IN THE WEST VIRGINIA SENATE

IN THE MATTER OF IMPEACHMENT PROCEEDINGS AGAINST RESPONDENT CHIEF JUSTICE MARGARET WORKMAN

Honorable Paul T. Farrell
Acting Justice of the
Supreme Court of Appeals of West Virginia
Presiding Officer

CHIEF JUSTICE WORKMAN'S MOTION TO DISMISS ARTICLE XIV(G)

Respondent Chief Justice Margaret Workman, by counsel, respectfully moves the Presiding Officer for a ruling that Article XIV(G) be dismissed insofar as there was no evidence before the House of Delegates from which that body could charge Respondent with maladministration. Article XIV(G) alleges that Chief Justice Workman failed "[t]o provide effective supervision and control over purchasing procedures which directly led to inadequate cost containment methods, including the rebidding of the purchases of goods and services utilizing a system of large unsupervised change orders, all of which encouraged waste of taxpayer funds." Art. XIV(G). But impeachment cannot lie for an honest, non-catastrophic mistake, or for an official act or omission amounting to ordinary lack of care. No evidence has been produced that Respondent specifically intended the alleged misconduct.

As an initial matter, the "system of large unsupervised change orders" provides the true motivation for Article XIV(G), and evidence indicates that alleged this use of change orders was attributable to the Court's former administrative director, not to any justice. In 2008, the Court bid out a construction project to renovate the counsel's office and the chief counsel's office. Transcript of House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices ("Tr.") Vol V. 1189:3–13. The Court decided to bid out the project as a precautionary measure even though it was not required to do so. *See id.* at Vol. V 1190:4–8,

1383:20–1384:6. Neighborgall Construction Company ("Neighborgall") was the lowest bidder and was awarded the contract. *See id.* at Vol. V 1189:14–18, 1191:10–19; House Judiciary Comm. Ex. 60. The justices admired Neighborgall's work on the original contract, so when they explored a plan for chambers renovations, they expressed to the administrative director that they wanted to keep Neighborgall to perform the work. *See* Tr. Vol. V 1388:7–12, 1532:3–17. The administrative director, evidence indicates, made the decision to use change orders to the original contract in order to fulfill this request and retain Neighborgall for the renovations. *See id.* at Vol. V 1529–1532. While the justices generally understood that the administrative director was using change orders to keep Neighborgall on board, "they were not aware of each of the costs" associated with each change order. *Id.* at Vol. V 1532:3–8. Indeed, it is the administrative director's signature alone that appears on the change orders on behalf of the Court. *See* House Judiciary Comm. Ex. 50–55.

Although the former administrative director was required by administrative rule to seek approval for purchases over $20,000, evidence before the Judiciary Committee indicates that he did not follow this requirement in relation to the renovations. *See* Tr. Vol. V 1397–1400. It was his "understanding" that costs related to the renovations had been approved in an "umbrella manner" so that he did not have to seek approval for each invoice or change order over $20,000. *Id.* at Vol. V 1399:1, 1400:2; *see id.* at Vol. V 1398:1–14:00:4. He considered furniture purchases to fall within this "general approval" also. *Id.* at Vol. V 1399:22. He explained that he continued unilaterally approving invoices and change orders in excess of $20,000 because he did not hear any objection. *See id.* at 1400:2–4. The administrative director also made clear during his testimony that when he was given an assignment by the justices, he personally believed that he was entitled "to make it happen" by any means necessary. *Id.* at Vol. V 1398:14–15.

Examination of the evidence (or lack thereof) before the House is mandated in this impeachment by fundamental principles of fairness and due process, though the same would not necessarily be countenanced in a criminal proceeding. The case before the Senate against Respondent is conceptually indistinguishable from that against two county supervisors in *Steiner v. Superior Court*, 58 Cal. Rptr. 2d 668 (Cal. Ct. App. 1996). In *Steiner*, the district attorney instituted removal proceedings before the grand jury, which returned accusations that the supervisors failed to adequately oversee the treasurer and other officials to prevent them from bankrupting the county through speculative investments. Of the accusations, the court remarked that "[i]n a nutshell," the supervisors were alleged to have done "a shoddy job of minding the store." *Id.* at 672. The court granted the supervisors' petitions for extraordinary relief and prohibited further proceedings, noting that although the removal threshold of "willful misconduct" required only a volitional act or omission short of criminal intent, a mere neglect of duty was not enough. Rather, removal of either supervisor could only be predicated on "a failure to discharge his duty with knowledge of the facts calling for official action; a failure which was willful, and which evidenced a fixed purpose not to do what ***actual knowledge*** and the requirements of the law declare he shall do." *Id.* at 674 (citation and internal quotation marks omitted). The *Steiner* court, after conducting a thorough review of applicable caselaw, concluded that controlling precedent had "engrafted a knowledge element to the required mental state." *Id.*

Consequently, "something more than neglect is necessary" to justify removal of a county official. *Steiner*, 58 Cal. Rptr. 2d at 675. Surely the same standard, or an even stricter one, applies to removal after impeachment of a member of West Virginia's highest court. Where a justice has engaged in "conduct that was otherwise criminal, conduct which was corrupt and *malum in se*," then removal is justified. *Id.* But where the alleged misconduct is instead "premised on something

the official ***should have known***," then removal cannot lie: "The procedure must be reserved for serious misconduct . . . that involves criminal behavior or, at least, a ***purposeful*** failure to carry out ***mandatory*** duties of office." *Id.* at 675-76; *accord In re Kline Twp. Sch. Dirs.*, 44 A.2d 377, 379 (Pa. 1945) ("It is not for every breach of duty that directors may be removed from office but only for the breach of those positive duties whose performance is commanded."). The concept is a familiar one in the context of civil liability, from which ordinary public officers are qualifiedly immune in their individual capacities "for discretionary acts, even if committed negligently." *W. Va. State Police v. Hughes*, 238 W. Va. 406, 411, 796 S.E.2d 193, 198 (2017) (citation and internal quotation marks omitted). Such immunity extends to all such officials, except those who are "plainly incompetent or those who knowingly violate the law." *Id.* (citation and internal quotation marks omitted).

The fatal defect here is that ***no*** evidence before the House remotely suggested that Respondent knew or should have known that the administrative director was not abiding by the administrative rule. Even more, there was no evidence presented to show that Respondent knew or should have known that some costs for the other justices' chambers renovations exceeded $20,000 such that the administrative director would need approval. To the contrary, the former administrative director testified that the justices did not see invoices for their own individual chambers renovations. Tr. Vol. V 1348:17–22 ("Q. . . . [W]ould the justices have seen the invoices for . . . his or her particular office before it went to the Fiscal Officer? [Canterbury] A. No, they would not. They never saw them."). He also testified that he did not share the costs of one justice's chambers renovation with any other justice. *See id.* at Vol. V 1484:4–12, 1544:14–22 ("I always kept [the costs] between the justices and me . . . .").

Additionally, Respondent was not on the Court in 2008 when the original contract with Neighborgall was executed. She therefore could not have participated in "umbrella" approval that would have arrogated the rule limiting the administrative director's spending. *Id.* at Vol. V 1399:1. There was no evidence presented to the House to dispute this fact.

WHEREFORE, Respondent respectfully requests that the Presiding Officer grant this motion and dismiss Article XIV(G).

CHIEF JUSTICE MARGARET WORKMAN

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2018, a true and correct copy of the foregoing **CHIEF JUSTICE WORKMAN'S MOTION TO DISMISS ARTICLE XIV(G)** was served by electronic mail and by depositing a true copy thereof in the United States mail, first class, postage prepaid, in envelopes upon the following:

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