

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

Dennis R. Schrader
Office of Secretary
Maryland Department of Health
Herbert R. O'Connor State Office
Building, 201 West Preston St.,
Baltimore, MD 21201-2399

and

Wendi W. Peters
Office of Secretary
Maryland Department of Planning
301 West Preston St., Baltimore, MD
21201-2365

Plaintiffs,

v.

Nancy K. Kopp
Maryland State Treasurer
80 Calvert Street
Annapolis, MD 21401

and

STATE OF MARYLAND
Serve: Brian E. Frosh
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202

Defendants.

Case No.: _____

COMPLAINT FOR MANDAMUS AND DECLARATORY JUDGMENT

Plaintiffs, Dennis R. Schrader and Wendi W. Peters, by and through counsel, Timothy F. Maloney, Veronica Nannis, Alyse L. Prawde, Megan A. Benevento, and Joseph, Greenwald & Laake, P.A., file this Complaint for mandamus, in accordance with Maryland Rule 15-701, and for declaratory judgment, in accordance with Md. Code Ann. § 3-401, *et seq.*, of the Courts and Judicial Proceedings Article (C.J.P.), against the Honorable Nancy K. Kopp, Maryland State Treasurer, and the State of Maryland, and state as follows:

Jurisdiction and Venue

1. This Court has jurisdiction over this action under C.J.P. § 1-501.
2. This Court has jurisdiction over the subject matter and all parties under C.J.P. § 6-102.
3. This Court is a proper venue for this action, under C.J.P. § 6-201.

Parties

4. Plaintiff Dennis R. Schrader is a citizen of the State of Maryland and regularly transacts business in Anne Arundel County. Plaintiff Schrader is currently an employee of the State of Maryland serving as the Secretary of Health.
5. Plaintiff Wendi W. Peters is a citizen of the State of Maryland and regularly transacts business in Anne Arundel County. Plaintiff Peters is currently an employee of the State of Maryland serving as the Secretary of Planning.
6. Defendant Nancy K. Kopp is a citizen of the State of Maryland and regularly transacts business in Anne Arundel County. Defendant Kopp is the current State Treasurer.

Introduction

7. This lawsuit seeks a writ of mandamus compelling the State Treasurer to countersign salary checks to the Secretary of Health and the Secretary of Planning, who are lawful recess appointees pursuant to Art. II, Sec. 11 of the Maryland Constitution. Plaintiffs also seek a declaratory judgment on their right to be paid their lawful salaries which have been appropriated in the annual state Budget Bill. Any budget language which purports to prohibit such payments is invalid under the Maryland Constitution and exceeds the appropriations authority of the General Assembly. Section 30 of the fiscal year 2018 Budget Bill unconstitutionally decreased Plaintiffs' salaries during their terms. Additionally the payment of appropriated salaries to lawful constitutional officers is a ministerial act. The Treasurer was sent a payroll warrant from the Comptroller for Plaintiffs' salaries, but declined to disburse funds or to countersign salary checks for the Plaintiffs. The State Treasurer lacks the legal authority to dishonor the payroll warrant or decline to countersign salary checks for these lawfully appointed officers. An order of mandamus should be issued to compel the State Treasurer to honor the Comptroller's payroll warrant, authorize the salary disbursements, and countersign salary checks for the Plaintiffs.

Facts Common to All Counts

8. The Maryland state government is constitutionally organized under the separation of powers which are set forth in Article 8 of the Maryland Declaration of Rights:

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

9. Under the separation of powers and the provisions of the Maryland Constitution, the Governor has the authority to appoint civil officers of the state:

He shall nominate, and, by and with the advice and consent of the Senate, appoint all civil and military officers of the State, whose appointment, or election, is not otherwise herein provided for, unless a different mode of appointment be prescribed by the Law creating the office.

Art. II, § 10.

10. Both Plaintiffs were lawful recess appointments of Governor Larry Hogan in 2016. Plaintiff Schrader was appointed to serve as the Secretary of Mental Health and Hygiene (now known as the Secretary of Health) on December 15, 2016. Until June 30, 2017, he was receiving a regular salary of \$174,417 paid routinely every two weeks.

11. Plaintiff Peters was appointed to serve as the Secretary of Planning on July 6, 2016. Until June 30, 2017, she was receiving a regular salary of \$137,749 paid routinely every two weeks.

12. Plaintiffs are both "civil officers" as that term is used in Art. II, § 13 of the Maryland Constitution.

13. As recess appointees, the Plaintiffs lawfully exercised all powers of their offices and actually held the offices (as opposed to merely serving in "acting" capacities).

14. As recess appointees, Plaintiffs' commissions continued in force until the end of the next session, in this case the 2017 session. Art. II, § 11 of the Constitution states as follows regarding the Governor's power to fill vacancies like these:

In case of any vacancy during the recess of the Senate, in any office which the Governor has power to fill, he shall appoint some suitable person to said office, whose commission shall continue in force until the end of the next session of the Legislature, or until some other person is appointed to the same office, whichever shall first occur; and the nomination of the person thus appointed during the recess, or of some other person in his place, shall be made to the Senate on the first day of the next regular meeting of the Senate. (1955, ch. 626, ratified Nov. 6, 1956.)

15. These Secretary positions are appointed by the Governor "with the advice and consent of the Senate." Md. Const. Art. II, § 10; Md. Code Ann., State Fin. & Proc. § 5-201(b); Md. Code Ann., Health-Gen. 2-102(a).

16. As recess appointees made in the previous session, Governor Hogan properly submitted the Plaintiffs' names to the Senate on the first day of the 2017 legislative session as required by Article II, § 11 of the Constitution, *supra*.

17. Both nominations were referred to the Senate's Executive Nominations Committee for a vote before the nominations reached the full Senate.

18. Plaintiff Schrader's nomination was never voted on by the Committee or the entire Senate.

19. Plaintiff Schrader's nomination was withdrawn by the Governor on March 31, 2017. Therefore, he was not "rejected by the Senate" under Art. II, § 12.

20. On March 13, 2017, the Executive Nominations Committee voted against advancing Plaintiff Peters' nomination to the full Senate.

21. On March 13, 2017, the Governor withdrew Peters' nomination without the full Senate having voted. Therefore, Plaintiff Peters was not "rejected by the Senate" under Art. II, § 12.

22. The 2017 legislative session concluded on April 10, 2017. Before its conclusion, the Governor did not nominate anyone else for these two positions, and the Constitution does not require him to have done so.

23. With the conclusion of the 2017 session, the positions of Secretary of Health and Secretary of Planning became vacant.

24. Maryland "law requires, in the public interest, that ... offices be filled at all times, without interruption." *Benson v. Mellor*, 152 Md. 481, 491, 137 A. 294, 298 (Md. 1927).

25. On April 11, 2017, after the legislative recess, the Governor appointed the Plaintiffs as recess appointments. Recess appointments do not require the advice and consent of the Senate. Plaintiffs continue to serve in these positions through today per the Governor's exclusive Art. II, § 11 power and also pursuant to his broad power and authority over Executive Branch employees and their working conditions.

26. The Constitution does not prohibit the Governor from or limit the Governor's power to reappoint withdrawn candidates as he did here. The Governor

has wide discretion in nominating candidates for public office, including the ability to withdraw nominees that have not been voted on by the Senate.

27. The Constitution vests in the Governor the authority to create and submit a budget to the General Assembly. Art. III, § 52(3).

28. The Governor did submit his budget, which included appropriations for the salaries of the Secretary of Health and the Secretary of Planning, the positions held by the Plaintiffs Schrader and Peters, respectively. The Budget Bill as enacted still contains the salaries for the Plaintiffs' positions. House Bill 150, Chapter 150, Acts of 2017.

29. The General Assembly has certain express budgetary powers which are limited to the power to strike or reduce Executive Branch appropriations. Art. III, § 52(6) of the Constitution provides:

The General Assembly shall not amend the Budget Bill so as to affect either the obligations of the State under Section 34 of Article III of the Constitution, or the provisions made by the laws of the State for the establishment and maintenance of a system of public schools or the payment of any salaries required to be paid by the State of Maryland by the Constitution thereof; and the General Assembly may amend the bill by increasing or diminishing the items therein relating to the General Assembly, and by increasing or diminishing the items therein relating to the judiciary, but except as hereinbefore specified, may not alter the said bill except to strike out or reduce items therein, provided, however, that the salary or compensation of any public officer shall not be decreased during his term of office; and such bill, when and as passed by both Houses, shall be a law immediately without further action by the Governor.

30. The General Assembly "shall not appropriate any money out of the Treasury except in accordance with this provisions of this section." Art. III, § 52.

31. After the General Assembly failed to bring the appointment of either Plaintiff up for a vote to the full Senate, and the Governor withdrew their nominations, the General Assembly enacted Section 30 of the fiscal year 2018 Budget Bill. This provision was intentionally and specifically targeted at the two Plaintiffs, and only the two Plaintiffs, with the purpose of conditioning the expenditure of funds for their positions as stated therein and with the intent and purpose to limit the Governor's ability to make recess appointments

32. Section 30 provides:

AND BE IT FURTHER ENACTED, That no funds in this budget may be expended to pay the salary of a Secretary or an Acting Secretary of any department whose nomination as Secretary has been rejected by the Senate or an Acting Secretary who was serving in that capacity prior to the 2017 session whose nomination for the Secretary position was not put forward and approved by the Senate during the 2017 session unless the Acting Secretary is appointed under Article II, Section 11 of the Maryland Constitution prior to July 1, 2017.

Further provided that no funds in this budget may be expended to pay the salary of a Secretary or Acting Secretary of any department who was a recess appointment in 2016 and whose nomination as Secretary was put forward and was not acted upon by the Executive Nominations Committee, or whose nomination was rejected by the Executive Nominations Committee and whose nomination was withdrawn before the full Senate acted.

Further provided that no funds in this budget may be expended to pay the salary of an Assistant Secretary or Deputy Secretary who was a recess appointment as Secretary in 2016 and whose nomination was rejected by the Executive Nominations Committee and was withdrawn before the full Senate acted or whose

nomination was not acted upon by the Executive Nominations Committee.

Nothing in this language may be construed to prohibit employment in State Government not serving in a leadership capacity in the Agency or Department in which the Secretary or Acting Secretary's nomination as Secretary was put forward and was rejected by the Executive Nominations Committee or who was not acted upon by the Executive Nominations Committee.

House Bill 150 at Section 30 (emphasis supplied).

33. As Plaintiff Schrader's nomination was not acted upon by the Executive Nominations Committee or the Senate, and he was then reappointed as a recess appointment, Section 30 pertains to him.

34. As Plaintiff Peters' nomination was voted down by the Committee but not voted on by the entire Senate, and then her nomination was withdrawn, and she was then reappointed as a recess appointment, Section 30 also pertains to her.

35. Section 30 is not meant to and does not affect any other employee, person or entity.

36. This budget language was intended for, and only for, the two Plaintiffs here.

37. The General Assembly has no authority to make or control recess appointments. This power is vested exclusively in the Governor. Art. II, § 11. The budget language is an unconstitutional attempt to circumvent the provisions of Art. II, § 11 of the Constitution and to unlawfully deprive the Governor of his exclusive authority to make recess appointments.

38. The budget language also exceeds the appropriations authority of the General Assembly under Art. III, § 52 of the Maryland Constitution. Although the legislature may condition appropriations with reasonable restrictions, it may not use the budget process to restrict the Governor's recess appointments or to preclude particular individuals from being paid compensation that is lawfully contained in the state budget.

39. The Constitution prohibits the enactment of special laws as was done here.

40. Art. III, § 33 states:

Section 33. Local and special laws.

The General Assembly shall not pass local, or special Laws, in any of the following enumerated cases, viz.: For extending the time for the collection of taxes; granting divorces; changing the name of any person; providing for the sale of real estate, belonging to minors, or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees; giving effect to informal, or invalid deeds or wills; refunding money paid into the State Treasury, or releasing persons from their debts, or obligations to the State, unless recommended by the Governor, or officers of the Treasury Department. And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law. The General Assembly, at its first Session after the adoption of this Constitution, shall pass General Laws, providing for the cases enumerated in this section, which are not already adequately provided for, and for all other cases, where a General Law can be made applicable.

41. Typically, a special law in this context is defined as "one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class." *Cities Service Co. v. Governor, Maryland*,

290 Md. 553, 567, 431 A.2d 663, 671 (Md. 1981). The legislature creates a closed class when the class of individuals that the law would affect is “based on an immutable, historical fact.” *Id.* at 268 (quoting *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. 2006)).

42. The legislation has intentionally created a closed class of two individuals, the Plaintiffs, because it explicitly only applies to nominees prior to July 1, 2017, and 2016 recess appointees, who meet certain express characteristics. The individuals who were nominated or appointed during this discrete past time period is an immutable, historical fact. No other individuals can ever enter this class.

43. In determining whether Article III, § 33 prohibits a particular piece of legislation, the Court of Appeals has “pointed to various considerations and factors, although certainly no one is conclusive in all cases.” *Id.* at 569. Those “considerations and factors” include: “whether [the legislation] was actually intended to benefit or burden a particular member or members of a class instead of an entire class”; whether the legislation identifies particular individuals or entities; whether “a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation”; whether the legislation’s substantive and practical effect, “and not merely its form,” show that it singles out one individual or entity, from a general category, for special treatment; and whether “the legislatively drawn distinctions . . . are arbitrary and without any reasonable basis.” *Md. Dep’t*

of the Env't v. Days Cove Reclamation Co., 200 Md. App. 256, 265-266, 27 A.3d 565, 571 (Md. Ct. Spec. App. Aug. 30, 2011) (quoting *Cities Service Co.*, 290 Md. at 569-570).

44. Because the General Assembly **actually intended** to discriminate against Plaintiffs by depriving them of the compensation accorded to their fellow executive appointees, and has in fact created and affected a closed class of the two Plaintiffs, the General Assembly has passed an unconstitutional special law.

45. The position of the State Treasurer was created by Art. VI, Sec. 1 of the Md. Constitution.

46. The Treasurer is responsible *inter alia* for the rendering of accounts, the deposit and safekeeping of state funds, the payment of interest on the public debt, and the countersigning of state checks. Art. VI, Sec. 3, 4.

47. The payment of salaries lawfully appropriated in the state budget to lawfully appointed officeholders is a ministerial act facilitated by the office of the Treasurer without discretion. When there is an appropriation like the salaries set forth for Plaintiffs in House Bill 150, Chapter 150, Acts of 2017, the Treasurer's duty is purely ministerial and nothing else. The Treasurer lacks the discretion to refuse to disperse lawfully appropriated salaries.

48. The Treasurer is not permitted to disburse money unless appropriated and unless a proper payroll warrant is received from the Comptroller. The Comptroller sent the Treasurer an appropriation and proper payroll warrant for the Plaintiffs' salaries.

49. The Treasurer has no constitutional or statutory authority to dishonor the Comptroller's payroll warrant, withhold salary checks, decline to sign salary checks for these Plaintiffs or otherwise decline to make disbursement of these salary payments to the Plaintiffs, who are lawfully appointed state civil officers.

50. As of June 30, 2017, the Treasurer took action to remove payments to the two Plaintiffs from the state employee payroll, depriving them of their compensation.

51. Plaintiffs have continued to work and serve every day and exercise the authority of their civil officers since June 30, 2017, though they have not received any paycheck the period after that date. The Treasurer has announced that she will not issue payroll checks to the Plaintiffs or honor the Comptroller's warrant because of the language in Section 30 of the Budget Bill.

COUNT I Writ of Mandamus

52. Plaintiffs incorporate by reference all allegations as though they were fully set forth within this count of the Complaint.

53. This is an action for mandamus according to Maryland Rule 15-701.

54. Plaintiffs are legal recess appointments, lawfully and properly appointed by the Governor under his sole authority and power in Art. II, § 11. Their terms, under Art. II, § 11, "continues in force until the end of the next session of the Legislature, or until some other person is appointed to the same office, whichever shall come first." *Id.*

55. The next session has not begun, let alone ended yet, and no other persons have been appointed to the same office.

56. The General Assembly passed House Bill 150, Section 30, in an unlawful attempt to block the recess appointments of the two Plaintiffs by attempting to condition the payment of their salaries on a full confirmation by the Senate. This was not a matter of appropriation and was instead an unlawful usurpation of the Governor's appointment authority.

57. Section 30 also specifically intends to, and has the necessary effect of, restricting the Governor from making recess appointments as he chooses. This violates the separation of powers doctrine.

58. The State Treasurer has a duty to make payments through the state payroll system to all eligible state employees.

59. House Bill 150, Chapter 150, Acts of 2017 contains the appropriations for the two lawfully appointed Plaintiffs. As such, the Treasurer's duty is to facilitate the payment of their salaries.

60. The Defendant Treasurer has acted to stop all payroll payments to the Plaintiffs as of June 30, 2017, so that the Plaintiffs are no longer being compensated for their employment, although they continue to lawfully serve the State of Maryland as Secretary of Health and Secretary of Planning.

61. The payment of salaries lawfully appropriated in the state budget to lawfully appointed officeholders is a ministerial act facilitated by the office of the

Treasurer without discretion. When there is an appropriation like this, the Treasurer's duty is purely ministerial and nothing else.

62. The Treasurer has no constitutional or statutory authority to withhold salary checks or decline to sign salary checks for these Plaintiffs, who are lawfully appointed state civil officers.

63. As of June 30, 2017, the Treasurer took action to remove payments to the two Plaintiffs from the state employee payroll, totally stripping them of their compensation.

64. The actions of the General Assembly violated the separation of powers provision of the Maryland Declaration of Rights, unlawfully exceeding its budgetary power, and enacting an unconstitutional special law.

65. The actions of the General Assembly, in passing House Bill 150, unconstitutionally decreased the Plaintiffs' salaries during their terms, in violation of Article III, § 52(6) of the Constitution.

66. The action of the Defendant Treasurer to remove the Plaintiffs from the state's payroll is similarly unlawful. The Treasurer does not have the power or authority to decide which state employees to pay and which to remove from payroll. The Treasurer had received an appropriation and warrant for the Plaintiffs' salaries from the Comptroller and accordingly was required by law to countersign their payroll checks.

67. The Plaintiffs have no adequate remedy by which they can obtain relief but by action of this Court.

Plaintiffs therefore demand that a Writ of Mandamus be issued by this Court ordering the State Treasurer to pay the salaries of the Secretary of Health and the Secretary of Planning as set forth in the budget bill, effective retroactively to July 1, 2017.

COUNT II
Declaratory Judgment

68. Plaintiffs incorporate by reference all allegations as though they were fully set forth within this count of the Complaint.

69. This is an action for declaratory judgment in accordance with C.J.P. § 3-401, *et seq.*, for the purpose of determining a question of actual controversy between the parties.

70. Plaintiffs are recess appointments, lawfully and properly appointed by the Governor under his sole authority and power in Art. II, § 11. Their terms, under Art. II, § 11, “continues in force until the end of the next session of the Legislature, or until some other person is appointed to the same office, whichever shall come first.” *Id.*

71. The next session has not begun, let alone ended yet, and no other persons have been appointed to the same office.

72. The General Assembly unlawfully passed House Bill 150 § 30 in an improper attempt to block the recess appointments of the two Plaintiffs by attempting to condition the payment of their salaries. This was not a matter of

appropriation, and unlawfully exceeded the budgetary power of the General Assembly.

73. The State Treasurer has a duty to make payments through the state payroll system to all proper state employees, and not to unilaterally pick and choose which state employees receive compensation and which get removed from state payroll.

74. The current Budget Bill contains the appropriations for the two lawfully appointed Plaintiffs. As such, the Treasurer's duty is to facilitate payment to them.

75. The Defendant Treasurer has acted to stop all payroll payments to the Plaintiffs as of June 30, 2017, so that the Plaintiffs are no longer being compensated at all for their employment.

76. Plaintiffs contend that the actions of the General Assembly violated separation of powers, unlawfully exceeded its budgetary power, and were unconstitutional special laws.

77. Plaintiffs contend that the General Assembly, in passing House Bill 150, unconstitutionally decreased the Plaintiffs' salaries during their term in violation of Article III, § 52(6) of the Constitution.

78. Plaintiffs also contend that the action of the Defendant Treasurer to remove the Plaintiffs from the state's payroll is similarly unlawful.

79. The Treasurer contends that she has the authority to remove payments on the basis of an informal letter of advice from the Attorney General and

has publicly stated that she will continue to remove these payments from the payroll until she is advised otherwise.

80. The Plaintiffs are employed and are working on behalf of the State of Maryland, but are not being compensated for their work.


81. Thus, an actual, justiciable controversy of a practicable issue between Plaintiffs and the Defendant State Treasurer within the jurisdiction of this Court involving the rights and liabilities of the parties and the parties' rights, status, or legal relations are affected by the Constitution and relevant statutes, and the controversy will likely only be resolved and determined by a judgment of this Court.

Plaintiffs therefore demand the following relief:


- That the Court determine the rights, obligations and responsibilities of the parties in this dispute;
- That the Court determine that Plaintiffs are lawful recess appointments;
- That the Court determine that the General Assembly unconstitutionally violated the separation of powers doctrine in enacting Section 30 of the fiscal year 2018 Budget Bill;
- That the Court determine that the General Assembly unconstitutionally exceeded its budgetary authority in enacting Section 30 of the fiscal year 2018 Budget Bill;
- That the Court determine that Section 30 of the fiscal year 2018 Budget Bill unconstitutionally violates Article III, § 52(6) of the Constitution;
- That the Court determine that the General Assembly enacted an unconstitutional special law when passing Section 30 of the fiscal year 2018 Budget Bill;
- That the Defendant State Treasurer unlawfully exceeded her authority by removing the salary payments from the Plaintiffs starting July 1, 2017 and continuing to do so;

- That the Plaintiffs are state employees, entitled to the regular payment of their salaries as appropriated for in the fiscal year 2018 Budget; and
- That this Court award Plaintiffs such other and further relief as in law and justice they may be entitled to receive.

I solemnly affirm under penalties of perjury that the contents of the foregoing Complaint are true to the best of my knowledge, information and belief.


Dennis R. Schrader

I solemnly affirm under penalties of perjury that the contents of the foregoing Complaint are true to the best of my knowledge, information and belief.


Wendi W. Peters

Dated: August 2, 2017

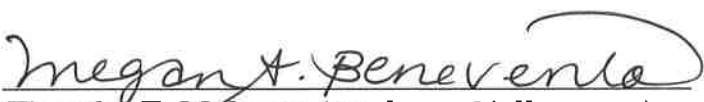
CERTIFICATE OF COMPLIANCE WITH RULE 20-201

Pursuant to Maryland Rule 20-201(f)(1)(a) of the Maryland Rules of Civil Procedure, I hereby certify that this filing does not contain any restricted information under Rule 1-322.1.


Megan A. Benevento

Respectfully submitted,

JOSEPH, GREENWALD & LAAKE, P.A.

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