Your Honors.

18 JUDGE RIVERA: Good afternoon.

19 MR. SPOLZINO: May it please the court, my name
20 is Robert Spolzino, and I represent the respondents,
21 Justices Gerald Loehr, J. Emmett Murphy, and William
22 Miller.

23 JUDGE RIVERA: There's no entitlement to
24 certification, right?

25 MR. SPOLZINO: No, Your Honor.

1 JUDGE RIVERA: To being certified? No?

2 MR. SPOLZINO: There's no entitlement to
3 certification, but there's entitlement to be considered for
4 certification like every other justice and in accordance
5 with the statutes and the Constitution. That's what this
6 case is about, and it's particularly about that because - -
7 -

8 JUDGE RIVERA: Well, they were considered and
9 found lacking, right?

10 MR. SPOLZINO: They were - - -

11 JUDGE RIVERA: Isn't that the point?

12 MR. SPOLZINO: Well, they were considered and
13 found cert - - - let's see if I can say this sentence
14 right, certificatable but for the fact that they were
15 receiving retirement benefits from prior judicial
16 employment.

17 JUDGE WILSON: Why is there an entitlement to be
18 considered for certification? Where does that come from?

19 MR. SPOLZINO: There's an entitlement - - - they
20 have the same right as any other Supreme Court justice to
21 put their names in to be considered. They - - - what's
22 happened here is that the Administrative Board has deprived
23 them of the choice that they have to collect their
24 pensions, which the choice - - - which is protected not
25 only by Retirement and Social Security Law Section 212,

1 right, this is - - - double-dipping is a
2 mischaracterization, as Judge Fahey pointed out.

3 JUDGE WILSON: Can - - - can I ask you about 212,
4 though? Because 212 seems to say it protects their right
5 that's provided under 212, right? That it - - - it says
6 this section.

7 MR. SPOLZINO: Um-hum.

8 JUDGE WILSON: But it doesn't - - - it says
9 notwithstanding - - - Section 211 says "Notwithstanding the
10 provisions of 212." And then there are things that deprive
11 people of the right to get a pension under 211. Have you
12 considered the interplay of 211 and 212?

13 MR. SPOLZINO: Yes. But 212 specifically says
14 once you hit age 65, you can earn whatever you - - - you
15 want.

16 JUDGE WILSON: It says that the - - - it says the
17 limits - - - I think it - - - you can look at it, but I
18 think it says the limits in this Section 212 don't apply.
19 212 says once you hit 65 - - -

20 MR. SPOLZINO: Right.

21 JUDGE WILSON: - - - the limits in 212 don't
22 apply.

23 MR. ADLERSTEIN: Correct.

24 JUDGE WILSON: But it doesn't - - - what does it
25 - - - how does that interplay with 211?

1 MR. SPOLZINO: There's - - -

2 JUDGE WILSON: Which has different limitations?

3 MR. SPOLZINO: But not that would apply here.

4 JUDGE WILSON: Because?

5 MR. SPOLZINO: Because these justices have
6 retired and are receiving their retirement benefits. I'm
7 not following what you're asking, Your Honor.

8 JUDGE WILSON: So your position is 211 is
9 inapplicable to - - -

10 MR. SPOLZINO: 211, right. This is governed by
11 212.

12 JUDGE WILSON: Only?

13 MR. SPOLZINO: 212 plus - - - plus the
14 Constitution. The constitutional right to collect their
15 benefits and to not have their retirement - - -

16 JUDGE GARCIA: I have a hard time understanding
17 the constitutional argument because they can collect their
18 pension. The question is can they do that while they are
19 serving in this capacity. So if they want to collect their
20 pension, you can - - - no one's taking your pension away.
21 So to me, it seems like it comes down to whether 212 gives
22 you the right to do that or it gives you the option to do
23 that. That to me seems like the real issue in this case.

24 MR. SPOLZINO: That's where the deprivation comes
25 in. Exactly, Judge Garcia, which is the - - -

1 JUDGE GARCIA: So what does "may" mean? And I -
2 - - I think you're hearing some skepticism on the Marro
3 case and does it give this, and I - - - I think a lot of us
4 are concerned that it does not say that. But it does say,
5 I think as Judge Wilson said originally, it isn't an
6 entitlement and it's an enablement. So that, I think, is
7 somewhat relevant, and the language "may." So given
8 Marro's enablement language and the language of "may" in
9 Section 212, what would prevent the State from saying this
10 cost to us of certifying or certificating a judge in this
11 position is too high, so we're going to say it's not
12 necessary in that case to spend X plus Y to have this judge
13 in this position?

14 MR. SPOLZINO: Let me - - - I - - - I want to
15 address what I think is a - - - I want to say
16 misunderstanding or unclarity in your - - - in what you're
17 saying they're doing. But I also want to address your
18 constitut - - - the constitutional argument, as well.

19 JUDGE GARCIA: But just assume for a second we're
20 not addressing the const - - - I'm not as interested in
21 that - - - in this question.

22 MR. SPOLZINO: Okay. So - - -

23 JUDGE GARCIA: So let's go to the statute.

24 MR. SPOLZINO: So let me try. Let me try - - -
25 try to do it this way. They're not getting anything - - -

1 they're not getting anything extra by what they're doing.
2 They earned their retirement benefits. Those benefits
3 stopped on the day they decided - - - elected to become
4 retired, and now they're getting paid for work they're
5 doing going forward. So the State is not paying them
6 anything extra. That's the - - - the factual concern I had
7 about was that the - - -

8 JUDGE GARCIA: The - - -

9 MR. SPOLZINO: The Constitution - - - and I hate
10 to get back to the constitutional issue because I know you
11 don't want to hear it but - - -

12 JUDGE GARCIA: But to the State is greater, the
13 cost to the State is greater in hiring - - - certifying a
14 judge who's collecting a pension than certifying a judge
15 who isn't, right?

16 MR. SPOLZINO: Well, I - - - I would disagree
17 with that, respectfully, Your Honor, because - - -

18 JUDGE GARCIA: Who's paying the pension?

19 MR. SPOLZINO: Well, the State Pension Fund is
20 paying the pension.

21 JUDGE GARCIA: Right.

22 MR. SPOLZINO: Those funds have been paid in
23 already by the judge and by the State, and that money's
24 coming out of a pension. Actually, the cost of having an
25 additional judge is less than hiring - - - than - - - than

1 electing another judge because they're not paying - - - or
2 the State's not paying the - - - or the Administrative
3 Board, the Office of Court Administration, is not paying
4 retirement benefits for the certificated judge.

5 JUDGE WILSON: Well, what about - - - what about
6 the circumstance where you have let's say there's a need
7 for one judge, and there's two possible candidates and one
8 has a lower pension than the other? Is it illegitimate for
9 the Administrative Board to pick the one who has the lower
10 pension cost?

11 MR. SPOLZINO: Yes. And - - - and the reason I
12 would say that, Judge Wilson, is because the cost to the
13 State going forward is the same, the judge's salary going
14 forward. The - - - the judge is entitled to receive his
15 pension based on everything that's happened before, all of
16 his employment before.

17 JUDGE WILSON: So do you - - - do you view the
18 two criteria in the Constitution, that is health,
19 essentially, and ability, necessity, as limiting factors or
20 necessary conditions but not sufficient?

21 MR. SPOLZINO: I - - - I submit that they're like
22 any other factor in an enabling statute which says to an
23 administrative body you can do this in accordance with
24 these criteria.

25 JUDGE WILSON: You can do this if these criteria

1 are met - - - criteria are met. Can you consider other
2 criteria or no?

3 MR. SPOLZINO: No.

4 JUDGE WILSON: No.

5 MR. SPOLZINO: You're bound - - - I submit that
6 you're - - - that the Administrative Board has no authority
7 to make up additional criteria. If - - -

8 JUDGE ABDUS-SALAAM: Counsel, even if the - - -
9 even if you're correct about whether the cost to the State
10 is the same or less, is the State able to address the
11 perception that the cost is more?

12 MR. SPOLZINO: I - - - I think there's a
13 fundamental misconception about what happened here, Judge
14 Abdus-Salaam, about what was, in fact, considered. I mean
15 there's no dispute that this policy was adopted in one day
16 on the basis of a comment by the governor that appeared in
17 the New York Post so - - - or the Daily News. So it's not
18 like this was some considered policy over - - - over many
19 months that - - - where people were consulted, and the
20 record even reflects that the official who is involved with
21 judicial benefits for the State of New York didn't even
22 know about it until we brought this lawsuit. So this was
23 not some considered policy having to do with that. It had
24 much more to do with Proposition 6 than it had to do with
25 anything else.

1 JUDGE STEIN: Well, but - - - but also, if we - -
2 - if we take the Chief Administrative Judge at her word, it
3 was concern for the budget of the court system which was -
4 - - is dependent upon the other branches of government and
5 the impact that that would have on the court system. And
6 why is that not a legitimate economic concern even - - -
7 and it goes to Judge Abdus-Salaam's question about
8 perception.

9 MR. SPOLZINO: Well, I have great respect for the
10 Chief Administrative Judge, but it's hard to believe that
11 that's a signification - - - that this pension issue would
12 be a significant factor with the other branches of
13 government when the Chairman of the Assembly Ways and Means
14 Committee is doing the same thing, as was the form - - - as
15 was the former chairman of the Senate Judiciary Committee.
16 There are 2,600 state employee who are receiving pensions,
17 post-retirement benefits post - - -

18 JUDGE RIVERA: But is it within the - - -

19 JUDGE FAHEY: But the - - -

20 JUDGE RIVERA: But is it within the board's
21 discretion to - - - to perhaps - - -

22 MR. SPOLZINO: That's - - -

23 JUDGE RIVERA: - - - calculate this and come out
24 differently from where you - - -

25 MR. SPOLZINO: That's - - -

1 JUDGE RIVERA: - - - come out?

2 MR. SPOLZINO: That's the second - - -

3 JUDGE RIVERA: Isn't that within their
4 determination?

5 MR. SPOLZINO: That's - - - that's the second
6 point I was going to make, Judge Rivera, which is this,
7 that as - - - as I expressed earlier, I would submit that
8 the Administrative Board can't make up its own criteria.
9 It's bound by what's in the Constitution and the statute,
10 and what the Constitution and the statute say is "necessary
11 to expedite the business of the court." Now how a judge
12 such as these three - - -

13 JUDGE FAHEY: Well, let - - - let me ask you
14 this, Mr. Spolzino, could we do it? Could the Court of
15 Appeals make such a policy?

16 MR. SPOLZINO: No. I don't say - - -

17 JUDGE FAHEY: I don't know that what you're argu
18 - - -

19 MR. SPOLZINO: I would say - - -

20 JUDGE FAHEY: Let me just finish then.

21 MR. SPOLZINO: Yep.

22 JUDGE FAHEY: So - - - so your argument is is
23 that this policy had to be approved by the Court of
24 Appeals, but, no, we couldn't approve it, we could not make
25 this policy?

1 MR. SPOLZINO: I - - - I believe that's correct.

2 JUDGE FAHEY: Okay.

3 MR. SPOLZINO: But it still would have to be
4 approved. I - - -

5 JUDGE FAHEY: So let - - - let me just finish for
6 my own purposes. Assuming that the issue was properly
7 preserved, which is - - - appears to be doubtful, the Court
8 of Appeals rules on the policy, could the Court of Appeals
9 rule on - - - on the policy, either up or down, in the
10 context of this lawsuit, or would a separate action have to
11 be brought?

12 MR. SPOLZINO: If - - -

13 JUDGE FAHEY: In other words, could we say yes to
14 - - - to no certification for judges, retired judges or yes
15 to it in the context of this lawsuit? Or given we exercise
16 independent power from the board, if we say the board does
17 not have the power, the Court of Appeals does have the
18 power, could we answer the question as to whether or not
19 the board policy is proper or not in the context of this
20 lawsuit?

21 MR. SPOLZINO: In - - - in the context of this
22 lawsuit, there are - - - there are two points with regard
23 to that. One is - - - and I would respectfully suggest
24 that it - - - that it was sufficiently preserved. It
25 wasn't in the pleading, I'll admit, but it was sufficiently

1 preserved by raising it at the Appellate Division, the
2 situation where there's no undisputed fact here. The - - -
3 if you decide that it was preserved and you decide that it
4 had to - - - it was statewide policy, which I would submit
5 that it is, then you could strike this down, this rule
6 down, on that basis alone.

7 JUDGE FAHEY: In the context of this lawsuit or
8 we could approve it?

9 MR. SPOLZINO: Or - - - or - - - I don't believe
10 that you could approve it. I believe you could also find
11 that it was not - - - it is not a proper policy and that
12 it's an unconstitutional and illegal policy, which it is.
13 To get back to - - - to where I was, the Administrative
14 Board, there's no common - - - there's no use of the
15 English language in which the word "necessary to expedite
16 the business of the court" involves whether the - - - the
17 judge who's in question is getting retirement benefits or
18 not. The Administrative Board decided these judges were
19 necessary - - - capable and necessary if they - - - if they
20 gave up their retirement benefits. That doesn't affect - -
21 - as Judge Garcia said the economic component. This
22 doesn't affect anything. The - - - the receipt of
23 retirement benefits doesn't change by any use of the - - -
24 normal use of the English language whether these judges are
25 necessary - - -

1 JUDGE GARCIA: My point on that was you can
2 always say more bodies are necessary to expedite. It's
3 just math. So if I had fifteen cases and I had fifteen
4 judges, it would be expedited, but that doesn't mean it's
5 necessary.

6 MR. SPOLZINO: But - - - but the Administrative
7 Board could quite clearly have said, and we wouldn't have
8 been able to challenge it, we only need one judge - - - one
9 certificated judge this year, and it's going to be X.

10 JUDGE GARCIA: Right. But the point is you can
11 factor economic concerns into the necessary analysis, and
12 if there are economic concerns, whether it's the more
13 general our budget may be affected or where is this money
14 coming from, why can't you - - - you know, if you're
15 admitting you can factor economic concerns in, fifteen
16 judges make fifteen - - - make that fifteen caseloads go
17 faster, why can't you do it to factor in other economic
18 concerns?

19 MR. SPOLZINO: Because the economic concerns
20 involving retirement benefits have no bearing on the - - -
21 on the budget or the expenditures of the Office of Court
22 Administration.

23 JUDGE STEIN: Could - - - could the board make
24 the determination one judge at a time? Not - - - not
25 promulgate a policy, but just every single judge that

1 appeared and sought recertification and they said no, we
2 don't think you're necessary without giving a reason.
3 Because, you know, I - - - I think Marro says you don't
4 have to give a reason. So what if they never said anything
5 at all, they just systemically denied the application of
6 every judge that was collecting a pension? Could they do
7 that?

8 MR. SPOLZINO: Then they might have been able to
9 rely on Marro, but that's not what happened here. What
10 happened here is they promulgated a policy, and that policy
11 is illegal and unconstitutional and violates both the
12 statute and - - - and the respondents' rights. Thank you,
13 Your Honors.

14 MR. ADLERSTEIN: Just a couple of points starting
15 with the discussion about Section 212. Section 212 does
16 not create a situation where an employee of the State of
17 New York, including a justice of the Supreme Court, can
18 retire and then start collecting their pension and then
19 automatically expect that they are going to be rehired. It
20 doesn't guarantee rehiring.

21 JUDGE RIVERA: No. I think the question is
22 whether or not they should be put in a worse position
23 because they are collecting a pension that they're legally
24 entitled to.

25 MR. ADLERSTEIN: Well, that - - - that is a

1 determination for the particular judge to decide in given
2 the option of continuing in service as certificated or not,
3 which is within the particular discretion of the court.

4 And then on the - - -

5 JUDGE RIVERA: Are there - - - are there any - -
6 - I'm trying to find a good way or articulating this
7 question for you. Are there any categories of conduct or
8 status that the board could not take into consideration
9 with respect to a justice who applies in trying to figure
10 out this criteria, the necessary criteria?

11 MR. ADLERSTEIN: Well, again, what the court said
12 in Marro is that's something that constitutionally
13 forbidden or something that's contrary to law, and so one
14 could think of various kinds of, perhaps, invidious
15 determinations that could be made that could be factored
16 here. Of course, this case is - - - is far different from
17 that. And if I may - - -

18 JUDGE RIVERA: But you say this is not contrary
19 to law even though they're entitled and legally they can
20 get this pension?

21 MR. ADLERSTEIN: Legally they - - -

22 JUDGE RIVERA: Say that's not contrary to that
23 statute?

24 MR. ADLERSTEIN: Correct. They're - - - they can
25 get the pension. What's happening here is they're looking

1 - - -

2 JUDGE RIVERA: Is that because you're just - - -
3 because the board is just saying you have to delay
4 collection? Is that why it's not contrary to the statute?

5 MR. ADLERSTEIN: It's not contrary to the
6 statute, yes, because the board is not taking away
7 anything. This court in Marro said that there's no
8 property right here to be reappointed to the courts. It's
9 really a matter for the court to determine. And then when
10 counsel suggested that the board would have the authority
11 to have, in a way, sub rosa determined on a case-by-case
12 basis that it would not certificate people who are applying
13 for judgeships because they knew that the person was going
14 to be looking to retain their pension, what the board did
15 here is it openly wanted judges to know going in - - -

16 JUDGE RIVERA: Sure.

17 MR. ADLERSTEIN: - - - what their choice was.
18 And I think in that matter the board acted absolutely
19 appropriately considering the various responsibilities that
20 it had.

21 JUDGE RIVERA: So just to clarify for me, let's
22 say that - - - that the court agrees with you, right, and -
23 - - and a justice is certificated who, indeed, agrees to
24 these terms. Does that mean that can the justice at any
25 time in the two years, let's say it's a two-year

1 certification, change their mind?

2 MR. ADLERSTEIN: Yes. A judge can retire and
3 then - - -

4 JUDGE RIVERA: That's what I'm saying. So - - -
5 so, obviously, they could change their mind and choose to
6 want to get this pension by retiring, which means then they
7 give up the - - - whatever time they have left on the
8 certification?

9 MR. ADLERSTEIN: That's correct.

10 JUDGE RIVERA: Yes? Okay.

11 MR. ADLERSTEIN: The judge would - - - would have
12 the ability to retire. The retired - - - the judge had to
13 have retired once.

14 JUDGE RIVERA: Yes.

15 MR. ADLERSTEIN: And now the judge would be
16 retiring for the second time. And then - - -

17 JUDGE GARCIA: Counsel, I'm sorry. 212 itself is
18 elective, right? A judge would have to - - - it's not a
19 default that you can do this if you retire and collect - -
20 - you have to elect under 212 to be able to double collect.

21 MR. ADLERSTEIN: Yes.

22 JUDGE GARCIA: Right?

23 MR. ADLERSTEIN: Yes, Judge. I think you do.

24 JUDGE GARCIA: And you also can elect not to do
25 it, as I read the statute.

1 MR. ADLERSTEIN: That's correct. And many people
2 do. It's not the prevalent practice, certainly. And then
3 I'll just leave with the thought - - -

4 JUDGE RIVERA: If it's not a prevalent practice
5 then what's the concern? I mean how many people are you
6 really - - - how many people is the board concerned about
7 that creates such a terrible public impression?

8 MR. ADLERSTEIN: The concern is that it's
9 increasing. The concern is that it's increasing. The
10 concern is - - - is that as - - -

11 JUDGE RIVERA: From what to what? What - - -
12 what are these numbers going to look like?

13 MR. ADLERSTEIN: Well, I think there's something
14 like eighty certificated judges now, and a certain number
15 of them are double-dipping but not a majority of them. I
16 think the concern is that also that as judicial salaries
17 are happily increasing, we already have a chart in the
18 record that shows that some judges who were double-dipping
19 are getting more than 250,000 a year in combination of - -
20 - of their salary plus their pension. And that's - - -
21 that - - - those numbers - - -

22 JUDGE RIVERA: If - - - if the court agrees with
23 you, is - - - is the board going to ask the people who are
24 collecting their pension - - - what - - - what is the board
25 going to do? Let them finish off their certification

1 period?

2 MR. ADLERSTEIN: I think that there's a
3 stipulation in effect. The board had made it clear that
4 the rule was prospective.

5 JUDGE RIVERA: I see. Okay.

6 MR. ADLERSTEIN: And there's a certification in
7 effect that everybody has everything in place, and then can
8 make their election after this court rules.

9 JUDGE RIVERA: Thank you.

10 MR. ADLERSTEIN: Thank you.

11 (Court is adjourned)

12

13

14

15

16

17

18

19

20

21

22

23


24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Loehr v. Administrative Board of the Courts of New York State, No. 37 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: March 27, 2017