JUDICIAL INVESTIGATION COMMISSION
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July 23, 2018

The Honorable Elizabeth D. Walker, Justice
Supreme Court of Appeals of West Virginia
Capitol Complex
Building One, Room E-302
Charleston, West Virginia 25305

In re: Complaint No. 41-2018

Dear Justice Walker:

On July 20, 2018, the Judicial Investigation Commission was presented with a complaint filed against you by Judicial Disciplinary Counsel. The complaint alleged potential violations of Rules 1.1, 1.2, 1.3, 3.13 and 3.15 of the Code of Judicial Conduct pertaining to the justices' practice of buying lunches on a State purchasing card while at work at the Capitol on argument docket and administrative conference days. The facts giving rise to the complaint are as follows: Prior to 2012, the Court began each argument day at 10:00 a.m. and recessed for lunch from 12:30 to 2:00 p.m. Thereafter, the Court would resume its work on the bench until the docket was complete. Afterward, the Court held conference to decide that day's cases. On days where there was an all-day administrative conference, the Court also took a lunch break in the middle of the day.

Beginning in January 2012, the Court, then comprised of Justices Davis, Workman, Ketchum, McHugh, and Benjamin, informally changed the schedule on argument days by ceasing the 12:30 p.m. to 2:00 p.m. lunch break. Instead, the Court opted to stay on the bench until the docket was completed. The Court then immediately began the decision conference and held a working lunch paid for by the Court. Lunches were also provided for visiting circuit court judges who filled in for justices conflicted off specific cases. With respect to all day administrative conferences, the Court also elected to have a working lunch. The Court also provided lunches for various court employees who had to remain at their posts and copy, type and/or retrieve documents for the Justices while they were on the bench or in conference.

According to Justices Davis, Workman, Ketchum and Benjamin, the change to a working lunch was brought about for several reasons. First, litigants, lawyers and other court participants who came from all over the state did not have to wait while the Court broke for a 90 minute lunch during argument docket days but would instead be able to begin their travel

home much earlier. Second, the practice proved more convenient for visiting judges who could return to their circuit the same day and perhaps engage in some work there. Third, eliminating the lunch break during argument and administrative conference days also allowed the Justices and certain staff additional time to work on research, writing and other Court matters. Fourth, the practice proved more efficient since the justices and staff members were no longer at the mercy of restaurants and traffic as to their ability to return to work in a timely manner.

You were elected to the bench in May 2016, and took office on January 1, 2017. By that time, the custom of a paid working lunch on argument docket and administrative conference days had been in effect for four years, was well known throughout the Court system, and no one had ever questioned the correctness of the policy. Consequently, when you took the bench, you likewise partook in the paid working lunches.

In mid-Fall 2017, you decided to reimburse the Court for your lunches – not because you believe you did anything wrong but because of a promise you made to yourself before taking office that you would limit the amount of public money that you would use for expenses.[1] You made a general verbal inquiry as to whether it was possible to compute the 2017 lunch expenses attributed to your assistant and you and you were told that it was too difficult to do so. You did not document your inquiry or the response.

In December 2017, the Court, for the first time, was asked about paid lunches in a FOIA request from a local television reporter. The Court's Finance Director was tasked with gathering the information about the lunches. By email dated December 20, 2017, you asked the Finance Director to inform you on how much the Court paid over the past year for the lunches in question and that you would be "writing a personal check . . . for 1/5 of the total." On December 29, 2017, you gave the then court administrator a check for $2,019.24.[2]

On or about April 18, 2018, Judicial Disciplinary Counsel opened a complaint against you alleging the aforementioned facts and potential Code violations. By letter dated May 4, 2018, you denied violating the Code of Judicial Conduct. You were also voluntarily interviewed by Judicial Disciplinary Counsel on May 23, 2018. You stated that when you took the bench you had no reason to question the practice of providing lunches to Justices and staff since it "seemed to be well-established" and "neither controversial nor disputed by any members of the Court." You also stated:

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[1] According to you, after you were elected you made a personal decision never to seek reimbursement for mileage or meal travel expenses. You also have never "driven and will not drive a state car for any purpose." You "declined the offer made by the Court Administrator in 2016 for the Court to purchase my judicial robe and to provide a computer and printer for my home office." You also "personally paid for all catering expenses associated with my swearing in ceremony. . . . "

[2] From January 4, 2017, through November 14, 2017, the Court purchased lunches for the Justices and various staff members for a total of approximately 602 lunches on 52 separate days from some upscale Charleston restaurants and spent a total of approximately $10,096.20. The average with tip included cost approximately $16.77 per meal. You actually only participated in 46 of the paid lunches with your last time occurring on or about October 31, 2017. If you had instead repaid the average price spent per meal for the 46 meals you purchased, you would have repaid approximately $771.42 for yourself and an additional $771.42 for your assistant for a total of $1,542.84.

> I was generally aware – as a result of my background in employment law – that employer provided meals on an employer's premises that are provided "for the convenience of the employer" are not considered income under federal tax law (26 U.S.C. § 119). Admittedly, I did not research whether the practice was restricted by state law. . . . I am unaware of any law or regulation prohibiting the Court from providing lunches to Justices and staff on days when we worked through the lunch hour. On those days, it is necessary for key staff to work through lunch in order for us to do our work.
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> Moreover, I have no personal knowledge of the original decision to provide Court-paid lunches. However, as stated in one of the Court's recent responses to a request under the Freedom of Information Act (FOIA), "the Court has in recent years chosen to remain on the bench without a lunch break until all arguments are concluded as a convenience to litigants and lawyers. Thereafter, a working lunch allows the Court to finish consideration of the cases and other administrative matters." I recall the Court's practice some years ago of taking a lunch break of unpredictable length on argument days, which on occasion resulted in inconvenience for counsel whose cases were not taken up prior to the break. Thus, . . . I believe that Court-provided lunches benefitted the public by enabling the Court to continue and complete its work promptly.

In applying the foregoing facts to the alleged Rule violations, the Commission finds that there is no probable cause to believe that you violated any provisions of the Code of Judicial Conduct. You had no involvement in the original decision to provide working lunches on argument and administrative conference days and you had no reason to challenge the practice at the time you took office because it was well-known and well-established practice although it had never been reduced to writing. As no further action is warranted, the complaint against you is dismissed, and the file in this matter has been closed.

Sincerely,

Ronald E. Wilson Chairperson
Judicial Investigation Commission

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Complaint No. 41-2018