

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 398

SENATORS TRUMP, TAKUBO, STOLLINGS, AND PREZIOSO,

original sponsors

[Passed March 9, 2019; in effect from passage]

1 AN ACT to amend and reenact §5-10-48 of the Code of West Virginia, 1931, as amended; to
2 amend and reenact §50-1-6a of said code; and to amend and reenact §51-9-10 of said
3 code, all relating to compensation for senior judicial officers; providing that senior judges,
4 justices, and magistrates may receive per diem compensation for temporary assignments
5 while receiving retirement benefits, subject to certain limitations; setting forth legislative
6 findings; limiting the per diem rate of compensation that may be paid to senior judges and
7 justices for each day served; providing that the combined total of per diem compensation
8 and retirement benefits paid to a senior judge or justice during a single calendar year may
9 not exceed the annual salary of a sitting circuit judge; limiting the per diem rate of
10 compensation that may be paid to senior magistrates for each day served; providing that
11 the combined total of per diem compensation and retirement benefits paid to a senior
12 magistrate during a single calendar year may not exceed the annual salary of a sitting
13 magistrate; providing an exception to the limitation on the combined total of per diem
14 compensation and retirement benefits paid to a senior judge, justice, or magistrate in a
15 calendar year, if the Chief Justice of the Supreme Court of Appeals enters an
16 administrative order certifying that certain circumstances necessitate extended
17 assignment of such judge, justice, or magistrate; providing that extended assignment of
18 senior judges or justices must not be utilized in a manner to threaten the qualified status
19 of the Judges' Retirement System under certain provisions of the Internal Revenue Code;
20 requiring that administrative orders regarding extended assignment of a senior judge,
21 justice, or magistrate be submitted to the State Auditor and the State Treasurer; providing
22 that senior judges, justices, and magistrates may be reimbursed for actual and necessary
23 expenses incurred in the performance of their duties; and requiring the State Treasurer to
24 petition the West Virginia Supreme Court of Appeals for a writ of prohibition prohibiting the
25 State Auditor from issuing warrants to authorize payment of compensation to senior
26 judges and justices above statutory limitations.

Be it enacted by the Legislature of West Virginia:

**CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE
GOVERNOR, SECRETARY OF STATE, AND ATTORNEY GENERAL;
BOARD OF PUBLIC WORKS; MISCELLANEOUS AGENCIES,
COMMISSIONS, OFFICES, PROGRAMS, ETC.**

ARTICLE 10. WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT ACT.

§5-10-48. Reemployment after retirement; options for holder of elected public office.

1 (a) The Legislature finds that a compelling state interest exists in maintaining an actuarially
2 sound retirement system and that this interest necessitates that certain limitations be placed upon
3 an individual's ability to retire from the system and to then later return to state employment as an
4 employee with a participating public employer while contemporaneously drawing an annuity from
5 the system. The Legislature hereby further finds and declares that the interests of the public are
6 served when persons having retired from public employment are permitted, within certain
7 limitations, to render post-retirement employment in positions of public service, either in elected
8 or appointed capacities. The Legislature further finds and declares that it has the need for qualified
9 employees and that in many cases an employee of the Legislature will retire and be available to
10 return to work for the Legislature as a per diem employee. The Legislature further finds and
11 declares that in many instances these employees have particularly valuable expertise which the
12 Legislature cannot find elsewhere. The Legislature further finds and declares that reemploying
13 these persons on a limited per diem basis after they have retired is not only in the best interests
14 of this state but has no adverse effect whatsoever upon the actuarial soundness of this particular
15 retirement system.

16 (b) For the purposes of this section: (1) "Regularly employed on a full-time basis" means
17 employment of an individual by a participating public employer, in a position other than as an

18 elected or appointed public official, which normally requires 12 months per year service and at
19 least 1,040 hours of service per year in that position; (2) “temporary full-time employment” or
20 “temporary part-time employment” means employment of an individual on a temporary or
21 provisional basis by a participating public employer, other than as an elected or appointed public
22 official, in a position which does not otherwise render the individual as regularly employed; (3)
23 “former employee of the Legislature” means any person who has retired from employment with
24 the Legislature and who has at least 10 years’ contributing service with the Legislature; and (4)
25 “reemployed by the Legislature” means a former employee of the Legislature who has been
26 reemployed on a per diem basis not to exceed 175 days per calendar year.

27 (c) If a retirant becomes regularly employed on a full-time basis by a participating public
28 employer, payment of his or her annuity shall be suspended during the period of his or her
29 reemployment and he or she shall become a contributing member to the retirement system. If his
30 or her reemployment is for a period of one year or longer, his or her annuity shall be recalculated
31 and he or she shall be granted an increased annuity due to the additional employment, the annuity
32 to be computed according to §5-10-22 of this code. If his or her reemployment is for a period less
33 than one year, he or she may request in writing that the employee and employer retirement
34 contributions submitted during reemployment be credited to the participating public employer
35 pursuant to §5-10-44 of this code, and his or her previous annuity shall be reinstated effective the
36 first day of the month following termination of reemployment and the board’s receipt of written
37 notice thereof. A retirant may accept legislative per diem, temporary full-time, or temporary part-
38 time employment from a participating employer without suspending his or her retirement annuity
39 so long as he or she does not receive annual compensation in excess of \$20,000.

40 (d) *Senior judges, justices, and magistrates.* –

41 (1) Notwithstanding the provisions of subsection (c) of this section, a retired judge or
42 justice who is recalled and assigned to temporary service as a senior judge or justice by the West

43 Virginia Supreme Court of Appeals may receive per diem compensation pursuant to the
44 requirements of §51-9-10 of this code while continuing to receive his or her annuity.

45 (2) Notwithstanding the provisions of subsection (c) of this section, a retired magistrate
46 who is recalled and assigned to temporary service as a senior magistrate by the West Virginia
47 Supreme Court of Appeals may receive per diem compensation pursuant to the requirements of
48 §50-1-6a of this code while continuing to receive his or her annuity.

49 (e) If a member retires and is then subsequently elected to a public office or is
50 subsequently appointed to hold an elected public office, or is a former employee of the Legislature
51 who has been reemployed by the Legislature, he or she has the option, notwithstanding
52 subsection (c) of this section, to either:

53 (1) Continue to receive payment of his or her annuity while holding public office or during
54 any reemployment of a former employee of the Legislature on a per diem basis, in addition to the
55 salary he or she may be entitled to as an office holder or as a per diem reemployed former
56 employee of the Legislature; or

57 (2) Suspend the payment of his or her annuity and become a contributing member of the
58 retirement system as provided in subsection (c) of this section. Notwithstanding the provisions of
59 this subsection, a member who is participating in the system as an elected public official may not
60 retire from his or her elected position and commence to receive an annuity from the system and
61 then be elected or reappointed to the same position unless and until a continuous 12-month period
62 has passed since his or her retirement from the position: *Provided*, That a former employee of
63 the Legislature may not be reemployed by the Legislature on a per diem basis until at least 60
64 days after the employee has retired: *Provided, however*, That the limitation on compensation
65 provided by subsection (c) of this section does not apply to the reemployed former employee:
66 *Provided further*, That in no event may reemployment by the Legislature of a per diem employee
67 exceed 175 days per calendar year.

68 (f) A member who is participating in the system simultaneously as both a regular, full-time
69 employee of a participating public employer and as an elected or appointed member of the
70 legislative body of the state or any political subdivision may, upon meeting the age and service
71 requirements of this article, elect to retire from his or her regular full-time state employment and
72 may commence to receive an annuity from the system without terminating his or her position as
73 a member of the legislative body of the state or political subdivision: *Provided*, That the retired
74 member shall not, during the term of his or her retirement and continued service as a member of
75 the legislative body of a political subdivision, be eligible to continue his or her participation as a
76 contributing member of the system and shall not continue to accrue any additional service credit
77 or benefits in the system related to the continued service.

78 (g) Notwithstanding the provisions of §5-10-27b of this code, any publicly elected member
79 of the legislative body of any political subdivision or of the State Legislature, the Clerk of the
80 House of Delegates, and the Clerk of the Senate may elect to commence receiving in-service
81 retirement distributions from this system upon attaining the age of 70 and one-half years:
82 *Provided*, That the member is eligible to retire under the provisions of §5-10-20 or §5-10-21 of
83 this code: *Provided, however*, That the member elects to stop actively contributing to the system
84 while receiving the in-service distributions.

85 (h) The provisions of §5-10-22h of this code are not applicable to the amendments made
86 to this section during the 2006 regular session.

CHAPTER 50. MAGISTRATE COURTS.

ARTICLE 1. COURTS AND OFFICERS.

§50-1-6a. Temporary appointment of retired magistrates.

1 (a) The West Virginia Supreme Court of Appeals is authorized and empowered to create
2 a panel of senior magistrates to consist of, and to utilize the talent and experience of, retired
3 magistrates of this state.

4 (b) Senior magistrates recalled and assigned to service shall receive per diem
5 compensation set by the Supreme Court of Appeals, but not to exceed \$200 for each day actually
6 served: *Provided*, That the combined total of per diem compensation and retirement benefits paid
7 to a senior magistrate during a single calendar year may not exceed the annual salary of a sitting
8 magistrate, except as set forth in subsection (c) of this section.

9 (c) Notwithstanding subsection (b) of this section, for purposes of maintaining magisterial
10 efficacy and continuity of magisterial decisionmaking, a senior magistrate may continue to receive
11 per diem compensation after the combined total of per diem compensation and retirement benefits
12 paid to the senior magistrate during that calendar year exceeds the annual salary of a sitting
13 magistrate if the Chief Justice of the Supreme Court of Appeals enters an administrative order
14 certifying there are certain extraordinary circumstances involving the necessary absence of a
15 sitting magistrate because of a protracted, but temporary, illness or medical condition or a lengthy
16 suspension which necessitate the extended assignment of the senior magistrate. Immediately
17 upon entering such an order, the chief justice shall submit copies of the order to the State Auditor
18 and the State Treasurer.

19 (d) In addition to the compensation authorized by this section, senior magistrates recalled
20 to service may be reimbursed for their actual and necessary expenses incurred in the
21 performance of their duties.

CHAPTER 51. COURTS AND THEIR OFFICERS.

ARTICLE 9. RETIREMENT SYSTEM FOR JUDGES OF COURTS OF RECORD.

§51-9-10. Services of senior judges and justices.

1 (a) The Legislature finds that:

2 (1) Section seven, article VIII of the Constitution of West Virginia expressly requires the
3 Legislature to fix judicial salaries by statute, providing that: “[j]ustices, judges and magistrates
4 shall receive the salaries fixed by law”.

5 (2) When originally enacted in 1949, this section of the code required any retired judge
6 receiving retirement benefits to serve as a special judge, when assigned to temporary service,
7 “without charge or compensation, per diem or otherwise to him”.

8 (3) In 1974, the Judicial Reorganization Amendment to the Constitution of West Virginia
9 was ratified. Among other matters, in section eight, article VIII, the amendment addressed the
10 ongoing practice of recalling retired judicial officers to service by empowering the Chief Justice of
11 the Supreme Court of Appeals to recall a retired judge or justice to service, “with his permission
12 and with the approval of the supreme court of appeals”, for temporary assignment.

13 (4) Absent from the Judicial Reorganization Amendment and article VIII of the Constitution
14 of West Virginia is any provision authorizing the Supreme Court of Appeals to fix compensation
15 for recalled judges or justices. Indeed, the Judicial Reorganization Amendment added language
16 to section seven, article VIII of the Constitution of West Virginia, unequivocally stating that
17 “[j]ustices, judges and magistrates shall receive the salaries fixed by law”.

18 (5) In 1975, the Legislature amended and reenacted this section of the code, which still
19 then required any retired judge receiving retirement benefits to serve as a special judge, when
20 assigned to temporary service “without charge or compensation, per diem or otherwise to him”.

21 (6) In 1991, the Legislature amended and reenacted this section of the code again,
22 authorizing and empowering the Supreme Court of Appeals to create a panel of senior judges
23 and justices “to be assigned duties as needed and as feasible toward the objective of reducing
24 caseloads and providing speedier trials to litigants throughout the State”.

25 (7) The 1991 reenactment of this section of the code statutorily authorized, for the first
26 time, “reasonable payment” to senior judges and justices “on a per diem basis”, and provided that
27 “the per diem and retirement compensation of a senior judge shall not exceed the salary of a
28 sitting judge”.

29 (8) In 2018, the West Virginia House of Delegates adopted and communicated Articles of
30 Impeachment to the West Virginia Senate, naming justices of the Supreme Court of Appeals

31 serving at that time as respondents. Several of the articles alleged that certain justices, each while
32 serving as Chief Justice of the Supreme Court of Appeals, had intentionally signed contracts
33 agreeing to pay retired judges recalled to service above the compensation limitations of this
34 section of the code.

35 (9) In a petition to the Supreme Court of Appeals, styled *State ex. rel. Workman v.*
36 *Carmichael*, one justice named as respondent in the 2018 impeachment proceedings challenged
37 the constitutionality of the Articles of Impeachment in which she was named, including the articles
38 alleging payment of senior judges above the limitations of this section of the code.

39 (10) In ruling on the petition in *State ex. rel. Workman v. Carmichael*, the Supreme Court
40 of Appeals, at that time composed of five circuit judges temporarily assigned to sit as justices for
41 that case, issued a writ of prohibition staying impeachment proceedings.

42 (11) In direct contradiction of section seven, article VIII of the Constitution of West Virginia,
43 the decision in *State ex. rel. Workman v. Carmichael* held, in part, that this section of the code,
44 providing for and limiting the compensation of senior judges, is “unconstitutional and
45 unenforceable”.

46 (12) The majority opinion in *State ex. rel. Workman v. Carmichael* ignored the plain
47 language of section seven, article VIII of the Constitution of West Virginia, which explicitly provides
48 that “[j]ustices, judges and magistrates shall receive the salaries fixed by law”.

49 (13) Syllabus point four of the majority opinion in *State ex. rel. Workman v. Carmichael*
50 mischaracterizes what the Legislature had done in enacting this section of the code, by providing
51 that: “West Virginia Code §51-9-10 (1991) violates the Separation of Powers Clause of Article V,
52 § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment
53 matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the
54 West Virginia Constitution. Consequently, W.Va. Code §51-9-10, in its entirety, is unconstitutional
55 and unenforceable”.

56 (14) Occasionally, circumstances may require the extended assignment of senior judges
57 and justices, necessitating the Legislature to prescribe such circumstances when the limitations
58 on compensation of senior judges and justices receiving retirement benefits may be exceeded.

59 (b) The Legislature recognizes and acknowledges the authority of the West Virginia
60 Supreme Court of Appeals to recall retired judges and justices for temporary assignment and to
61 create a panel of senior judges and justices to utilize the talent and experience of former circuit
62 court judges and supreme court justices of this state: *Provided*, That extended assignment of
63 retired judges and justices must not be utilized in such a way as to threaten the qualified status
64 of the Judges' Retirement System under applicable provisions of the Internal Revenue Code,
65 including Treasury Regulation section 1.401(a)-1(b)(1) requiring that a qualified plan must be
66 established primarily to provide payment of definitely determinable benefits to its employees after
67 retirement or attainment of normal retirement age.

68 (c) Senior judges and justices recalled and assigned to service shall receive per diem
69 compensation set by the Supreme Court of Appeals, but not to exceed \$430 for each day actually
70 served: *Provided*, That the combined total of per diem compensation and retirement benefits paid
71 to a senior judge or justice during a single calendar year may not exceed the annual salary of a
72 sitting circuit judge, except as set forth in subsection (d) of this section.

73 (d) Notwithstanding subsection (c) of this section, for purposes of maintaining judicial
74 efficacy and continuity in judicial decisionmaking, a senior judge or justice may continue to receive
75 per diem compensation after the combined total of per diem compensation and retirement benefits
76 paid to the senior judge or justice during that calendar year exceeds the annual salary of a sitting
77 circuit judge if the Chief Justice of the Supreme Court of Appeals enters an administrative order
78 certifying there are certain extraordinary circumstances involving the necessary absence of a
79 sitting judicial officer because of a protracted, but temporary, illness or medical condition or a
80 lengthy suspension which necessitate the extended assignment of the senior judge or justice.

81 Immediately upon entering such an order, the Chief Justice shall submit copies of the order to the
82 State Auditor and the State Treasurer.

83 (e) In addition to the per diem compensation authorized by this section, senior judges and
84 justices recalled to service may be reimbursed for their actual and necessary expenses incurred
85 in the performance of their duties.

86 (f) Within 90 days after the effective date of this section, the Treasurer, as the chief
87 custodian of public funds, shall petition the West Virginia Supreme Court of Appeals for a writ of
88 prohibition pursuant to the court's original jurisdiction, naming as respondent the State Auditor
89 and petitioning the court to prohibit the State Auditor from issuing any warrant for the payment of
90 per diem compensation to senior judges and justices in excess of the limitation on the daily rate
91 of per diem compensation in subsection (c) of this section.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2019.

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Governor