

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

Senate Bill 97

SENATORS TRUMP, HAMILTON, LINDSAY, ROMANO, AND

MARONEY, *original sponsors*

[Originating in the Committee on the Judiciary;

reported on February 5, 2020]

1 A BILL to amend and reenact §51-9-10 of the Code of West Virginia, 1931, as amended, relating
2 to adding a delay by the Governor in filling a judicial vacancy as an additional circumstance
3 in which a senior judge or justice may continue to receive per diem compensation after
4 the judge or justice has already received the amount of the annual salary of a sitting circuit
5 judge.

Be it enacted by the Legislature of West Virginia:

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5 (2) When originally enacted in 1949, this section of the code required any retired judge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: (1) A protracted, but temporary, illness or medical condition; or
80 (2) a lengthy suspension; or (3) a delay by the Governor in filling a judicial vacancy, any of which
81 necessitate the extended assignment of the senior judge or justice. Immediately upon entering
82 such an order, the chief justice shall submit copies of the order to the State Auditor and the State
83 Treasurer.

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

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

NOTE: The purpose of this bill is to add a circumstance, a delay by the Governor in filling a judicial vacancy, to the circumstances in which a senior judge or justice may continue to receive per diem compensation after the judge or justice has already received the amount of the annual salary of a sitting circuit judge.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.