

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF ERIE : CIVIL TERM : PART 1

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3 STEFAN I. MYCHAJLIW, JR.,

Index #806558-2020

4 Plaintiff,

5 - vs -

6 MARK POLONCARZ,

**Motion**

7 Defendant.

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8 92 Franklin Street  
9 Buffalo, New York  
10 August 25, 2020

11 B E F O R E: HONORABLE JOSEPH R. GLOWNIA,  
12 Supreme Court Justice.

13 A P P E A R A N C E S:

14 WILLIAM F. SAVINO, ESQ. and  
15 ANDREA DiLUGLIO, ESQ.,  
Appearing via Skype for the Petitioner.

16 DANIEL SPITZER, ESQ. and  
17 RAYMOND FADEL, ESQ.,  
Appearing via Skype for the Defendant.

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1 THE CLERK: In the matter of Stefan Mychajliw  
2 versus Mark Poloncarz, index number 806558-2020. Counsel,  
3 could you please state your names for the record?

4 MR. SAVINO: William Savino of Woods, Oviatt,  
5 Gilman for the petitioner, the Honorable Stefan I.  
6 Mychajliw, Jr.

7 MR. SPITZER: Daniel A. Spitzer and Raymond  
8 Fadel of Hodgson Russ for the Honorable Mark Poloncarz,  
9 county executive of the County of Erie.

10 THE CLERK: Thank you.

11 THE COURT: Okay. Mr. Savino?

12 MR. SAVINO: Your Honor, counsel and the Court  
13 will agree that legislative equivalency and equal dignity  
14 are established doctrines within the state, at least since  
15 my former mentor, Jim Magavern, won the case of Gallagher  
16 versus Regan. And those doctrines are reinforced by the  
17 cases cited in petitioner's original and reply memorandums  
18 of law that provide that the charter administrative code  
19 and the adopted budget resolutions of the legislature  
20 prevail over mere administrative acts by the county  
21 executive and his department of personnel.

22 The legislature exercises its power to fix or change  
23 compensation of officers and employees paid with county  
24 funds through the county budget. The budget for 2020 is  
25 attached to our petition as Exhibit D, and on page

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1 twenty-two it expressly provides for the most junior  
2 associate deputy comptroller at job group eleven being  
3 paid in 2020 sixty-five thousand five hundred and fifteen  
4 dollars, which represents step five. And that dollar  
5 amount is the most specific and legislatively considered  
6 document in this case.

7 Paragraph twenty-six of Mr. Spitzer's answer states  
8 that a resolution of the legislature is required for Ms.  
9 Dixon to be at step five, but that element is more than  
10 satisfied by this budget entry for the exact step five  
11 amount of sixty-five five hundred and fifteen dollars, as  
12 resolved by the legislature.

13 Simply stated, the budget here is the law of greater  
14 dignity than mere administrative action by the county  
15 executive, and nothing in the charter and the  
16 administrative code give it the power to change that  
17 budget item without going back to the legislature.

18 It can not be overstated that this associate deputy  
19 comptroller is not merely a new appointment. This was a  
20 new position pursuant to an amendment to the 2018 budget,  
21 as contemplated by paragraph 93(b), which is our Exhibit  
22 A. Thus, with a new position created by amendment, step  
23 five became baked into it and recognized by successive  
24 line items, by the dollar, passed in the 2019 and 2020  
25 budgets right up to the current entry for the sixty-five

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1 thousand five hundred and fifteen dollars.

2 THE COURT: Mr. Savino, let me just interrupt  
3 you for a second because you say step five was baked into  
4 it, if I heard you correctly, when it was created. And my  
5 question is when the position was created the position was  
6 a variable minimum up to step five. So when it was  
7 created and the -- was it Ms. O'Neill that filled that  
8 position? She filled it as a step five. What if the  
9 comptroller at that time had Ms. O'Neill fill that  
10 position at a step three, would that then be baked into  
11 the position?

12 MR. SAVINO: At a minimum it would have been,  
13 but he would have had the discretion, hinging totally on  
14 the budget because the budget, as resolved by the  
15 legislature, had the step five. That is what gave him  
16 authority to go in 2020 for step five. But if that budget  
17 had the step three that you just mentioned, that might  
18 have been given to Ms. O'Neill, but wasn't, if it was a  
19 step three dollar amount in that budget that would be the  
20 dollar amount that would be the limit on the comptroller  
21 because he has to state, quote, within the parameters of  
22 the appropriation. So that would limit --

23 THE COURT: I get that. But what I'm saying is  
24 if that position -- if Ms. O'Neill held that position for  
25 several years from her step three would she not, through

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1 the years, get increments that would take it to a step  
2 four and ultimately a step five?

3 MR. SAVINO: Potentially based on longevity and  
4 merit.

5 THE COURT: Well, that's the point I'm getting  
6 at then. It would then be going through the steps of the  
7 position up to step five, and then when she left the next  
8 following year with that particular position, if the  
9 comptroller were filling it, the comptroller would then  
10 have a window to fill it at a minimum step three and up to  
11 five. Is that what you're saying?

12 MR. SAVINO: His maximum would be whatever is  
13 the line item in the budget passed --

14 THE COURT: I understand. I understand that.  
15 What I'm saying here though is when through the years --  
16 let's say Ms. O'Neill started at step three, and then  
17 whatever number of years later through longevity she gets  
18 to a step five. Each of those years when she was going  
19 from a step three to a step four the new budget for the  
20 upcoming year would fund her position at the level she  
21 would be at. So it would go up from a step three and they  
22 would then fund it in the budget, that position, at the  
23 step three, and then it would ultimately become a step  
24 four and they would fund it at that, and then they would  
25 fund it at a step five and it would be funded at that

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1 because there is a person in that position, anticipated to  
2 stay in that position for the upcoming year and the budget  
3 would have to cover for that salary. So the fact that  
4 it's in the budget at step five and then it's newly filled  
5 by someone else, she leaves, it's filled and then the  
6 comptroller says okay, you started at step three, under  
7 your argument because that's the minimum and you started  
8 at step three, it's still funded at a step five in the  
9 budget that year because that's what the budget  
10 anticipated, isn't it? That's what the legislature  
11 anticipated, that Ms. O'Neill would still be in it and  
12 therefore we fund it at a step five?

13 MR. SAVINO: That would be the cap. But it  
14 doesn't stand in the way of the comptroller here, with the  
15 history in this situation, using the step five.

16 Here's what comes together, Your Honor. You have a  
17 confluence of the creation of the new position with the  
18 2018 budget giving him the discretion to set the variable  
19 minimum. That's the first of the two elements that are in  
20 the confluence. Then the comptroller duly picked step  
21 five. Then because he's got that in the budget, because  
22 the budget has the greater dignity that gives him  
23 discretion, the second prong of the confluence is to go up  
24 to step five for that position in the year where someone  
25 else takes the position that was created for calendar year

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1 2018. It is the two prongs together that give him this  
2 discretion. He can use the budget item that's afforded to  
3 him because the third prong is he can manage within his  
4 appropriation.

5 So when you take those three prongs together, the  
6 creation, the dollar amount in the budget and his power to  
7 manage within the appropriation, that lets him do step  
8 five with Ms. Dixon.

9 And you either agree, or don't agree, Judge.

10 THE COURT: I'm not saying I agree or don't  
11 agree. I'm trying to understand your argument here.  
12 That's why I'm asking you.

13 MR. SAVINO: Let me go through that again. We  
14 have different points within the timeline. You've got  
15 that resolution ninety-three in book B, which is our  
16 Exhibit A, and that gives the comptroller the power to  
17 create the position within the job group up to the  
18 variable minimum. He did so. He did so for Jessica  
19 O'Neill.

20 Number two, the legislature passes its budget from  
21 time to time. That has greater legislative dignity than  
22 the administrative acts of the county executive, and that  
23 reflected the step five going forward.

24 So now the comptroller going into 2020 has the  
25 creation of this new associate deputy comptroller at step

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1 eleven (sic). He has the budget that has been duly passed  
2 by the legislature, and then under 2507 of the charter he  
3 has the power to manage within the appropriation. Because  
4 there's an appropriation, because he's got the discretion  
5 to manage, because he already created the position he can  
6 then put Ms. Dixon in at step five.

7 THE COURT: Okay. I guess what I'm trying to --  
8 the difficulty that I'm having in the argument here is  
9 what's the point of the legislature passing a resolution  
10 that said when you create a new position, added with  
11 amendments to the upcoming budget, you can fill it at a  
12 variable minimum up to step five? In your argument once  
13 it's filled at the step five it's step five. It doesn't  
14 -- the variable aspect of this is totally gone.

15 So if the legislature is saying create a position and  
16 they authorize an amendment to the budget creating a  
17 position saying you can fill it from zero to five, why,  
18 why would they do that? When the first person -- it would  
19 seem to me that the purpose of a variable minimum created  
20 position would be because if you create a new position you  
21 are not sure how difficult it may be to fill it at a  
22 certain salary level, and you might have to have some  
23 discretion depending on the expertise of the person you're  
24 hiring for, especially in something like the comptroller's  
25 office or the DA's Office for example, you might need to

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1 have some discretion in filling that new position at  
2 something a little bit higher than what the minimum person  
3 would start at so you give that opportunity for that first  
4 person. But once you've established the position, and the  
5 county personnel policy says when a new hire comes in they  
6 start at zero unless there's some prior county experience  
7 or otherwise, they might start at a one as a legislator or  
8 something like that, but that position is created and it  
9 has a range from zero to five, and therefore, the new  
10 person coming in starts at zero and goes up from there  
11 through the years ultimately to a five.

12 MR. SAVINO: Judge, may I address that?

13 THE COURT: Yes.

14 MR. SAVINO: Our question --

15 THE COURT: That's why I'm asking.

16 MR. SAVINO: Our position is that because this  
17 is an independently elected official with particular  
18 powers under 2507 of the charter, as amended in 2006 and  
19 2017 to expand the independence of the comptroller, if he  
20 has, and that's a huge if, if he has the budget  
21 appropriation then he has the discretion to manage within  
22 that appropriation. And if he decides within his  
23 discretion this position justifies the step five, just as  
24 Tim Holtz approved in January of 2020 a step five, if that  
25 position justifies to the comptroller within his

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1 discretion given under 2507 he has the legislatively  
2 approved line item and he can use it. He can go less than  
3 it, but he can go up to it.

4 THE COURT: Let me just address that for a  
5 moment. I know, and in Mr. Gach's affidavit and your  
6 memorandum -- excuse me, that's my cell phone going off  
7 and I apologize but it's the setting -- but you reference  
8 the amendments of 2006 and 2017. But what wasn't included  
9 in there is what were those specific amendments that added  
10 to the power that Mr. Gach referenced as similar to the  
11 board of elections? What was the power that was given to  
12 the comptroller. Was it given to the comptroller and the  
13 District Attorney and the sheriff and everybody in those  
14 amendments, or what was the specific wording of the  
15 amendments that dealt with the comptroller having more  
16 power, control over his budget? I don't know what these  
17 amendments were.

18 MR. SAVINO: Two things, Your Honor. We tried  
19 to get our reply in in the time that was allotted as much  
20 as we could and we didn't trace through the history of the  
21 exact verbiage. I have on here Ms. DiLuglio, who drafted  
22 the memorandum of law while I did the affidavit, and if  
23 she has in front of her the exact insertion of the new  
24 language, which I think is the manage and parameters  
25 language, I invite her to speak on the record so she can

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1 add that to the discussion.

2 MS. DiLUGLIO: The language of 2507 was added to  
3 the charter in 2006. I believe, and it specifically -- it  
4 reads, the county executive shall maintain control at all  
5 times over the expenditures of every department or other  
6 administrative unit, officer, employee and financial  
7 activity of the county, except for the departments  
8 overseen by the independently elected officials, which  
9 include the clerk, the comptroller, the District Attorney  
10 and the sheriff, whom shall have the power to manage their  
11 department within the parameters of an adopted budget.

12 So with that language essentially it is our belief --  
13 the ability to manage the office within the parameters of  
14 the budget from the county executive to those  
15 independently elected officials.

16 THE COURT: My question was what did it say  
17 prior to that? I have that language in front of me,  
18 2507(b), but what did it say prior to that?

19 MS. DiLUGLIO: I don't know how the charter read  
20 prior to that. All I know is this language, in its  
21 entirety, was added to the charter for the purpose of  
22 making this new distinction over who was in charge of the  
23 management of the offices of independently elected  
24 officials. So I --

25 THE COURT: So my question is -- actually was

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1 did similar language exist for the other elected officials  
2 and not the comptroller, that the comptroller was added to  
3 this? I'm trying to get back to the legislative intent  
4 and history here to have an understanding of what this  
5 means.

6 But I don't think anyone would argue, Mr. Spitzer or  
7 otherwise I guess -- they have the power to manage the  
8 departments within the parameters of the adopted budget.  
9 It's a question of what discretion they have to control or  
10 to override the personnel policies of the county.

11 MR. SAVINO: It's a very basic point of our  
12 papers, and we hope Your Honor agrees, that the budget  
13 has, quote, greater dignity than the administrative act of  
14 these various personnel books. The legislature actually  
15 resolves and adopts the budget, and there is language that  
16 says that the budget then can supersede other law. I  
17 think that's in 2002.

18 If you look at 2002 it says notwithstanding the  
19 provision of any state law or any local law, act,  
20 resolution or salary plan heretofore adopted or enacted by  
21 the county legislature, such legislature shall have the  
22 power to fix or change the compensation of all officers  
23 and employees paid from county funds, except members of  
24 the judiciary. They set that compensation by adopting, as  
25 a body, the budget, which the county executive then has

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1 the opportunity to veto. So the irony here is that line  
2 item was there in front of the county executive in  
3 December of 2019.

4 THE COURT: All right. As a practical matter  
5 with municipal budgets I guess, and I am not going -- I  
6 want either one of you to correct me if I'm wrong, but my  
7 familiarity with municipal budgets would be that  
8 oftentimes the position may be filled where there's a line  
9 item for an appropriation for X number of dollars in  
10 anticipation that the person working or some work is going  
11 to be done in the upcoming year and therefore it's  
12 budgeted. So the money is there. However, in the next  
13 year as you're into that budget year it often turns out  
14 that this project does not go forward or the person that's  
15 in this position retires or leaves for whatever reason and  
16 there's still a budget line item that then is often  
17 switched, changed, reduced, taken to appropriate some  
18 other project and those monies are moved around.

19 The fact that there's a line item for a position,  
20 you're saying the comptroller has control of that as soon  
21 as that budget is adopted and can utilize the full amount  
22 of that salary within the appropriations it seems.

23 MR. SAVINO: -- has the authority as an  
24 independently elected official to manage within the  
25 appropriation. Your Honor, any other interpretation would

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1 actually weed out of that sentence within the  
2 appropriation, within the parameters. To take away that  
3 discretion would weed out of a law part of the language,  
4 which is something courts are not allowed to do. That is  
5 exactly what we mean. That discretion was given to him as  
6 independently elected.

7 THE COURT: Okay. I don't think I have any  
8 other questions. Is there anything further you want to  
9 say?

10 MS. DiLUGLIO: I just do want to note if the  
11 county executive believes that the comptroller is taking  
12 action that could be harmful to the budget he has the  
13 ability to go to the legislature pursuant to 2507(b) and  
14 request that the legislature impose some kind of control  
15 on the comptroller's spending. So there is a mechanism in  
16 place for them to challenge the authority exercised by the  
17 comptroller, and it's by request to the legislature.

18 MR. SAVINO: Thank you, Andrea. May I go back  
19 to some of my original thoughts now that I answered the  
20 questions that the bench had?

21 THE COURT: Yes.

22 MR. SAVINO: What I did was as I went to our  
23 cases as I prepared for this important argument, this is  
24 important for the County of Erie, and everybody involved  
25 knows that, I wanted to go back through the very court

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1 decisions which gave deference to the bench as having a  
2 different county's greater dignity than the administrative  
3 acts.

4 In the Court of Appeals in the Henry case the Court  
5 said in the budget which defines the extent of the  
6 District Attorney's hiring power, while that power  
7 properly may be limited by legislative action of equal or  
8 greater dignity, then that sought to be altered, it may  
9 not be done indirectly by a resolution such as this.  
10 Equal dignity to the budget.

11 When you look at the Second Department in Poillucci,  
12 the obvious intent of the framers of those statutory and  
13 regulatory provisions was to provide for consistency and  
14 finality in the budgetary process under which positions  
15 are established and funded. That clear intent would be  
16 frustrated if this Court were to interpret the county  
17 charter and administrative code as granting the county  
18 legislature, the county legislature to nullify the effect  
19 of the budgetary process by adopting salary resolutions  
20 inconsistent with the budget. We're talking about the  
21 legislature changing its own enacted budget. And in  
22 Poillucci, the Appellate Division said a budget is  
23 sacrosanct. The Second Department said, I'm paraphrasing,  
24 to prevent filling new positions authorized under the  
25 budgetary process the county legislature would have had to

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1 create a process at least as onerous as the budgetary  
2 process to override the county executive's veto. So the  
3 legislature itself could not go back and do it, except  
4 within a budget because the budget has the veto power in  
5 it. The budget is given deference.

6 And even locally in Chautauqua County Judge Lee Towne  
7 Adams, and I understand this is not an appellate decision,  
8 but still in his Larson decision he says where salaries  
9 are established -- I'm omitting a couple of words --  
10 within the limits of the budget appropriations of the  
11 county legislature he concluded there's no need for the  
12 legislature of the county to adopt the resolution  
13 establishing --

14 Your Honor may not feel one hundred percent  
15 comfortable with the confluence that we have. But going  
16 back to where I started, there's a position created with  
17 the variable minimum job of a level eleven (sic),  
18 resolution ninety-three. There is a budget with an  
19 appropriation, that sacrosanct budget talked about in  
20 Henry, Poillucci and Larson, and then we have the power of  
21 the county comptroller to manage within, within those  
22 appropriations, within those parameters. This is a power  
23 he has. And I think it is incumbent on the Court to  
24 recognize that the budget is the touchstone and he has  
25 satisfied that touchstone test.

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1 THE COURT: Okay. Anything further?

2 MR. SAVINO: Not from me, Your Honor.

3 THE COURT: Okay. Mr. Spitzer?

4 MR. SPITZER: Thank you, Your Honor. As a first  
5 matter, I would be happy to e-mail to you and learned  
6 counsel the formal language. I can have it come from me,  
7 or I could have it come from the county clerk if you  
8 wanted it in some official form. Somebody tracked it down  
9 while we were on the call. So I could forward that on to  
10 you if it's an issue afterwards so everybody could see the  
11 formal language.

12 What we're talking about here, Your Honor, is the --  
13 what is the meaning of the term to manage. Is it really  
14 the carte blanche to ignore the legislature? We're  
15 talking about the legislature here, not the executive's  
16 policies. The county comptroller is supposed to be the  
17 people's fiscal watchdog. The power of the purse is  
18 vested in the legislature and it's brought forward by  
19 legislature and the executive.

20 The 2007 additions did not create the sort of  
21 exception to salary steps and other personnel policies  
22 from which the comptroller seeks to be freed. If you look  
23 at what the effect of this power grab, which His Honor  
24 really hit on with his questions, means in terms of the  
25 budget and other policies, don't even talk about salaries,

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1 they put fifty thousand dollars in the comptroller's  
2 budget for new computers. Anti-conflict provisions in the  
3 code of ethics don't apply, he's managing it.  
4 Anti-nepotism rules in the code of ethics don't matter if  
5 he's managing it. It's not carte blanche. The power to  
6 manage must be seen within the powers granted by the  
7 legislature. So we start with that general rule, that  
8 both parties agreed to. The legislature is the champion  
9 of setting salaries under charter provision 206 and 202(c)  
10 and the legislature has the power. What have they  
11 devolved and what haven't they devolved?

12 The next step which they run from on page two of  
13 their brief and their papers today is that in 2010 the  
14 legislature adopts a resolution that says managerial  
15 confidential employees shall be managed in the same manner  
16 as the white collar union. If you think about the  
17 legislature setting salaries, most of them are set by the  
18 labor agreements; they're really not at issue. The labor  
19 agreements say how people move, how everything is set.  
20 There's really not concern here. This is all about  
21 managerial confidential employees.

22 By the way, my client has a lot more managerial  
23 confidential employees, and were he not here to protect  
24 the people's purse he would be saying all power to you,  
25 Mr. Comptroller, because then I get all this power over

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1 people's salaries. He doesn't, and neither does the  
2 comptroller because the legislature said it's going to be  
3 judged on those rules.

4 The legislature also granted the county executive --

5 THE COURT: Let me just interrupt you for a  
6 second because that was going to an issue that I raised  
7 with Mr. Savino on this amendment to the charter. I was  
8 looking for some distinction between the extra control  
9 that was talked about in the Gach affidavit to the  
10 comptroller, as opposed to the District Attorney or county  
11 executive or sheriff, other elected officials, or whether  
12 there was a broad change to the charter that talked of the  
13 same for all of those elected officials, something that  
14 wasn't unique to the comptroller, it was argued similar to  
15 what the board of elections would have. I guess can you  
16 expand on that for me?

17 MR. SPITZER: Yes, sir, I can. So the prior  
18 language also spoke to the elected officials in total. It  
19 talks about clerk, attorney, District Attorney, talks  
20 about the sheriff. It does not single out in the prior  
21 language the comptroller. The 2017 amendment, which was  
22 broad, follows the specifics. If you're looking at the  
23 prior language, the 2006 language talks about  
24 independently elected officials, and in paren. uses the  
25 terms clerk, comptroller, District Attorney and sheriff.

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1 It does that in both sections A and B of the prior  
2 2006-2007 budget control provisions. In my quick reading  
3 I do not see anyplace where either of those four elected  
4 positions are singled out. Rather, it is the broader  
5 sense of elected officials, as opposed to and the  
6 comptroller can do that. So I will share that with the  
7 Court but I do not see anywhere in my brief review of that  
8 where it's singular to the comptroller; rather it talks  
9 about the elected officials collectively.

10 THE COURT: So this would be true then if this  
11 power were there for the sheriff and for the county  
12 executive and for the District Attorney?

13 MR. SPITZER: It would be there for all of them.  
14 And the situation that Your Honor detailed where a  
15 position is increased to step five, or in the case of this  
16 current position step five plus because the prior  
17 applicant -- the prior occupant had actually earned  
18 longevity pay on top of step five, it's budgeted, as you  
19 say, to reflect what could be earned, that's how a budget  
20 would have to be set up. Can you imagine if a state  
21 approved judges' salary increases and didn't budget for  
22 that salary? Municipal budgeting does, as Your Honor  
23 said --

24 THE COURT: To answer your question, no, I could  
25 not imagine that.

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1 MR. SPITZER: Fair enough. But obviously a  
2 municipal budget has to accommodate the outer shelf of  
3 what could be earned. Merit increases, for example, are  
4 not automatic. Someone may have the right to go up to the  
5 step five.

6 The prior occupant of the secretary's position --  
7 that position, and this is really important to understand  
8 in terms of all this argument, the secretary's position  
9 was originally budgeted for this year at step two. Now,  
10 the comptroller claims he put it in there as a step five.  
11 How did he do that if the budget was only for step two?  
12 How did he accomplish that? Because the rules don't apply  
13 to someone whose power to manage (sic).

14 There's a number of things here where the actual  
15 facts don't reflect the narrative of this argument. He  
16 first went, and this is outlined in the Buffalo News  
17 article that we wanted you to have a copy of so you didn't  
18 have to deal with the link, he says in the -- it says in  
19 the article that he went to the legislature, and after the  
20 legislature refused he went this route. Why did he go to  
21 the legislature? He's the master of his own domain. He  
22 didn't need to go to the legislature. Well, he did. Of  
23 course he did before he came up with this scheme to expand  
24 the meaning of to manage within 2507.

25 So think about what Your Honor is saying. If

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1 everybody is getting stuck at point five or point five  
2 plus and the next person doesn't follow the 2010  
3 resolution but comes in then, what you've done is you  
4 shifted that whole longevity and merit increase portion of  
5 the budget power from the legislature to the elected  
6 official.

7 The legislature has certainly never done that. It  
8 certainly did not do that in the 2017 budget resolution  
9 which -- or 2018 budget resolution or 2019 budget  
10 resolution, which consistently talked about new positions.

11 Now, unlike some counties, including some of the ones  
12 in the inappropriate cases cited by my learned counsel  
13 friend, they have salary resolutions where they actually  
14 detail the salaries. It's not required, and Erie County  
15 doesn't do that. Therefore, the authority to set salary  
16 steps must be found.

17 Now, the board of elections has that authority. The  
18 state legislature said we're not going to have any  
19 interference. Board of elections, you get a pot of money  
20 and it's your money to spend. The state legislature  
21 didn't say that about any other positions.

22 The county legislature, which knew that was the rule,  
23 did not say that. And as Your Honor knows, in statutory  
24 interpretation when something is included in one place and  
25 omitted in others, the omission is intentional. The state

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1 legislature did not intend to expand the power to manage  
2 or the ability to create the power to manage beyond the  
3 legislative control of the budget.

4 Now, let's talk about the budget. I will admit this  
5 is kind of nice for me near the end of my career to talk  
6 about a budget since I started my career as a municipal  
7 budget officer, I was a finance director of the city. I  
8 never thought I'd be at the court arguing about what  
9 budgets mean. What I do know about budgets is they're not  
10 the law. They are not the absolute right.

11 And in fact, the prior cases, one of which was  
12 referred to and which -- one of which is in front of you,  
13 was Mr. Poloncarz talking about how does the budget work  
14 between the comptroller and between the legislature, and  
15 you may recall Mr. Poloncarz did not prevail.

16 Interestingly, by the way in that case, and I can dig  
17 it out for you if you don't have a copy, Mr. Gach took the  
18 opposite point of view since he was on the other side of  
19 the political spectrum and working for the then county  
20 executive and took the position that the comptroller's  
21 authority was more constrained. And Mr. Gach's affidavit  
22 is important because he supports my position. He says in  
23 the affidavit, tellingly, Kathy Konst was put in a step  
24 three, implying that see, this can be done by whoever puts  
25 her in there. In fact, and this is why we submitted a

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1 supplemental affidavit, it clearly shows that she was  
2 submitted as a temporary emergency employee, which the  
3 county personnel policy specifically says the personnel  
4 director can do when appropriate. And that's what was --  
5 the county personnel director has admitted he made a  
6 mistake, he should not have signed off on step one. Once  
7 she went in as a step five she transferred into the new  
8 position.

9 No one is disputing the comptroller's power to say  
10 that Lynne Dixon was fully qualified and a perfect person  
11 to be the secretary to the comptroller. No one is saying  
12 that she's not qualified and an appropriate person to be  
13 an assistant deputy comptroller. That's what to manage  
14 means. It was specifically adopted to the keep the county  
15 executive out of saying who can be hired. It was not a  
16 carte blanche, to use the term of art that's been  
17 expressed here today, baked into the budget, a step  
18 increase that is earned through the normal personnel  
19 policies.

20 If you find that's true, then I guess the county pay  
21 equity law doesn't apply, for example, to the  
22 comptroller's office since he's free of those  
23 restrictions. I guess he's free of all of the personnel  
24 policies that talk about every other thing that were  
25 adopted pursuant to legislative authority to the county

1 executive.

2 That is -- as Your Honor knows, when looking at  
3 authorities and powers of municipalities we look at what  
4 powers are necessary, explicit, and that's the authorities  
5 we have under the Dillon rule. We don't take expansive  
6 views in New York. Under the Dillon rule you take a very  
7 limited view of what the legislature say they could do.

8 He didn't say anything different than what the  
9 Zielinski case said. And I apologize if I mispronounced  
10 that name. Mr. Magavern was also my mentor in this area,  
11 Mr. Savino, and I remember him teaching us that case, and  
12 that case about the power to appoint. That's what this  
13 section goes to. That's what 2507 is about, you, county  
14 executive, stay out of my business in terms of who I  
15 appoint, keep politics out of these offices.

16 It is not, and there is no case that they have cited  
17 that says otherwise, that says the comptroller controls  
18 step increases. If you take the position that the 2018  
19 budget resolution authorizing up to step five for the new  
20 positions is a permanent step for that position were not  
21 the person who first fills it, then you have done more  
22 than undo county personnel policies. You have undone the  
23 2010 resolution of the legislature. You have  
24 significantly shifted authority of the legislature over  
25 the budget to the comptroller, and that's all things that

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1 this Court should not do and which are not justified by  
2 the arguments presented here in the context of a  
3 department or within budget parameters.

4 When you have multiple laws, as we pointed out and  
5 they didn't even address this in their papers, when you  
6 have multiple laws on the same subject you read those  
7 laws, those rules as applying together. So therefore, you  
8 must read the county's power invested in the legislature  
9 and the county's actions with its resolutions as it  
10 applies to 2507, and when you do that you do not find this  
11 expansion of power.

12 I can also address the standing or other issues if  
13 Your Honor wants me to, or answer any questions the Court  
14 has, but I think I've outlined our position on the key  
15 point which Your Honor zeroed in on.

16 MR. SAVINO: May I be heard briefly, Your Honor?

17 THE COURT: Yes.

18 MR. SAVINO: Your Honor, listen to what  
19 Mr. Spitzer said. He said 2507 is only about the power to  
20 appoint, it's only about who can be hired, to manage means  
21 to means to appoint, to hire. But what he's reading out  
22 of the language is within the appropriations, within the  
23 parameters. Why would the words even be necessary if the  
24 only point is that he has the power to say it is going to  
25 be Lynne Dixon, and that's where the comptroller's power

1 ends?

2 Another thing, my opponent -- and you can tell we  
3 have a high regard for each other, but another thing where  
4 my opponent errs is when he says budget isn't law. And  
5 what we saw from Henry, Poillucci and from Larson, at the  
6 Court of Appeals, Appellate Division and the Supreme Court  
7 level, a budget is law. And the question here is going to  
8 be is the confluence, as I've described, where there is  
9 the appropriation, does that, with the discretion given to  
10 the comptroller, give him the power to have Ms. Dixon at  
11 step five.

12 And I'm going to stop there so I don't repeat, but I  
13 did want to address those three points of my opponent with  
14 which I disagree.

15 MR. SPITZER: Very briefly, Your Honor. What  
16 that means in terms of the budget is you can go up to that  
17 number in accordance with all the other rules. It doesn't  
18 mean you have carte blanche to ignore the other rules. A  
19 budget has never meant that. A budget never means that it  
20 sits in isolation of procurement rules, salary rules,  
21 benefit rules. It means that the legislature and the  
22 comptroller and the executive did their job and set out an  
23 appropriate amount. It is not seen as a law that stands  
24 by itself.

25 There is certainly no case law, most of which have to

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1 do with getting rid of positions. That was a red herring  
2 in all of their papers. Nobody was getting rid of a  
3 position. Nobody was reducing a position. Mr. Hogues  
4 said in his affidavit I made a mistake. He said it is my  
5 responsibility -- the comptroller.

6 It's an interesting question whether they even sued  
7 the right person here. It's also an interesting question  
8 whether this is a mandamus case versus a declaratory  
9 judgment case because you're really asking what's the  
10 powers of the executive versus the comptroller in this  
11 situation.

12 That all aside, he has not made the case that a  
13 budget resolution creating an appropriation stands  
14 separate even under the language of 2507, from the other  
15 rules that apply. It doesn't say that, and you should not  
16 read that into it.

17 MR. SAVINO: Your Honor, as the petitioner, just  
18 to have my right of the last word, what Mr. Spitzer has  
19 wholly omitted from the fifty minutes we've been arguing  
20 is any explanation as to what would be the purpose of the  
21 words within 2507, the power to manage the department  
22 within the parameters of the adopted budget. This is in a  
23 section called budget controls. What does it mean to  
24 manage within the parameters of the adopted budget if that  
25 does not involve any discretion to the person, the

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1 comptroller?

2 And I'll stop there. I just wanted to say -- what  
3 those words -- how those words are necessary under the  
4 analysis of the respondent. They're purposeless if the  
5 power is as truncated as was argued by the county  
6 executive.

7 MR. SPITZER: If what you just said is true then  
8 if on March -- April 1 someone announces to their boss I'm  
9 retiring, the comptroller can say no problem, I'm going to  
10 pay you your whole hundred-thousand-dollar salary in the  
11 first three months because I can do that because I can  
12 manage within the budget.

13 If what you just said is true, that to manage is as  
14 broad as you said, and you certainly have not cited any  
15 authority that management is that broad, the question is  
16 is why isn't 2507 under the section on salaries then?  
17 It's under budget control because he has control over his  
18 budget. He can spend up to that amount within the other  
19 rules.

20 He's not -- you certainly would not argue that he  
21 could avoid sex discrimination or age discrimination rules  
22 in managing. I certainly hope not. He has other rules he  
23 has to follow, and it's under budget controls because he  
24 can use the budget in accordance with everything.

25 The basic disagreement is that my learned counsel

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1 wants to place that law on a pedestal of its own, separate  
2 from all the rules, and that's not how we do statutory  
3 interpretation, and that's certainly not how we protect  
4 the public fisc, which the Court of Appeals has said over  
5 and over again, our main job is to protect the taxpayers  
6 and the public fisc. This does not do it. It shifts  
7 power inappropriately.

8 MR. SAVINO: But Henry, Poillucci, and Larson  
9 each gave that level of deference to a budget as having  
10 the greater dignity, and that won't go away. Nothing we  
11 say today makes those holdings go away.

12 MR. SPITZER: Nothing to add because he's added  
13 nothing new there. I thank you very much for allowing us  
14 to go on this long.

15 THE COURT: I have the argument on this. I've  
16 spent a great deal of time prior to this point looking  
17 through everything that has been provided to me. I had  
18 some questions along the way for each of you, which I  
19 think you have fully answered to my satisfaction as to  
20 what my concerns were.

21 It is -- it's my belief, okay, that this really  
22 hinges on the meaning of what a new position in its  
23 creation is without affecting anything that deals with the  
24 personnel policies of the office. The reason why someone  
25 would put in a position, a variable minimum attached to a

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1 position, why the legislature would authorize that seems  
2 quite simple and basic to me. But once the position is  
3 created and it exists there's no reason why it can't flow  
4 along with the other county policies as is. It's not some  
5 unique position that forever holds that variable minimum  
6 or once it was started at the top range it would be there  
7 forever.

8 I think it hinges on this and I don't see -- I would  
9 see that -- I agree with the respondent that this would be  
10 expanding the powers of the elected officers way beyond  
11 what's here. I am going to deny the petition in its  
12 entirety.

13 MR. SPITZER: Your Honor, can we submit an order  
14 or will Your Honor issue a decision, or how should we  
15 proceed, Your Honor?

16 THE COURT: You can submit an order.

17 MR. SPITZER: I will send you a draft order in  
18 advance.

19 MR. SAVINO: I figured you would. Anything  
20 else, Judge?

21 THE COURT: Thank you.

22 MR. SPITZER: Thank you, Your Honor. We  
23 appreciate your time.

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I hereby certify that the foregoing 31 pages are a true and accurate transcription, to the best of my ability, of the stenographic notes taken by me on August 25, 2020, in the matter of Mychajliw -vs- Poloncarz, held before the HONORABLE JOSEPH R. GLOWNIA.

  
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CAROLYN KERR, RPR  
SENIOR COURT REPORTER