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 ARTICLES IV AND VI

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 Articles IV and VI. In support of its Response, the Board of Managers states as follows:

The Board of Managers has filed this Response as a consolidated Response as the arguments advanced by Respondent, while distinct, relate to the same Articles. Only specific factual assertions and the interpretation placed upon those, relevant to each such Motion, vary, economy dictates a simple consolidated response. Therefore, this Response begins with an analysis of the precedent and authority relied upon by Respondent and will then proceed to examination of her factual assertions and argument in each such Motion.

I. ARTICLE IV AND ARTICLE VI DO NOT REQUIRE A SHOWING OF INTENT TO LIE AGAINST RESPONDENT

Respondent argues in the opening paragraph of her Motion, numbered as Motion 2, that intent is a necessary component of Articles IV and VI 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, be 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 alone 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 weight in this state.

A. The California standard

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.

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*,[1] 147 Cal. 525 (1905).

B. The West Virginia Standard

The problem for Respondent is that West Virginia is simply not California.[2] Mere "neglect of duty", which in California is not a ground 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 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*

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

2 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 Qualfiications*, 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.

spells out the defined terms by which county officials can be removed.[3] 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 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.

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3 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.

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 of the enabling statue, a statute which the Court found unanimously to be ambiguous, on the part of Boyd. 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.

C. *Steiner* Further Distinguished

Finally, in differentiating *Steiner* from the case at bar, two major points remain to be considered. First, as noted, *Steiner* is a case involving county official, 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.

Respondent argues, if we understand her rightly, with regard to Articles IV and VI 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", as it is 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).[4] 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 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.

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.

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[4] 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)

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 Articles IV and VI, 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. Testimony was produced as Respondent admits that the deputy administrators at the Court were tasked with keeping track of when senior status judges were coming close to their statutorily mandated salary cap, and that they were then transferred to an independent contractor status (see Testimony of Steve Canterbury, Vol. V, pp. 1502-8 and Testimony of Sue Racer-Troy Vol. VII, pp. 1745-1760). Respondent had to execute the forms WV-48 which ratified this change in status, and did so personally, by signing them on at least two occasions in 2015. (See Exhibit 71) How then she can pretend that she has no actual knowledge, given this fact, is extremely puzzling.

We do not believe, under the weight of precedent, that bad intent on the part of Respondent is necessary to sustain the Articles against her. However, even if malintent were required, there is, thus, evidence that she had such actual knowledge and intent. For these reasons, Respondent's Motion to dismiss Articles IV and VI upon these grounds should fail.

II. ARTICLE IV AND ARTICLE VI DO NOT REQUIRE A CERTAIN SHOWING OF STAUTORY VIOLATION

Respondent argues in the opening paragraph of her Motion which is numbered as Motion 2, that Articles IV and VI should be dismissed as the execution of forms WV-48, whose sole purpose was to provide an alternate mechanism of compensation for senior status judges, which would pay them sums in excess of the statutory cap promulgated under W.Va. Code § 51-9-10. Respondent argues that she "cannot be removed from office absent a predicate act of wrongdoing." We disagree, for multiple reasons.

First, our disagreement is based upon the argument above. In the first paragraphs of this Response, we have articulated our longstanding objection that wrongdoing is necessary to remove a West Virginia officer of state from their post. Such terms as "neglect of duty", "incompetence" and "maladministration" being included among the Constitutional grounds for impeachment is, implicitly, proof of this concept. None of those require active criminality, merely being predicated upon some failing, either moral, intellectual, or of initiative, to do what one ought.

Second, we noted Respondent's argument that compensation, as W.Va. Code § 51-9-10 intends, may mean something other than salary is not a benefit to the Respondent. Indeed, if we accept that compensation may include PEIA, or the judges' individual Social Security payments, then the $126,000 per year threshold would have been reached much sooner, and the violation Respondent connived at would have been all the more egregious and would have implicated additional judges.

We do not believe this to be the case, however. The statute makes a distinction between the two forms of payments the State would make to a senior status judge, sitting by special assignment; i.e. first, their retirement, and, second, their "per diem compensation". Counsel for Respondent is, we believe correct, in noting that the Judges are to be paid on daily basis, and that this is the usual and customary meaning of *per diem*. Given the plain translation of the Latin, and its usual meaning as gleaned from contextual use within the W.Va. Code generally, it is puzzling how one could be supposed to have argued otherwise. Rather, we believe this argument on the part of Respondent to be an attempt to obfuscate and confuse the issue generally. With this confusion created, the problem can appear much thornier than it actually is.

We agree with Respondent's Counsel that the holding of Syl. Pt. 4, *Osborne v. United States*, 211 W. Va. 667, 668, 567 S.E.2d 677, 678 (2002), "stating each word of statute should be given some effect and undefined words will be given their common, ordinary and accepted meaning", as cited by the Respondent in her opinion in *Wiseman Const. Co. v.*

Maynard C. Smith Const. Co., Inc, 236 W.Va.351,358 779 S.E.2d 893,9000 (2015), should apply. Let us therefore, look at the "common, ordinary and accepted meaning" of the word "compensation".

As defined by Black's Law Dictionary, Eighth Edition, compensation means "remuneration, and other benefits received in return for services rendered; esp., salary or wages", citing Corpus Juris Secundum on [Cases: Master and Servant Key number 68-72.5. *Employer Employee Relationship*]. Thus, there is no mystery as to what was intended here by the Legislature; the word should be taken to mean the remuneration or wages paid to the senior status judge for hearing the cases at bar.

Plainly, logic dictates that where the statute says "That the per diem and retirement compensation of a senior judge shall not exceed the salary of a sitting judge, and allowances shall also be made for necessary expenses as provided for special judges under articles two and nine of this chapter" that the intention was to account for the total of the per diem payments made and the total of the retirement benefits paid. How do we know this? This tribunal can take judicial notice of that fact, and with certainty, as there is much evidence from the internal correspondence of the Supreme Court payroll staff that they knew this to be the case.

Moreover, the entire structure connived at by the Court, including the Respondent, to make these overpayments, suggests that they knew and believed this limitation to be in effect. If they did not, they could have simply continued ordinary payments to the judges under a form W-2 and not resorted to the contortions of logic engaged in to defend this practice. We disagree with Respondent's counsel that there is latent ambiguity and tension in the statute. All that ambiguity and tension is manufactured by counsel, as their client knew well what the statute intended, as did her colleagues. This is demonstrated by their actions. This proves that our construction that the words "per diem" and "retirement" are both as adjectives to both modify the

word "compensation" in the statute.[5] All parties herein have always acted as if that were accordingly the case.

Moreover, if there is ambiguity as to what the statue means, this is prima facie evidence that the Respondents motion should be denied. A Motion to Dismiss should only be granted when no such ambiguity exists. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove **no set of facts** in support of his claim which would entitle him to relief." See Syllabus Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d, 207 (1977) citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). (emphasis added)

We believe, contrary to the assertion of the Respondent, that merely because the Supreme Court has not been called to rule upon it, does not mean that there is no one who can construe the meaning of the statute. We believe that the House and Senate who passed this statute have some ability to explicate the meaning of it, as well as the Respondent, and to determine whether or not the Respondent adhered to its strictures; after all, they wrote it.

We also deny the assertion that Respondent's conduct did not cause any overpayment to the senior status judges. Without her signature, employees under her supervision would never have approved payment for, nor transmitted payment to, the senior status judges who were overpaid. The WV-48 was a necessary condition precedent for payment to continue to flow to those judges; else, they would be doing then as they do now and receive no payment (save for expenses) once the maximal compensation limit was reached. While the Respondent's act may be characterized by her as merely ministerial, there is no denying that it had real life consequences for the other persons. The check would never have been issued in the first place without her order to do exactly that. Her action was a necessary precondition to this alleged violation of law; contrary to the misunderstandings of her counsel.

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[5] While it might be clearer if the language read "per diem compensation and retirement compensation", it is not for us to editorialize upon the stylistic choices of the Legislative branch.

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.

John Shott (WV Bar #3382)
Chairman, Board of Managers of the
West Virginia House of Delegates
Brian Casto (WV Bar #7608)
Robert E. Akers (WV Bar #10791)
Counsel to the Board of Managers of the
West Virginia House of Delegates

IN THE WEST VIRGINIA SENATE
SECOND EXTRAORDINARY SESSION

2018

IN RE: The Matter of Impeachment Proceeding

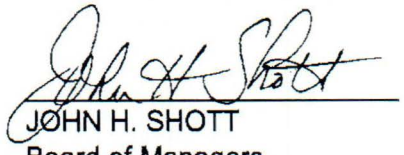
Against Respondent Chief Justice Workman

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 IV and VI*" has been upon the following individuals this 5th day of October 2018, by delivering a true and exact copy thereof as follows:

Benjamin L. Bailey
Steven Robert Ruby
Bailey & Glasser, LLP
209 Capitol Street
Charleston, WV 25301
Via electronic mail

Lee Cassis
Clerk of the West Virginia Senate
1900 Kanawha Boulevard, East
Room M-211
State Capitol Complex
Charleston, WV 25305
Via electronic mail



JOHN H. SHOTT
Board of Managers
WV House of Delegates
1900 Kanawha Boulevard, East
Room M-418
State Capitol Complex
Charleston, WV 25305