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 IV AND ARTICLE VI AS LACKING EVIDENCE OF KNOWLEDGE OR INTENT

Respondent Chief Justice Margaret Workman, by counsel, respectfully moves the Presiding Officer for a ruling that Article IV and Article VI be dismissed insofar as there was no evidence before the House of Delegates from which that body could charge Respondent with a knowing or intentional violation of the law. Article IV explicitly charges that Respondent "did knowingly and intentionally act" to violate the law, that is, "to overpay certain Senior Status Judges" in contravention of certain constitutional and statutory proscriptions. Article VI in effect charges the same *mens rea*, alleging that Respondent disregarded her oath of office by authorizing the same payments. In either case, 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 intended any violation.

Examination of the evidence (or lack thereof) before the House is mandated in this impeachment by fundamental principles of fairness and due process. 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 in California. *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 requisite mental state is non-controversial and presumably undisputed, inhering as it does in the explicit and implicit allegations of Articles IV and VI. The fatal defect in this case is that ***no*** evidence before the House remotely suggested that Respondent had any knowledge that the appointment of senior judges might, down the line, contravene the prohibition found in West Virginia Code § 51-9-10 that "the per diem and retirement compensation" of such judges "not exceed the salary of a sitting judge." As an initial matter, inasmuch as the annual pension paid senior judges is tens of thousands of dollars less than the salary of a sitting judge, the prohibition would not be effective until months following the senior judge's appointment. And the only evidence presented during the impeachment hearings revealed that the Court's administrative personnel — not the justices — tracked the compensation paid. *See* Transcript of House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices ("Tr.") at 1503-04 (testimony of Steven Canterbury that deputy administrators Kathleen Gross and Jennifer Singletary "were involved with keeping track of this"). Indeed, as Mr. Canterbury testified without dispute, "none of the chief justices had anything to do with their payment at all, and I don't think they ever gave it much of a thought." *Id.* at 1505. Without evidence of malintent, there are insufficient grounds for removal. *See Steiner*, 58 Cal. Rptr. 2d at 676 (forecasting that adoption of mere negligence standard for removal "would have ominous public policy implications[,]" permitting ouster of elected officials "for getting a C minus on their report cards").

WHEREFORE, Respondent respectfully requests that the Presiding Officer grant this motion and rule that Article IV and Article VI be dismissed for lack of sufficient evidence before the House of Delegates of an impeachable offense, and in particular the essential element of knowledge or intent.

CHIEF JUSTICE MARGARET WORKMAN

By Counsel:

Benjamin L. Bailey (WVSB #200)
bbailey@baileyglasser.com
Steven R. Ruby (WVSB #10752)
sruby@baileyglasser.com
Raymond S. Franks II (WVSB #6523)
rfranks@baileyglasser.com
Holly J. Wilson (WVSB #13060)
hwilson@baileyglasser.com
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, WV 25301
T: 304-345-6555
F: 304-342-1110
Counsel for Respondent

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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 IV AND ARTICLE VI AS LACKING EVIDENCE OF KNOWLEDGE OR INTENT** 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:

Honorable John Shott
Room 418M, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Honorable Andrew Byrd
Room 151R, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Honorable Geoff Foster
Room 214E, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Honorable Ray Hollen
Room 224E, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Honorable Rodney Miller
Room 150R, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Benjamin L. Bailey (WVSB #200)
Steven R. Ruby (WVSB #10752)