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(A)

Respondent Chief Justice Margaret Workman, by counsel, respectfully moves the Presiding Officer for a ruling that Article XIV(A) be dismissed insofar as there was no evidence before the House of Delegates from which that body could charge Respondent with maladministration or any other impeachable conduct. Article XIV(A) alleges that Respondent failed "[t]o prepare and adopt sufficient and effective travel policies prior to October of 2016, and failed thereafter to properly effectuate such policy by excepting the [j]ustices from said policies, and subjected subordinates and employees to a greater burden than the [j]ustices." Art. XIV(A). 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, reimbursements paid to another justice and to the court's former administrative director for rental cars used for personal purposes while on out-of-state official Court business trips serve chiefly as the impetus for Article XIV(A). The Legislative Auditor concluded in its April 16, 2018 Report that on seven occasions between 2013 and 2017, "Justice Loughry rented vehicles with mileage driven during out-of-state trips which [were] for purely personal reasons." *See* Post Audit Div., Joint Comm. on Gov't and Fin. W. Va. Office of the Leg. Auditor, Supreme Court of Appeals of West Virginia Report 10 (Apr. 16, 2018) [hereinafter Report

1]. In total, "these seven car rentals in question cost the State . . . approximately $2,669 in unnecessary expenditures." *Id.* at 11; *see also* Transcript of House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices ("Tr.") Vol. I 45–50. Moreover, the other justice in question is alleged to have normally "selected the 'fuel option' when he rented vehicles, which automatically charged a full tank of gas to the state for part of his fuel usage." Report 1 at 11; *see also* Tr. Vol. I 45:24–46:2.

Evidence also indicates problems with rental car use by the Court's former administrative director. The Legislative Auditor concluded that between 2010 and 2016, the former director drove rental cars for personal purposes while traveling for out-of-state Court business on 20 occasions. *See* Post Audit Div., Joint Comm. on Gov't and Fin. W. Va. Office of the Leg. Auditor, Supreme Court of Appeals of West Virginia Report 2 4–5 (May 20, 2018) [hereinafter Report 2]. In total, this cost the state $11,076.31. *See id.* at 5. When pressed on his rental car use during the House Judiciary Committee proceedings, the former director admitted that "[w]hen the conference was over, [he would] go for drives in the desert or whatever" but reasoned that this use was acceptable because the cost of the rental car was "not charged by the mile; it was charged by the day, at unlimited mileage." Tr. Vol. V 1414:23–1415:3.

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 fatal defect here is that ***no*** evidence before the House remotely suggested that Respondent knew or should have known about other justices' or court personnel's improper personal use of reimbursed rental cars. Instead, testimony reveals that the other justice in question did not report his travel to other justices and that Respondent had no authority to monitor other justices' travel. *See* Tr. Vol. V 1218:23–1220:1. Significantly, the former administrative director stated, "Nobody could look over the justices' shoulders. I have to emphasize that [Justice Loughry] was the boss. If [Justice Loughry] decided to go somewhere, he did it." Even the former administrative director, "didn't . . . know sometimes when a justice would go to a certain conference or another meeting." *Id.* at Vol. V 219:23–1220:1. Travel reimbursements were reviewed by the Finance Division, not other justices. *See id.* at Vol. V 1221:1–10.

No evidence was presented to the House that Respondent was ever reimbursed for rental cars used primarily for personal purposes during out-of-state travel. The House never even hinted that Respondent may have traveled excessively or taken advantage of the Court's travel policy. But significantly, the evidence presented does reflect that when the travel regulations were updated in October 2016, Respondent objected to the proposed language and insisted that it be amended to add accountability. *See id.* at Vol. I 215:12–217:1. As introduced, the language read: "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." *Id.* at Vol. I 216:110–13. The language ultimately adopted at Respondent's behest read: "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 language contained in these travel regulations." *Id.* at Vol. I 216:10-16 (emphasis added).

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

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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(A)** 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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