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(C)

Respondent Chief Justice Margaret Workman, by counsel, respectfully moves the Presiding Officer for a ruling that Article XIV(C) be dismissed insofar as there was no evidence before the House of Delegates from which that body could charge Respondent with maladministration. Article XIV(C) alleges that Respondent failed "to provide proper supervision, control, and auditing of the use of state purchasing cards [("p-cards")] leading to multiple violations of state statutes and policies regulating the proper use of such cards, including failing to obtain proper prior approval for large purchases." Art. XIV(C). 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 impetus for Article XIV(C) is that "in 2016 and 2017, the drug courts under the purview of the Supreme Court . . . purchased approximately $105,000 in gift cards, using the State [p-card] as part of its incentive program for drug court participants." 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 8 (May 20, 2018) [hereinafter Report 2]; *see generally* Transcript of House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices ("Tr.") Vol. I 315:22–345:2. The Court approved these purchases

even though the p-card holders had not received approval from the State Auditor's Office as the State Auditor required. *See* Report 2 at 8; *see also* Tr. Vol. I at 320:11–15, 326:22–327:2, 335:11–336:4.

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 that the drug court p-card holders were not seeking or obtaining approval by the State Auditor for gift card purchases. Further, there was no evidence presented that Respondent personally reviewed p-card transaction histories.

Significantly, the evidence before the House demonstrates that Respondent made extensive efforts to develop written policies for p-cards *even before the gift card purchases at issue started.* These efforts were thwarted by Steve Canterbury ("Canterbury"). Sue Troy ("Troy") testified that in 2015 Respondent "told [her] personally" that she had asked Canterbury to develop written p-card policies. Tr. Vol VII 1772:4–16, 1773:6–11. Respondent intended for these policies to be Canterbury's responsibility entirely. *See id.* at Vol. VII 1773:13–15. As further confirmation,

Canterbury "let [Troy] know that [Respondent] had made that request of him" but told her that she "did not need to worry about it" because he had no intention of developing the policies. *Id.* at Vol. VII 1773:20–22. In essence, Canterbury told Troy: "[w]asn't necessary, wasn't gonna happen." *Id.* at Vol. VII 1774:9–11. In Troy's opinion, Canterbury was "bucking" Respondent on this issue. *Id.* at Vol. VII 1776:2–4. In 2017, Respondent questioned Troy about why the policies had never been written as directed and was "pretty aggravated" to learn about Canterbury's insubordination. *Id.* at Vol. VII 1774:13–22.

Additionally, after learning about the p-card problems in March 2018, upon the recommendation of the Post Audit Division, Respondent suspended the drug court's practice of purchasing gift cards with p-cards. *See* Report 2 at 9; *see also* Ex. 17 (recommending suspension). As the Chief Justice, Respondent is "currently discussing the process with the State Auditor's Office to determine if the practice can be continued and to develop a method for doing so that would alleviate the State Auditor's Office's concerns with accountability and transparency." Report 2 at 9.

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

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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(C)** 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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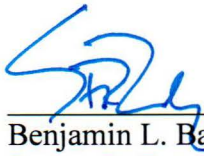

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