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IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION
2018

IN RE: The Matter of Impeachment Proceedings
Against Respondent Justice Margaret Workman

BOARD OF MANAGERS OF THE WEST VIRGINIA HOUSE OF DELEGATES' CONSOLIDATED RESPONSE TO RESPONDENT CHIEF JUSTICE MARGARET WORKMAN'S MOTIONS TO DISMISS ARTICLE XIV (A)-(G), INCLUSIVE

Comes Now, the Board of Managers of the West Virginia House of Delegates (hereinafter "Board of Managers") and request the Court to reject the Motions of the Respondent to Dismiss each and every component of Article XIV (a)-(g), inclusive.

In support of its Response, the Board of Managers states as follows:

The Board of Managers has, for principles of judicial economy, filed this Response as a consolidated Response because the arguments advanced by Respondent, and indeed, the material citations to authority made, were essentially identical for all of these Motions. Only specific factual assertions and the interpretation placed upon those, relevant to each such Motion, varied in any way. Therefore, this Response begins with an analysis of the precedent and authority relied upon by Respondent. We will then proceed to examination of her factual assertions and argument in each such Motion.

I. Respondent's Precedent and Authority

Respondent argues in the opening paragraph of each of these Motions that "impeachment cannot lie for an honest, non-catastrophic mistake, or for an official act or omission amounting to ordinary lack of care." (See p.1 of each of Respondent's Motions) Her argument, premised upon this conclusion, is that no evidence has yet been produced to prove that she had a specific intent to cause the misconduct alleged in each count, and that absent

such intent, she cannot be found culpable for it, and thus, removed from office. We disagree with this assertion.

First, we state, without reservation, that we believe all issues surrounding impeachment are essentially political questions. The enumerated offenses which the framers of our state Constitution sought to punish are, we contend, substantially the same as those Hamilton noted when he wrote as Publius in *Federalist* 65: "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." The Constitution of the State of West Virginia, specifically provides in Article IV, Section Nine that "The House of Delegates shall have the sole power of impeachment. The Senate shall have the sole power to try impeachments and no person shall be convicted without the concurrence of two thirds of the members elected thereto." Thus, it is not for us, but for the Senate, to determine upon what grounds impeachment may lie, as they must judge whether the conduct of the Respondent is sufficient in their understanding to be "maladministration, corruption, incompetency, gross immorality, neglect of duty, or any high crime or misdemeanor." *Id.*

This is the view of the United States Supreme Court as well. In *Nixon v. United States*, 506 U.S. 224,231 (1993) that Court held that

> The commonsense meaning of the word "sole" is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. The dictionary definition bears this out. "Sole" is defined as "having no companion," "solitary," "being the only one," and "functioning ... independently and without assistance or interference." Webster's Third New International Dictionary 2168 (1971). If the courts may review the actions of the Senate in order to determine whether that body "tried" an impeached official, it is difficult to see how the Senate would be "functioning ... independently and without assistance or interference."

The United States Supreme Court went on to note in *Nixon* at p. 235 that "In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. On the topic of judicial accountability, Hamilton wrote:

> "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. *This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges."* The Federalist No. 79, (emphasis added).

Assuming, *in arguendo*, that we can set standards for the Senate to follow in its examination of the case before it, we do not believe that the standard articulated by Respondent is accurate. Respondent relies upon authority which is easily distinguishable, and of questionable persuasive authority in this state.

Respondent places great weight upon one case, which she cites extensively in each of her Motions for the proposition noted, *supra,* that "impeachment cannot lie for an honest, non-catastrophic mistake, or for an official act or omission amounting to ordinary lack of care." The basis for this rests solely upon a holding of the California 4th District Court of Appeal in the case of *Steiner v. Superior Cour*t, 50 Cal. App. 4th 1771, 58 Cal. Rptr. 668 (1996).

In *Steiner*, the district attorney of Orange County brought suit to unseat Steiner and Stanton as Orange County supervisors, significantly, and unmentioned by Respondent under the provisions of a California-specific statute: specifically, Section 3060 of the California Government Code. This section provided, as it still does, that "an officer of a district, county or city" could be removed "for willful or corrupt misconduct in office." *Cal. Gov. Code* § 3060.

This action was initiated, after another elected official, Orange County Treasurer Robert Citron, made speculative high-stakes financial investments, which suffered a precipitous downturn and plummeted Orange County into bankruptcy. The district attorney instituted proceedings before the grand jury, which issued substantially identical accusations against

Steiner and Stanton, alleging, in essence, they failed to adequately carry out their duties to supervise Citron and other county officials.[1]

The California Court of Appeal for the 4th District arrived at its verdict in *Steiner*, not upon applying some set of abstract principles or articulating a widely held legal theory; rather it construed the very specific language of a California statute. Thus, that Court arrived at the conclusion that "a mere neglect of duty" was not sufficient for removal under Section 3060, but that it required "a fixed purpose not to do what actual knowledge and the requirements of the law" declare an officer should do. *Steiner* at 1779, citing *Coffey v. Superior Court*,[2] 147 Cal. 525 (1905).

The problem for Respondent is that West Virginia is simply not California.[3] Mere "neglect of duty", which in California is not grounds for removal in accordance with Section 3060, is **explicitly** provided for as Constitutionally permissible grounds for impeachment in West Virginia. Indeed, it is one of the listed potential offenses in the Articles exhibited by the House of Delegates, and there is **nothing** in the language of Article XIV to suggest that neglect of duty is **not** grounds to be considered in its evaluation and application. West Virginia does not require a fixed purpose not to act lawfully, as *Steiner* and *Coffey* do, but allows that simple "neglect of duty", carelessness in failing to do what one should, is grounds for impeachment and removal.

If, as we believe, the Respondent is alleging that the statutes for removal of county officials and holdings surrounding their removal in accordance with these statues is valuable

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1 Though perhaps not significant, *Steiner* involves a dispute between three elected officials over misconduct and the responsibility for the same. Respondent places much of the blame for her current condition on an unelected official, Administrative Director Canterbury, whom she directly supervised.

2 "The font of Section 3060 cases", as it is called in that decision.

3 Moreover, even if we were in California, *Steiner* notes that judges in California, are subject to a different standard, which can even result in a judge being removed from office for conduct undertaken in good faith "but which would nevertheless appear to an objective observer to be unjudicial conduct but conduct prejudicial to public esteem for the judicial office." see Footnote 14 of *Steiner*, supra citing *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 283-4. (1973). Additionally, California has three means of removing judges:1) removal by a Commission 2) recall elections 3) impeachment and conviction. We have but one: impeachment.

precedent, then we have some very interesting holdings here in West Virginia. Our removal statute, Chapter 6, Article 6 of the *W.Va. Code* is very illustrative. §6-6-1 of the *W.Va. Code* spells out the defined terms by which county officials can be removed.[4] Those being, as listed in §6-6-7 of that Code "official misconduct, neglect of duty, incompetence or on any of the grounds provided by any other statute." §6-6-5 (b) provides for removal on the grounds of "official misconduct, malfeasance in office, incompetence, neglect of duty, or gross immorality."

In the matter of *Daugherty v. Ellis*, 142 W.Va. 340, 97 S.E.2d 33 (1956), our Supreme Court dealt with a case in which County Prosecutor Daugherty sought to remove Cabell County Commissioner Ellis from office for committing malfeasance in a sale of county-owned cattle. Appropriately, Circuit Judge Hereford found against Ellis, who appealed.

Our Supreme Court held therein that one who conducts "an unauthorized sale of a herd of livestock owned by the county for a sum which is substantially less than the value...is guilty of malfeasance..which warrants his removal." *Id.* at 358, 43. Given this standard for malfeasance, that selling cattle too cheaply is grounds for a removal from office, we see immediately that

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[4] The text in full of this section is as follows

§6-6-1. Definitions.

(a) The term "official misconduct", as used in this article, means conviction of a felony during the officer's present term of office or any willful unlawful behavior by a public officer in the course of his or her performance of the duties of the public office.

(b) The term "neglect of duty", as used in this article, means the knowing refusal or willful failure of a public officer to perform an essential act or duty of the office required by law.

(c) The term "incompetence", as used in this article, may include the following acts or adjudications committed or arising during the challenged officer's term of office: The waste or misappropriation of public funds by any officer when the officer knew, or should have known, that such use of funds was inappropriate or inconsistent with the lawful duties of the office; conviction of a misdemeanor involving dishonesty or gross immorality, having been the subject of a determination of incapacity, as defined and governed by section seven, article thirty, chapter sixteen of this code; or other conduct affecting the officer's ability to perform the essential official duties of his or her office including but not limited to habitual drunkenness or addiction to the use of narcotic drugs.

(d) The term "qualified petitioner", as used in this article, means a person who was registered to vote in the election in which the officer was chosen which next preceded the filing of the petition.

West Virginia's standards are very different from California. We require, under our case law and statutes, a patently lower barrier to remove county officials.

In Syllabus Point 4 of *George v. Godby*, 174 W.Va. 313, 325 S.E.2d 102 (1984), a case involving removal for wrongful conduct by an assessor, our Supreme Court in a decision authored by Justice McHugh upholding that removal, noted that a "waste of public funds is not an absolute requirement to removal of person from office...[but]...may be considered with respect to the removal of a person from office." This is relevant to the allegations contained in the Articles against Respondent; thus, she herself need not have necessarily wasted money to be removed, though evidence of such may be used against her.

Moreover, in that matter, equally relevant to the Articles against Respondent, the Supreme Court held as dicta that retention of incompetent personnel may be adduced as grounds of incompetency against the supervisory officer, though such was not proven in that matter. *Id.* at 321, 110. Again, actual waste of public funds is not essential to prove removal of a county official, though helpful, and the hiring of incompetent or corrupt assistants may be grounds for removal. We shall examine both of these points later with regard to Respondent.

Finally, in another case with some relevance to the issues presented in the case at bar, Justice Darrell McGraw authored the holding in *Kemp v. Boyd* 166 W.Va. 471, 275 S.E.2D 297 (1981), wherein the Court overturned the removal of a county commissioner, which had occurred, in part, because he had submitted improper mileage reimbursements. Justice McGraw noted therein that while the reimbursements submitted were indeed, improper, they arose from a misinterpretation on the part of Boyd of the enabling statue, a statute which the Court found unanimously to be ambiguous. As Justice McGraw noted, however, despite the fact that the Court would not penalize Commissioner Boyd, it was still "clear that the appellant had no legal right to submit vouchers or to receive reimbursement for the expenses he incurred[.]" *Id.* at 486, 307. Though the Court noted therein that mistake or misinterpretation

might be an effective defense to removal, it implicitly noted that this was confined to certain limited circumstances.

Finally, in differentiating *Steiner* from the case at bar, two major points remain to be considered. First, as noted *Steiner* is a case involving elected county officials, not officers of state for whom a greater level of responsibility and sophistication is expected, particularly when those officials are members of the bar, and in this instance, jurists, who are expected to know and comport with the law at all times. Second, West Virginia's law of impeachments furnishes a clear precedent where an official was impeached with no allegation of criminal wrongdoing, simply waste of funds; this of course, is the case of Treasurer A. James Manchin. Manchin was never accused, charged, nor convicted of any criminal offense; yet, no one, not even he, ever suggested that his impeachment upon grounds for waste of funds and insufficient oversight of the expenditure of public funds was invalid or illegal.

II. Respondent's Individual Arguments

a. Article XIV(a)

Respondent argues, if we understand her rightly, with regard to article XIV(a) applying *Steiner* that she cannot be removed from office for acts that did not involve a purposeful failure to carry out a mandatory duty of office, *Steiner* at 675-6, citing *In re: Kline Twp. Sch. Dirs.* 44 A.2d.377, 379 (Pa. 1945). That case is easily distinguishable as the Pennsylvania Supreme Court in that matter was not dealing with the relationship between removal by impeachment as compared to removal for cause, under statutory guidelines. It was dealing only with the question of whether a school director could be removed from office by a court in a civil action as distinguished from a criminal prosecution in court. This matter is radically different. Moreover, despite Respondent's reliance on *W.Va. State Police v. Hughes*, 238 W. Va. 406, 796 S.E.2d 193 (2017) with its finding that there is qualified civil immunity for ordinary public employee "for

discretionary acts, even if committed negligently", Respondent can find no protection in her contention that this is a civil matter; it is not.

To both of these contentions, we can only place in opposition the Constitution; that is all we have, and it is enough. Article IV, Section 9 of our state Constitution provides that: "Any officer of the state may be impeached for **maladministration,** corruption, **incompetency,** gross immorality, **neglect of duty,** or any high crime or misdemeanor." (emphasis added) Impeachment is a political proceeding, and the Constitutional grounds spelled out to allow for it, explicitly provide that maladministration, incompetence, and neglect of duty are grounds for removal, all of which allow for some degree of negligence to be sanctionable.

Respondent is not a mere employee, and we take grave exception to her confounding the term "employee" used throughout the *Hughes* holding with that of an officer of state. They are distinct; she holds "a position created by law with duties cast on the incumbent which involve an exercise of some portion of sovereign power and in which the public is concerned." Syl. Pt. 1, *State ex. rel. Key v. Bond*, 94 W. Va. 255, 118 S. E. 276 (1923).[5] She is not a mere employee, assigned certain duties by superiors; she holds a post beyond "mere employment". "Among the criteria to be considered in determining whether a position is an office or a mere employment are whether the position was created by law; whether the position was designated an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign." Syllabus Point 5, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970). Here, the Respondent can in no way to be construed as a mere employee as she has all of these criteria; we cannot view her as anything but an officer of state, with all the equivalent responsibilities, and none of the protections.

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[5] Other jurisdictions have adopted similar tests, see, as an example Maryland's construction of this issue in *D'Aoust v. Diamond*, 424 Md. 549 (2012)

As part of her duties she superintends and oversees the workings of public employees and cannot and should not be confounded with them. There is as much difference between these two classes as there is between labor and management in the private sector, and, the distinction between the treatment of their pension rights is, thus, one which was not made for arbitrary reasons. Public employees earn less money, have less prestige, and face a greater risk of being deprived of employment at any time; many are at-will employees, and some face the vagaries of political fortune, and can be turned out with a mere change in electoral fortunes. A great officer of the State can only be removed from office for some form of Constitutionally enumerated wrongdoing by a vote of the Senate.

With regard to the wrongdoing in question herein in Article XIV(a), Respondent alleges a lack of actual knowledge. With respect, management of the Judicial branch is a duty devolved upon all of the Justices, and, in the relevant time frame, she served a time as Chief Justice, with an even greater responsibility for oversight of the Courts.

She had full authority to develop and implement the policies that would have prevented such abuses. She did not.

She alleges that she amended the travel policy to make it more stringent by altering the the phrase that "an expense account submitted by a justice of the West Virginia Supreme Court of Appeals shall be honored irrespective of any...of the language in these travel regulations" to read that "an expense account submitted by a justice of the West Virginia Supreme Court of Appeals **pursuant to judicial branch policies** shall be honored irrespective of any...of the language in these travel regulations." Vol. I 216:110-13, 10-16. Perhaps this might have had some ameliorative impact upon the travel policy—but there were no judicial branch policies for the submission of such expense accounts, and so her words remain a hollow gesture: a well-intended one, perhaps, but ultimately, of no effect.

b. Article XIV(b)

Respondent does not dispute herein that policy development and procedure are the responsibility of every Justice of the Court. Rather, she alleges, there is no evidence concerning her personal car use and lunches were taxable fringe benefits. This may be true as to her personal car use. We believe, however, if we are allowed to present evidence at trial as we were in the trial of Justice Walker, **that evidence will show that the lunches by Respondent violated key provisions of the rules promulgated** to administer and provide guidance concerning such lunches could be considered as working lunches. As this is a factual matter in dispute, we believe it should go to the jury, here, the Senate.

As to the Respondent's contention that she was unaware of the payroll division's reporting, or failure to report regarding car use, while she may have had no personal knowledge of that conduct, it is a legitimate question as to whether or not she should have. Justice Workman, was at a relevant period, Chief Justice of the Supreme Court, and had the responsibility to serve as the chief administrative officer not merely of the Court, but of our whole Judiciary branch. It is, we submit, a legitimate question of fact as to whether or not she should have overseen that division, or to have developed policies for that division which would have prevented any form of improper reporting from occurring. In that capacity, we contend that had a non-derogable duty to oversee the actions of subordinate personnel, and cannot shirk this responsibility.

c. Article XIV(c)

Respondent in this portion of her pleading attempts to plead that she had attempted to develop written policies for Purchasing card use, even before the issue involving gift card purchases came to a head but that her effort was thwarted by the countervailing efforts of Court Administrative Director Steve Canterbury. This is evidence which can be entered by Respondent at trial, as exculpatory evidence; it does not automatically clear her of wrongdoing.

Respondent, again, was at a relevant period, Chief Justice of the Supreme Court, and had the responsibility to serve as the chief administrative officer not merely of the Court, but of

our whole Judiciary branch. The Administrative Director works for the Justices, and is not an independent actor; Mr. Canterbury's position was dependent upon the continued goodwill of the Justices. He is not an elected official, and reports only to the Justices; with his alleged insubordination noted in Respondent's brief, it was her responsibility, and that of her colleagues, to call him to task.

We appreciate that Respondent has acted to mitigate the damage done by this problem in her current term as Chief Justice, an act made considerably easier by the Auditor's renewed oversight of these expenditures, but we cannot overlook the lack of control in the past. Whether such is sanctionable with regard to the Respondent should be a matter for the Senate to examine.

d. Article XIV(d)

Respondent in this portion of her pleading notes that she abides individually by the "standard home office practice" and acknowledges that she knew there was no written policy governing home computer use. Respondent claims that the actions which are alleged to have been undertaken by Justice Loughry were unforeseen and unforeseeable. It seems, at least arguably, that the Senate should have the right to consider whether such is a true point, and whether or not the presence or absence of such policies governing home computers or a home office may have contributed either to aiding in, or preventing, such actions. Contrary to her representation, specific intent is not necessary for there to be a potential finding against her, as, we reiterate that incompetence, neglect of duty or maladministration, or a combination of some or all of these may apply for removal.

e. Article XIV(e)

Respondent in this portion of her pleading complains that this provision is an attempt to hold her responsible for other Justice's improper use of state cars. This is not the case, this provision seeks to examine her oversight of the actions of the Courts and subordinate Courts in her capacity as a Justice and as Chief Justice. Respondent does not deny improper acts took

place, and that state vehicles were used for personal purposes. She advances no rationale under which she should have exercised her proper and necessary oversight to prevent this, appearing to believe it was no part of her responsibility. We disagree, and note that whether such constitutes neglect of duty, or another sanctionable offense with regard to the Respondent should be a matter for the Senate to examine.

f. Article XIV(f)

Respondent in this pleading argues that a system of "effective supervision and control over inventories" could not have prevented the harms alleged to have been committed by Justice Loughry with regard to the removal of certain items of state property. We believe that an actual inventory, routinely conducted, would have revealed the absence of the contested property, and would have avoided the embarrassment to the state by the revelation of this new. We reiterate .that contrary to Respondent's claims that the actions alleged to have been committed by Justice Loughry were unforeseen and unforeseeable, that whether the presence or absence of such policies would have contributed either to preventing such actions is a point the Senate should have the right to consider; we again reiterate that actual knowledge on her part is not necessary to establish her culpability, and some degree of negligence alone may be enough for the Senate to find removal is proper.

Though we do not believe the Justices to be personally responsible for every item of state property held by the Court, they do have a responsibility to have systems in place to safe guard the assets of the citizens of West Virginia. We do not believe, as Respondent would have the tribunal believe that this is all someone else's fault. She had oversight responsibilities, and the manner of her discharging them is fit for Senate review.

g. Article XIV(g)

It is admittedly difficult to follow the thread of argument in the Respondent's pleading upon this point. The relevant language at issue is that Respondent failed "[t]o provide effective supervision and control over purchasing procedures which directly lead 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." The Respondent seizes upon this to argue that she has somehow discerned "the true motivation" for this Article subpart and attributes the true motivation to be attributable solely to former Supreme Court Administrative Director, Steve Canterbury.

The Respondent makes a few interesting admissions in this pleading. She admits that the Justices wanted to retain Neighborgall as a contractor, and that "they were not aware of each of the costs" incurred as a result of the change orders approved by the Administrative Director. While this places all of the direct responsibility upon these two parties, it places a great deal of culpability upon the Justices for their failure to exercise oversight upon these parties.

Again, while there may have been limitations on spending placed upon the Administrative Director, the Court never inquired in the face of what should have been open and obvious violations of this policy as to what Canterbury was doing. Indeed, he admitted he believed that he was instructed to "make it happen" in Respondent's words, "by any means necessary." He could only have derived this notion from his superiors.

Though we do not believe the Justices to be personally responsible for spending on every piece of property acquired or work done on behalf of the Court, we do not believe, as Respondent would have the tribunal believe, that this is all someone else's fault. She had oversight responsibilities, and the manner of her discharging them is fit for Senate review.

III. Conclusion

The collective absence of policies as noted in this pleading generally, rises to some level of negligence, perhaps even gross negligence, or intentional or willful blindness to problems. Thus, it is impossible to argue that some incompetence, neglect of duty, or maladministration, or

a combination of some or all of these Constitutional grounds for impeachment, does not attach to the behavior of the Respondent and of the Court in this matter. The Senate must be allowed the opportunity to decide and to perform its Constitutional duty concerning these matters.

Accordingly, for these and other good and sufficient reasons, we respectfully request this Presiding Officer deny the requested Motions to Dismiss and provide us with all appropriate and consistent relief.

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IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION

2018

IN RE: The Matter of Impeachment Proceeding

Against Respondent Chief Justice Workman

CERTIFICATE OF SERVICE

I, JOHN H. SHOTT, on behalf of the Board of Managers, do hereby certify that the foregoing "*Board of Managers of the West Virginia House of Delegates' Consolidated Response to Chief Justice Workman's Motion to Dismiss Article XIV (A) – (G), Inclusive*" has been upon the following individuals this 5th day of October 2018, by delivering a true and exact copy thereof as follows:

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