

Maryland's trusted source for business, legal and government news

Md. high court orders that Schrader, Peters be paid

Ruling says state lawmakers violated Maryland constitution

By: [Bryan P. Sears](#) Daily Record Government Reporter June 21, 2018



Dennis Schrader and Wendi Peters

The state's highest court ruled Thursday that the Maryland General Assembly ran afoul of the state constitution when it passed budget language barring Gov. Larry Hogan from reappointing and paying two Cabinet secretaries.

The Court of Appeals, in a 4-3 decision, ruled that Dennis R. Schrader and Wendi Peters, the former secretaries of the Departments of Health and Planning, respectively, had been legally reappointed by Hogan. Additionally, language inserted into the budget that was specifically aimed at prohibiting payment of salaries to either fell outside the powers of the legislature, the court said.

Court of Appeals Judge Alan M. Wilner, writing for the majority, said the legislature strayed from its recognized budgetary authority when it attempted to use budget language to prevent the payment of Hogan appointees whose names had been withdrawn during the 2017 session before they could be voted on.

"If the legislature chooses to place some limit or condition on the expenditure of an appropriation it has approved, it must 'directly' tie that limit or condition to the particular appropriation rather than leave it hovering aimlessly over the entire state budget," wrote Wilner, adding that even then such specific language "brings it into compliance" with the legislature's budgetary authority but wouldn't fully insulate it from future legal challenges.

Timothy Maloney, a principal at Joseph Greenwald & Laake P.A. who represented the pair of secretaries, said the ruling was a complete vindication of his clients and Hogan.

THE DAILY RECORD

Maryland's trusted source for business, legal and government news

"Reducing a Cabinet official's salary to zero is a blunt device for enforcing legislative prerogative," said Maloney. "This is not the way to resolve separation of powers issues."

The legislature created the budget language at the tail end of the 2017 session after Hogan withdrew the names of Schrader and Peters before the full Senate could hold confirmation votes. Hogan then reappointed the pair to their positions after the legislature ended its 90-day session. "The majority made it clear that budget language can't be used as a free-floating legislative device," said Maloney. "It has to be tethered to a specific appropriation and narrowly tailored to that appropriation and not some omnibus purpose."

Instead, Maloney said, the General Assembly should have gone to the courts if it thought the governor had overstepped his authority in making the reappointments.

The court's decision effectively upholds a decision in Anne Arundel County Circuit Court. The Court of Appeals remanded the case back to that court with an order to vacate the earlier judgment in favor of a declaratory judgment ordering that Schrader and Peters be paid their back salaries. The order would also require Treasurer Nancy Kopp to honor payroll warrants for both and enjoin the state from further interfering with the payment of those salaries.

The case raised both separation of powers issues and questions about whether the state treasurer had the ability to refuse to pay employees once the comptroller issued payroll warrants. "Not only does today's decision deliver long-awaited justice for two dedicated public servants, it is a clear rejection of legislative overreach through the budget, and ultimately a victory for good government and the people of Maryland," said Amelia Chassé, a Hogan spokeswoman. A spokesman for Comptroller Peter Franchot called the ruling "an appropriate judicial response to a rather obvious instance of legislative overreach."

"(Franchot) also believes that the livelihoods of state employees should not be used as a instrument for settling political and partisan grudges," said Len Foxwell, Franchot's chief of staff. In dissent, Judge Robert N. McDonald called budget legislation stripping compensation from an agency head a permissible legislative check on a governor's appointment authority.

"I agree with the majority opinion that there is a sort of loophole in the constitutional design that allows a governor to maintain the governor's preferred candidates in office without Senate confirmation by withdrawing a nomination before rejection by the Senate and making repeat recess appointments," McDonald wrote in a dissent joined by Chief Judge Mary Ellen Barbera and Judge Sally D. Adkins.

"However, there is a check on the governor's use of that loophole – if the General Assembly chooses to exercise it," McDonald added. "That check is the legislature's power under the state constitution to strike, reduce, or condition appropriations in the state budget, including those related to the compensation of appointees like the appellees. This is how a system of checks and balances works."

Sen. William "Bill" Ferguson, D-Baltimore and chairman of the Senate Executive Nominations Committee, called the ruling "narrow." "Now we have a bit more certainty on the use of budget language in the future," said Ferguson. "The Court of Appeals has provided additional guidance that will be helpful in the future." But Ferguson said many of the issues arising from the



Maryland's trusted source for business, legal and government news

Schrader-Peters episode were resolved with the passage this year of Senate Bill 687. The new law bars future governors from withdrawing and reappointing in the same session where the Senate has not acted on the nomination. Hogan opposed the bill but allowed it to become law without his signature.

As a result of the decision, Peters will be paid for nearly three months of her \$137,750 annual salary as well as lost benefits. Schrader is owed for more than six months of back pay — about half of his more than \$174,000 annual salary plus benefits. It is unclear how soon Schrader and Peters can expect to be paid. Maloney said he believes it will be soon.

"The comptroller will issue the warrant and the treasurer will issue the checks and this chapter will close," said Maloney.

Legal affairs reporter Steve Lash contributed to this report.