

## Probation Officers Feel the Chill of Asking Court To Rule Against Itself

Seek to overturn ruling that arming them violates separation of powers

By Charles Toutant

In the showdown over the arming of probation officers, the judiciary clearly holds the upper hand, and last Wednesday, the Appellate Division's reaction to arguments was a good illustration why.

The attorney general and the probation officers' union are asking the court system to rule against itself: that is, to declare null and void a declaration by the Administrative Office of the Courts that a statute calling for some probation officers to be armed compromised the courts' neutrality in criminal matters.

The AOC sued for a declaratory judgment that the statute violates constitutional separation of powers, and in December 2003, Mercer County Superior Court Judge Paulette Sapp-Peterson agreed, granting summary judgment.

The probation officers' union had tried to get the case removed to federal court, arguing that state judges could not adjudicate impartially a dispute where the judiciary itself is a party. U.S. District Judge Anne Thompson declined in 2002, finding no federal subject matter jurisdiction, and in August 2003, the Third U.S. Circuit Court of Appeals affirmed.

On Wednesday, the appellants were left scratching their heads for a way to get around the nearly complete autonomy that New Jersey Constitution, Art. VI, vests in the judiciary to run the court system.

David Fox, the attorney for the Probation Association of New Jersey, argued that the AOC should submit to arbitration of the firearm issue.

"Arbitration is a matter of agreement between parties, correct?" Judge Dorothea Wefing asked impatiently.

"Partially correct," replied Fox, of Livingston's Fox & Fox. He said the judiciary has been subject to arbitra-

tion of labor disputes, such as one over the lack of metal detectors and guards in the Dover probation office, where probationers have been found carrying guns and knives.

"Mr. Fox, you're getting far afield of the case before us, which, with all respect, represents a very narrow issue," Wefing said.

Fox then mentioned a bill pending in the Assembly, A-3045, that would transfer control of the Probation Department from the judiciary to the executive branch. The fact that the present conflict could be resolved legislatively "with the stroke of a pen" revealed the "folly" of the AOC's position, he said.

The legislation is "not before us today," Wefing observed.

"I believe it is," Fox responded. "Doesn't the Legislature have the right to say the public needs to be protected and the officers need to be protected? ... There will be a probation officer killed or a member of the public killed if probation officers don't have immediate access to firearms. It's going to happen, and that goes to the policy argument. Where do you draw that line? Today I would say that line needs to be drawn

in favor of the Legislature."

The attorney general's outside counsel likewise took a plaintiff tone, saying in the interest of comity the



**TAKING COVER:** David Fox argued for the probation officers' union that the AOC should submit the firearm issue to arbitration.

court was obliged to work out the dispute with the probation officers. "I think everyone would agree with the separation of powers, but there isn't a watertight segregation of the branches of government," said Andrea Sullivan, of Greenbaum, Rowe, Smith & Davis in Woodbridge.

Sullivan said the statute in question is a broad policy initiative of a type that the state Supreme Court has found the Legislature can impose on the judiciary. But Wefing took issue, noting that the statute sets quotas for the numbers of armed officers in each county.

Wefing asked why such specific

directives didn't fall into the category of internal court operations, which case law has held is the prerogative of the AOC. Sullivan likened the quotas to the Legislature's stipulation that the court system should consist of 428 judges.

When her turn came, the AOC's outside counsel, Cynthia Jacob, of Collier, Jacob & Mills in Somerset, seemed to be preaching to the choir. She said Fox had raised ancillary issues to distract the court and parties from the issue of whether the statute is constitutional. She called Fox's suggestion of arbitration "an exercise in futility" and said "an arbitrator may

not determine facial constitutionality."

Wefing and the other judges on the panel, Robert Fall and Edith Payne, did not interrupt Jacobs' presentation or address the safety issues Fox had raised.

But Wefing did offer a balm to the several dozen probation officers who packed the hearing. "There are a number of people here who have an interest in this matter," she said. "I don't know what the outcome of the case will be but I want to assure them we have enormous respect for the job they do."

The case is *Williams v. State of New Jersey*, A-3389-03T3. ■