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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF THOMAS P. O'NEILL, et al.

Appellants-Respondents,

-against-

No. 115

HON. ANN PFAU,

Respondent-Appellant.

20 Eagle Street
Albany, New York 12207
May 7, 2014

Before:

ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 JUDGE GRAFFEO: Number 115, O'Neill against
2 Pfau.

3 Counsel, do you wish to reserve any time
4 for rebuttal?

5 MR. SCHLACHTER: Yes, two minutes, please.

6 JUDGE GRAFFEO: Two minutes.

7 MR. ADLERSTEIN: And may we have two
8 minutes on the cross-appeal, please?

9 JUDGE GRAFFEO: Yes.

10 MR. SCHLACHTER: Yes. My name is David
11 Schlachter.

12 When the respondent amended the
13 classification plan retroactively, it reset the
14 statute of limitations. The review that took place
15 appears to have been a fresh, complete, and unlimited
16 ex - - -

17 JUDGE SMITH: Who has the burden of proof
18 on that issue?

19 MR. SCHLACHTER: I'm sorry?

20 JUDGE SMITH: Who has the burden of proof
21 on that issue?

22 MR. SCHLACHTER: I believe that that would
23 - - - would remain with the respondents.

24 JUDGE SMITH: Even - - - I mean, they
25 proved that more than four months elapsed since the

1 original ruling. Don't you have to prove a reset?

2 MR. SCHLACHTER: We have alleged the reset,
3 but the claim is that of the statute of limitations,
4 and with respect to that, the burden remains with the
5 respondent.

6 JUDGE SMITH: Well - - -

7 JUDGE GRAFFEO: Well, is your argument
8 different than what it would have been if you had
9 challenged the January - - - the January order? I
10 mean, you're objecting to the reclassification,
11 correct?

12 MR. SCHLACHTER: No, what we're objecting
13 to is the finding that there was a substantial change
14 in the duties and responsibilities.

15 JUDGE RIVERA: Isn't that the basis for the
16 reclassification?

17 MR. SCHLACHTER: Well, the reclassification
18 could take place, as it did, and - - -

19 JUDGE SMITH: You're saying - - -

20 MR. SCHLACHTER: - - - a determination
21 could be - - -

22 JUDGE SMITH: - - - it should be treated as
23 a reallocation, not a reclassification?

24 MR. SCHLACHTER: Correct.

25 JUDGE SMITH: Right.

1 JUDGE GRAFFEO: But couldn't you make that
2 - - - I'm sorry, it should have been reallocation.
3 Couldn't you have made that same reallocation
4 argument within four months after the January action
5 by the Chief Administrative Judge?

6 MR. SCHLACHTER: The argument could have
7 been made. The - - - the facts may be somewhat
8 different, because there was another review, and we -
9 - -

10 JUDGE SMITH: How do we know that he
11 reviewed the question of whether the duties were
12 different? We know that he changed his mind about
13 whether it was 17 or 18.

14 MR. SCHLACHTER: Well, there are a number
15 of things to - - - I believe, that we need to look
16 at. The first is the complete failure, in the
17 paperwork, for the respondents to identify any basis
18 for the reallocation that took place in December.
19 The - - - in reading the affidavit of Judge Marks,
20 it's very clear that he just stopped short - - -

21 JUDGE SMITH: Well, I mean, are you - - -

22 MR. SCHLACHTER: - - - of examining that
23 challenge.

24 JUDGE SMITH: Have we switched from the
25 statute of limitations to the retroactivity issue

1 now?

2 MR. SCHLACHTER: No. Even with respect to
3 the - - - the statute of limitations argument, the
4 question of what he examined is - - -

5 JUDGE SMITH: Okay. Well, it seems to me
6 if you have no idea what he did or what he examined
7 the second time around, wouldn't that hurt you on the
8 sta - - - don't you have to show that he took a
9 complete fresh look and started the statute over
10 again?

11 MR. SCHLACHTER: I - - - I think we can
12 show that, and I - - - I'm going to get to that in -
13 - - in a second, if I might.

14 But with respect to the obligation and
15 burden of proof, the respondent in this case has put
16 forth no explanation of what the judge did and why he
17 did it. In other words, once the allegation is made
18 that there had been a statute of limitations issue
19 and that the judge necessarily - - - and I'll show
20 you the argument - - - that we had necessarily
21 reached that issue, the respondent remains silent as
22 to what it actually did - - -

23 JUDGE SMITH: Well, take - - -

24 MR. SCHLACHTER: - - - and therefore - - -

25 JUDGE SMITH: Take a commercial case - - -

1 MR. SCHLACHTER: Okay.

2 JUDGE SMITH: - - - assume we had a
3 contract, the statute of limitations has run; the
4 plaintiff takes the position that it was refreshed
5 because the defendant made a promise to pay within
6 the statute. You're saying - - - does the defendant
7 have the burden of proving there's no promise, or
8 does the plaintiff have to prove the promise?

9 MR. SCHLACHTER: The plaintiff, I believe,
10 would have to assert the promise, but the burden - -
11 -

12 JUDGE SMITH: So why don't you - - - why
13 doesn't the person trying to prove a reset have to
14 show the reset?

15 MR. SCHLACHTER: I - - - well, we have
16 alleged the - - - the reset, and I believe that the
17 reset is shown. The - - -

18 JUDGE GRAFFEO: Why don't you tell us - - -

19 MR. SCHLACHTER: In order for the judge - -
20 -

21 JUDGE GRAFFEO: Why don't you tell us what
22 the reset is.

23 MR. SCHLACHTER: Sure. In order for the
24 judge to reach the determination that the - - - that
25 the duties and responsibilities belonged at grade 18

1 service credit, I'm not sure I understand it, but it
2 looks to me like somebody is saying that you - - -
3 that because of the peculiarities of the Civil
4 Service Law, it's better to go 16 then 17 then 18,
5 then go jump from 16 to 18.

6 MR. SCHLACHTER: Correct.

7 JUDGE SMITH: You make more money.

8 MR. SCHLACHTER: Correct. That's the
9 second issue.

10 JUDGE SMITH: And that's why you want the
11 jump not to be retroactive. You don't want to be
12 retroactively jumped from 16 to 18. You want to get
13 the bump from 16 to 17 and another bump from 17 to
14 18.

15 MR. SCHLACHTER: Correct. Correct.

16 Now, with respect to the - - - the
17 timeliness - - -

18 JUDGE GRAFFEO: So how would that have been
19 done in this time period? Explain to me what - - -
20 if you had been the Chief Administrative Judge, what
21 would you have done?

22 MR. SCHLACHTER: Well, first, at - - - in
23 January, when the reclassification was done and it
24 was - - - and the classification was moved from grade
25 16 to 17, an examination at that point would have

1 shown that there was no substantial change in duties.
2 So I would have implemented that by allowing for the
3 continuous service credit. When the amendment came
4 along in December of that year, having - - -

5 JUDGE ABDUS-SALAAM: I'm sorry, counsel,
6 before you go on. Would that have been no
7 substantial change in duties for all of the
8 reclassified individuals? Weren't some of them lower
9 court officers who didn't - - - you know, who weren't
10 working in parts where juries were being - - - where
11 jury trials were going on, or in bigger courts where
12 there might have been more foot traffic?

13 MR. SCHLACHTER: Sure. I think that the -
14 - - when you talk about the change in duties and
15 responsibilities, the reference is to the title
16 standards and what is permitted within the scope of
17 the title standards. The - - - it may or may not
18 apply to each individual. There may be particular
19 individuals whose duties remain the same. But it's
20 the scope of permitted duties that becomes relevant
21 on the reclassification and on the reallocation.

22 JUDGE GRAFFEO: So you're saying the
23 written documents that set forth the job duties,
24 that's what governs?

25 MR. SCHLACHTER: Correct.

1 JUDGE GRAFFEO: Not what actually happened

2 - - -

3 MR. SCHLACHTER: Correct.

4 JUDGE GRAFFEO: - - - to court officers?

5 Okay. Can you go back to my question what
6 you would do if you were making - - -

7 MR. SCHLACHTER: Sure.

8 JUDGE GRAFFEO: - - - this decision?

9 MR. SCHLACHTER: When a - - -

10 JUDGE GRAFFEO: So okay, you would change
11 16 to 17 and then - - - and then what would you do?

12 MR. SCHLACHTER: And then when it came time
13 to move it from 17 to 18, I would not have done that
14 retroactively; I would have done that prospectively.

15 JUDGE SMITH: Why not? If 18's the right
16 number in the first place, why wouldn't you do it
17 retroactively? Can't we imagine Judge Lippman saying
18 to himself, you know, when I said 17 I made a
19 mistake, it should have been 18; I'm going to - - -
20 I'm going to bump it up to 18, but I'm going to put
21 you in exactly the same position you would be if I'd
22 done it the first time?

23 MR. SCHLACHTER: There - - - first, that
24 explanation is never given in any of the papers. And
25 in an Article 78, they're required to have an

1 explanation.

2 JUDGE GRAFFEO: Weren't - - -

3 MR. SCHLACHTER: And there is - - -

4 JUDGE GRAFFEO: Weren't some of the court
5 officers already 18?

6 MR. SCHLACHTER: Not the court officers;
7 the senior court officers were 18.

8 JUDGE GRAFFEO: Okay. So were they moved -
9 - -

10 MR. SCHLACHTER: Which was a different
11 title.

12 JUDGE GRAFFEO: Were they moved to seven -
13 - - did they move from seven - - - from 18 to 17 - -
14 -

15 MR. SCHLACHTER: No.

16 JUDGE GRAFFEO: - - - when the initial - -
17 -

18 MR. SCHLACHTER: No.

19 JUDGE GRAFFEO: - - - adjustment - - -

20 MR. SCHLACHTER: This affected only the - -
21 -

22 JUDGE GRAFFEO: - - - was made?

23 MR. SCHLACHTER: Right. The - - -

24 JUDGE GRAFFEO: They didn't - - -

25 MR. SCHLACHTER: - - - senior court

1 officers - - - actually, that title was ultimately
2 done away with, and a temporary adjustment was made
3 for them in the interim. It became an asterisk
4 title.

5 JUDGE GRAFFEO: Okay. So no one was - - -
6 I'm using the word "demoted" loosely, but nobody
7 suffered a downgrade - - -

8 MR. SCHLACHTER: Correct.

9 JUDGE GRAFFEO: - - - from 17 - - - from 18
10 to 17?

11 MR. SCHLACHTER: Correct. Okay. So aside
12 from the fact that no one - - - that the respondent
13 never advanced a reason, there is nothing in the
14 Civil Service Law which is applicable by reference.

15 JUDGE PIGOTT: Doesn't logic tell you that?
16 I mean, it would seem to me if the - - -

17 MR. SCHLACHTER: Yeah.

18 JUDGE PIGOTT: - - - if the judge said, you
19 know, I'm going to move them up and I - - - you know,
20 I should have done it a while back so I'm going to
21 give him retroactive pay. What's - - -

22 MR. SCHLACHTER: Well - - -

23 JUDGE PIGOTT: What explanation do you
24 need?

25 MR. SCHLACHTER: - - - but that's inherent,

1 I think, in the nature of a reallocation, whenever
2 you make the change. In this case it was done in a
3 way that negatively affected a significant number of
4 people, and there was no justification given for it.

5 JUDGE SMITH: Well, it negatively affected
6 them only in the sense that they lost the benefit of
7 that interim step from 16 to 17 and 17 to 18. But
8 they're in the same position they would have been if
9 he'd put them from 16 to 18 in January.

10 MR. SCHLACHTER: Correct. I see my time is
11 up.

12 JUDGE SMITH: Well, I do have one more
13 question - - -

14 MR. SCHLACHTER: Sure.

15 JUDGE SMITH: - - - if I could. Do you
16 challen - - - do you say that the Chief
17 Administrative Judge lacked power to make his
18 decision retroactive?

19 MR. SCHLACHTER: Yes.

20 JUDGE SMITH: Why?

21 MR. SCHLACHTER: Because there's nothing -
22 - - there's nothing that authorizes a retroactive
23 reallocation. The rules of the Chief Judge, by
24 reference, are to be consistent with the Civil
25 Service Law. And the Civil Service Law provides that

1 that only be done prospectively.

2 JUDGE SMITH: Which section are you
3 referring to?

4 MR. SCHLACHTER: I'm sorry; it's in the
5 brief.

6 JUDGE SMITH: Okay.

7 MR. SCHLACHTER: I don't - - - I don't
8 recall it by name.

9 JUDGE GRAFFEO: You'll have your rebuttal.

10 MR. SCHLACHTER: Thank you.

11 MR. ADLERSTEIN: May it please the court.
12 Lee Adlerstein with Pedro Morales, on behalf of the
13 Chief Administrative Judge.

14 I think that the overlay on - - - on the
15 case is, as has been expressed through some of the
16 questions, that essentially a benefit was conferred
17 on these particular employees who were in the court
18 security officer titles. They moved from a 16 to a
19 17, received a salary increase at that time, as well
20 as future salary increases that would accrue to them
21 going forward in time.

22 And then later on, they moved from a 17 to
23 an 18, applied retroactively, through the second
24 action that's at issue here.

25 JUDGE SMITH: What's the - - -

1 JUDGE GRAFFEO: So what did they lose?
2 What's the - - - how does the continuous service
3 credit - - -

4 MR. ADLERSTEIN: Well, what happened - - -

5 JUDGE GRAFFEO: - - - play in - - - play
6 into this, and what is that? What is - - -

7 MR. ADLERSTEIN: Well, what happens is,
8 there is a concept that's embodied in Section 37 of
9 the Judiciary Law - - -

10 JUDGE GRAFFEO: Do they lose the time for
11 the longevity increases? Is that - - -

12 MR. ADLERSTEIN: They lost - - -

13 JUDGE GRAFFEO: What's that - - -

14 MR. ADLERSTEIN: They lost - - -

15 JUDGE GRAFFEO: Is that what's at the core
16 of this?

17 MR. ADLERSTEIN: They claim to have lost,
18 essentially, the way we understand it, is two things.
19 Number one, that they weren't on the same longevity
20 step when they were promoted from 16 to 17, because
21 the court system treated this as what's called a
22 reclassification where the duties and
23 responsibilities of the job were different. So
24 there's - - -

25 JUDGE SMITH: So a guy who had been three

1 and a half years was only six months from getting his
2 longevity increase was set - - - you had - - - now
3 has to wait four years for a longevity increase?

4 MR. ADLERSTEIN: No, not necessarily.
5 There - - - there were - - - there were adjustments
6 downward, but not slipping people all the way back.

7 JUDGE SMITH: Okay.

8 MR. ADLERSTEIN: I think that the salary
9 schedule will reflect that.

10 JUDGE SMITH: I exaggerated, but that's the
11 general idea? Is that what - - -

12 MR. ADLERSTEIN: The general idea is you
13 lose some ground on your longevity. However, you are
14 net-net better off, because you did get the salary
15 increase to the next grade. The question is should
16 you receive the same seniority. And because these
17 jobs were essentially new responsibility jobs,
18 because of the fact that they were now applied to
19 trial courts throughout New York State, rather than
20 what had been the case before with the - - - with the
21 grade 16, which were limited to some of the more
22 local courts - - -

23 JUDGE GRAFFEO: If you had pulled the job
24 descriptions off the OCA Internet to look at what
25 these jobs involved, would there have been a

1 difference in the - - - in the job duties?

2 MR. ADLERSTEIN: There - - -

3 JUDGE GRAFFEO: Do we not look at that?

4 Are we supposed to look at what actually happened

5 here?

6 MR. ADLERSTEIN: Well, there's two things
7 in - - - in these job title descriptions that are at
8 play. First are the day-to-day functions of the job.
9 At the same time, there is, at the very beginning of
10 the job descriptions - - - and all of them are in the
11 record - - - that talk about distinguishing
12 characteristics of the position. And the
13 distinguishing characteristics of the position talk
14 about the overall duties and responsibilities of the
15 job.

16 And it's very apparent, when one compares
17 the job description for a level 16, and you look at
18 the distinguishing characteristics of the job and
19 compare it to what then took place when they were
20 promoted - - - actually it's not a promotion but when
21 they were moved from 16 to 17, at that time the
22 distinguishing characteristics of the job changed
23 from the local court level to overall responsibility
24 to serve all trial courts throughout the state.

25 JUDGE SMITH: The argument you're now

1 making, as I understand it, that's on the issue that
2 the Appellate Division found to be time barred?

3 MR. ADLERSTEIN: It would be, yes, that's
4 correct.

5 JUDGE SMITH: Okay. Well, maybe if you'd
6 talk a minute about the statute of limitations.

7 MR. ADLERSTEIN: That's correct. I think
8 that, you know, the equities here, and we think that
9 what the court system did, if the court moved beyond
10 the statute of limit - - - of limitations issue, we
11 think that it's - - -

12 JUDGE SMITH: You'd win any way.

13 MR. ADLERSTEIN: - - - we think that it's -
14 - - we think that it would be very solid on behalf of
15 our - - -

16 JUDGE SMITH: Yeah, but tell us - - - talk
17 about the statute for a minute.

18 MR. ADLERSTEIN: Well, we - - - we think
19 that what happened here is that there was a failure
20 to make the claim within four months, and as the
21 Appellate Division found, this was not a fresh,
22 complete, and unlimited examination into the merits
23 that took place later on in December of 2004.

24 JUDGE SMITH: Whose burden is it to prove
25 that it was a fresh, complete examination of the

1 merits?

2 MR. ADLERSTEIN: Well, it would - - - it
3 would appear to be logical that the burden should be
4 on the proponent of the claim overall because where
5 we showed that the claim was made beyond the four
6 months, the burden should logically be with the
7 proponent of the overall claim.

8 JUDGE GRAFFEO: So in your view, what
9 timely issues are before us, based on the January - -
10 -

11 MR. ADLERSTEIN: Well - - -

12 JUDGE GRAFFEO: - - - if we take the
13 January order out of the picture, which is what
14 you're asking us to do, what's left for us to look at
15 in the December order? Just the retroactivity?

16 MR. ADLERSTEIN: Yes, we're not asserting a
17 statute of limitations defense on the retroactivity
18 component.

19 JUDGE SMITH: And what's the reason for the
20 retroactivity? What's the rationale?

21 MR. ADLERSTEIN: The rationale for the
22 retroactivity component is found within the overall
23 documentation. It - - -

24 JUDGE GRAFFEO: Well, the judge's affidavit
25 doesn't say too much about the retroactivity issue.

1 MR. ADLERSTEIN: Our position is is that
2 you don't need to be confined to any one particular
3 document or explanation.

4 JUDGE SMITH: Do - - - I mean, I actually
5 suggested an argument a few minutes ago that maybe
6 Judge Lippman just thought he should have done it
7 that way in January. But he's right that you don't
8 argue that, do you?

9 MR. ADLERSTEIN: Well, we do. We do argue.
10 As a matter of fact, there is case law that says that
11 it's axiomatic that the court system has the ability
12 to revise and correct the plan so that if it is
13 exactly what you're saying, Judge Smith, that you're
14 looking, with the experience of having rolled it out,
15 and taken some time to see how it works, and to see
16 how everything fits together, and to talk to your
17 constituency, which here would be the people in the
18 employee force and the labor unions, and you say - -
19 - you ask the question what should we have done in
20 the first place, and within the same calendar year,
21 the decision was made that, essentially, the job was
22 the equivalent of what the senior court officers had
23 done - - -

24 JUDGE PIGOTT: Is that what happened here,
25 is somebody went around and talked to the union and

1 talked to the employees in the court system and then
2 made this determination?

3 MR. ADLERSTEIN: Well, I think there is - -
4 - I don't know for sure, but I think there is bound
5 to have been discussion as the - - -

6 JUDGE PIGOTT: I think your - - -

7 MR. ADLERSTEIN: - - - roll-out takes
8 place.

9 JUDGE PIGOTT: I think your opponent's
10 argument is that that's speculation and there's no
11 justification found in the record for it.

12 MR. ADLERSTEIN: Well, I think there's
13 plenty of justification, if one looks at the overall
14 picture and all - - -

15 JUDGE SMITH: I guess what's bothering - -
16 -

17 MR. ADLERSTEIN: - - - of the
18 documentation.

19 JUDGE SMITH: - - - some of us is why isn't
20 there an affidavit from somebody who says, yeah, this
21 is why I decided in December that it should go from -
22 - - that it should go to 18?

23 MR. ADLERSTEIN: Well, I think that you do
24 have the affidavit from Judge Marks which explains
25 the initial rationale for what was done. And the

1 initial rationale for what was done was the court
2 wanted to solidify and combine the court security - -
3 -

4 JUDGE SMITH: I'm not talking about - - -

5 MR. ADLERSTEIN: - - - officer positions
6 statewide.

7 JUDGE SMITH: - - - the January decision;
8 I'm talking about the December - - -

9 JUDGE ABDUS-SALAAM: Why make it
10 retroactive?

11 JUDGE SMITH: - - - decision.

12 MR. ADLERSTEIN: Excuse me?

13 JUDGE ABDUS-SALAAM: Why make it
14 retroactive?

15 MR. ADLERSTEIN: It was made retroactive
16 because it was felt that, essentially, it was part of
17 the same kind of a program where they should have had
18 the 18s to begin with because it had been the
19 equivalent of the senior court officer position.

20 JUDGE ABDUS-SALAAM: Is - - - what I'm
21 asking is, based on what you were saying - - -

22 MR. ADLERSTEIN: Yeah.

23 JUDGE ABDUS-SALAAM: - - - assuming it's
24 not speculation and that somebody did talk to the
25 employees, and they said, gee, this should have been

1 an 18, but why - - - why not make it prospective,
2 because then they would have still kept their step,
3 right?

4 MR. ADLERSTEIN: Well, there's - - -
5 there's two reasons for it. First, the idea was that
6 it was part of the same program, that it had been
7 explained that, essentially, the position was the
8 same statewide position as the senior position - - -
9 the senior court officer position. And this, again,
10 was a benefit for the court officers. What they
11 didn't get is they didn't get two steps of increases
12 in the salary grade, as Judge Smith had - - -

13 JUDGE SMITH: Even though your time is up,
14 can you just take a minute to explain why it is that
15 these people want their pay increase not to be
16 retroactive? Most people like retroactive pay
17 increases.

18 MR. ADLERSTEIN: Correct. They do want
19 their pay increase to be retroactive, and they did
20 receive a retroactive pay increase. What happ - - -
21 what operated here, besides the seniority position,
22 is that when one looks at the salary schedules, there
23 is a step-up that occurs when you move from a 16 to a
24 17, and then another step-up in salary which occurs
25 when you move from a 17 to an 18. So what the

1 petitioners - - -

2 JUDGE SMITH: If you move directly from 16
3 to 18 you don't get two bumps?

4 MR. ADLERSTEIN: You don't get two bumps;
5 you get the step-up for eight - - - that's next to
6 18, but you don't get also the step-up that's next to
7 17. So our understanding - - -

8 JUDGE GRAFFEO: Once they've lost one step,
9 is that - - -

10 MR. ADLERSTEIN: They - - - they didn't
11 lose the - - -

12 JUDGE GRAFFEO: Is that how they boil this
13 down?

14 MR. ADLERSTEIN: They didn't lose the step,
15 because they got it when they moved to 17, but they -
16 - - they didn't get the full step from 17 to 18.
17 They only got the difference between what had - - -

18 JUDGE GRAFFEO: So - - - so I have a que -
19 - -

20 MR. ADLERSTEIN: - - - what they did get
21 and - - -

22 JUDGE GRAFFEO: I have a question for you
23 on remedy.

24 MR. ADLERSTEIN: Yes.

25 JUDGE GRAFFEO: Say we don't agree with

1 annual?

2 MR. ADLERSTEIN: It would have - - - their
3 salary level would have to be adjusted upward, if
4 that were to occur, because they lost the benefit of
5 the second step-up.

6 JUDGE SMITH: The question is, is there
7 more money in the step-ups than in the retroactive
8 component of the pay. And I think the answer's yes,
9 isn't it? They wouldn't be suing if it weren't.

10 MR. ADLERSTEIN: There - - - it's very
11 difficult to calculate that, because the seniority
12 levels operate in a very particular way. The way
13 that these step-ups impact on over - - - overall on
14 seniority - - -

15 JUDGE GRAFFEO: So different - - -

16 MR. ADLERSTEIN: - - - as you go - - -

17 JUDGE GRAFFEO: For different - - -

18 MR. ADLERSTEIN: - - - I mean, on salary as
19 you go along.

20 JUDGE GRAFFEO: Is the result different for
21 different employees?

22 MR. ADLERSTEIN: It would be different for
23 different employees, depending on their level of
24 seniority. But again, net-net, what was done here
25 was there was a benefit both times, because these

1 employees are still better off today, with the fact
2 that they moved up from a 16 to a 17 and from a 17 to
3 an 18, than if they had stayed at the 17 level, and
4 certainly if they had stayed at the 16 level.

5 The only question here is, is whether
6 they're entitled to more money, whether they're
7 entitled to that second step-up. And if it's treated
8 like a reclassification, that is, that their - - -
9 the job duties are essentially different than they
10 were originally, and under the retroactivity, that is
11 what is pointed to by Section 37 of the Judiciary
12 Law. And - - -

13 JUDGE PIGOTT: But I assume their argument
14 is I'm wearing the same uniform I wore before; I'm
15 going the same job I did before. I go from a 16 to
16 an 18 and all of a sudden you tell me I'm new in my
17 job and I lose my longevity.

18 MR. ADLERSTEIN: Well, we have, you know,
19 the McKillop case, where - - - where Justice Richter
20 took a look at this, and - - - and she concluded,
21 back in 2005, that this was a different position
22 because it was a position of statewide
23 responsibility. And - - - and again, you have an
24 intangible component - - -

25 JUDGE SMITH: But isn't - - -

1 MR. ADLERSTEIN: - - - where - - -

2 JUDGE SMITH: - - - isn't there a problem
3 with the McKillop - - - didn't you persuade her that
4 essentially the same lawsuit that you now say was
5 time barred after four months was premature when
6 McKillop brought it?

7 MR. ADLERSTEIN: Well, we - - - we - - - it
8 was not raised below, and I think the time periods in
9 McKillop are - - - are a little bit indefinite, you
10 know, as far as when everything happened. We do know
11 that the unions did write complaining - - - the
12 particular unions in - - - in McKillop did write, at
13 a relatively early point in time, to utter some
14 complaints.

15 But bear in mind that overall, these are
16 very, very few complaints that have come in from the
17 broader court security force, as a result of these
18 adjustments that were made and reclassifications - -
19 -

20 JUDGE GRAFFEO: Okay, counsel.

21 MR. ADLERSTEIN: - - - that were made in
22 2004. Judge Richter - - -

23 JUDGE GRAFFEO: Counsel, can you wrap up?

24 MR. ADLERSTEIN: Yeah.

25 JUDGE GRAFFEO: Because your red light's

1 been on for quite a while.

2 MR. ADLERSTEIN: Right. I'm just saying
3 that Judge Richter identified all of that in her
4 opinion, and I think that it - - - it should be
5 apparent from the record that - - - that we have a
6 very, very few number of court officers who have
7 actually complained - - -

8 JUDGE GRAFFEO: Thank you.

9 MR. ADLERSTEIN: - - - because they're
10 better off. Thank you.

11 JUDGE GRAFFEO: Your rebuttal, counsel?

12 MR. SCHLACHTER: You know, we're
13 introducing a whole lot of concepts here that seem to
14 me to be very foreign to the civil service system.
15 You know, these concepts of equity and the number of
16 people who are complaining, all of these things are
17 irrelevant. You know, the - - - you know, I think
18 the case is very clear that both the respondent and
19 the court are required to follow the law. And you
20 know, when it - - -

21 JUDGE GRAFFEO: Well, what's your best
22 proof that it was a reallocation as opposed to a
23 reclassification?

24 MR. SCHLACHTER: Okay. I think the - - -
25 the best explanation is contained directly in the

1 Supreme Court decision in which the judge carefully
2 analyzes exactly what is contained in the title
3 standards and shows that the title standards are
4 identical.

5 You know, the couple of issues that have
6 been raised with respect to a - - - a difference, the
7 level of the court - - - I mean, this court has, you
8 know, rejected that in the Association of
9 Secretaries to Judges (sic) case regarding court
10 clerks. The question is what job responsibilities
11 are being performed. The - - - the question is not
12 the level of the court. And that's the major
13 difference between the New York State court officer
14 position and the former court officer position. And
15 that's just simply not a basis.

16 The other two issues that come up is the
17 number of jury trials, and the number of jury trials
18 is not relevant. Both title standards permit jury -
19 - - permit working with juries and supervising
20 juries. So there's no change from the court officer
21 position to the New York State court officer
22 position.

23 And finally, the - - - the OCA raises the
24 question of public attention to cases, and that's
25 simply not listed in either of the title standards.

1 But if you examine those title standards, they're
2 identical. The analysis that was done in the Supreme
3 Court is nowhere questioned and nowhere challenged,
4 if you read the - - - the briefs that were, you know,
5 submitted to this court. The - - - the only bases
6 are those which have been clearly and definitively
7 rejected, such as the level of the court. So that
8 the - - - there's no question that what took place
9 was, in essence, a reallocation.

10 Now, but then I go back to the - - - the
11 time limit issue. And the - - - the respondents have
12 indicated that when the change was made in December,
13 it was made because of the fact that they found - - -
14 or the Chief Administrative Judge found that the New
15 York State court officer title is roughly comparable
16 to the former senior court officer title which had
17 been the 18.

18 Now, in order to make that comparison, the
19 Chief Administrative Judge necessarily had to compare
20 the title standards for the former court officer
21 position, the new New York State court officer
22 position, and the senior court officer position.
23 There are two possibilities. If the Chief
24 Administrative Judge didn't do that, then by
25 definition his determination is arbitrary and

1 capricious. If he did it, as alleged in the brief,
2 although alleged no place in the responsive papers,
3 then he necessarily had to consider those duties,
4 which is exactly the same issue that makes a
5 determination as to whether there was a substantial
6 change in the duties and responsibilities of the
7 position.

8 JUDGE GRAFFEO: Okay. We need you to
9 conclude, counsel.

10 MR. SCHLACHTER: Yeah. I mean, I - - - I
11 have - - - I have nothing further.

12 JUDGE GRAFFEO: Thank you.

13 MR. ADLERSTEIN: Your Honor, I have - - -

14 JUDGE GRAFFEO: Brief - - -

15 MR. ADLERSTEIN: - - - some rebuttal, but I
16 know I ran over, and - - - and unless the court has
17 questions, I'm - - - I'm going to end.

18 JUDGE GRAFFEO: Thank you.

19 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter Of Thomas P. O'Neill, et al. v. Hon. Ann Pfau, No. 115, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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