



JUDICIAL INVESTIGATION COMMISSION

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July 23, 2018

The Honorable Margaret L. Workman, Chief Justice
Supreme Court of Appeals of West Virginia
Capitol Complex
Building One, Room E-306
Charleston, West Virginia 25305

In re: Complaint No. 39-2018

Dear Justice Workman:

On July 20, 2018, the Judicial Investigation Commission was presented with a complaint filed against you by Judicial Disciplinary Counsel. The complaint alleged potential violations of Rules 1.1, 1.2, 1.3, 3.13 and 3.15 of the Code of Judicial Conduct pertaining to the justices' practice of buying lunches on a State purchasing card while at work at the Capitol on argument docket and administrative conference days.¹ The facts giving rise to the complaint are as follows:

You were first elected to the Supreme Court in November 1988, took office on January 1, 1989, and resigned in 2000 to return to private practice. You were next elected to a twelve-year term on the Court in November 2008, and took office on January 1, 2009. Since that time, you have served as Chief Justice of the Court five separate times.

Prior to 2012, the Court began each argument day at 10:00 a.m. and recessed for lunch from 12:30 to 2:00 p.m. Thereafter, the Court would resume its work on the bench until the docket was complete. Afterward, the Court held conference to decide that day's cases. On days where there was an all-day administrative conference, the Court also took a lunch break in the middle of the day.

¹ Soon after the complaint was opened, the Commission on Special Investigations contacted the Judicial Investigation Commission and alleged that you may have hired one or more people who worked on your 2008 judicial campaign as "ghost" employees of the Court. A ghost employee is someone on the payroll who doesn't actually work or do work for an agency. Through falsification of personnel or payroll records paychecks are generated to the "ghost" for work that was never performed. The "ghost" then converts these paychecks. Following a thorough investigation into this claim, the Judicial Investigation Commission finds there is **no** probable cause to charge you with any violation of the Code of Judicial Conduct.

Beginning in or around January 2012, the Court, then comprised of Justices Davis, Ketchum, Benjamin, McHugh, and you, informally changed the schedule on argument days by ceasing the 12:30 p.m. to 2:00 p.m. lunch break. Instead, the Court opted to stay on the bench until the docket was completed. The Court then immediately began the decision conference and held a working lunch paid for by the Court. Lunches were also provided for visiting circuit court judges who filled in for justices conflicted off specific cases. With respect to all day administrative conferences, the Court also elected to have a working lunch. The Court also provided lunches for various court employees who had to remain at their posts and copy, type and/or retrieve documents for the Justices while they were on the bench or in conference.

According to Justices Davis, Ketchum, Benjamin and you, the change to a working lunch was brought about for several reasons. First, litigants, lawyers and other court participants who came from all over the state did not have to wait while the Court broke for a 90 minute lunch during argument docket days but would instead be able to begin their travel home much earlier. Second, the practice proved more convenient for visiting judges who could return to their circuit the same day and perhaps engage in some work there. Third, eliminating the lunch break during argument and administrative conference days also allowed the Justices and certain staff additional time to work on research, writing and other Court matters. Fourth, the practice proved more efficient since the justices and staff members were no longer at the mercy of restaurants and traffic as to their ability to return to work in a timely manner.

The custom of a paid working lunch on argument docket and administrative conference days remained in effect for several years, was well known throughout the Court system, and no one had ever questioned the correctness of the policy prior to the FOIA request. Importantly, the policy was never reduced to writing. While it was never an express written policy, it was clearly a longstanding practice by custom and habit.

In December 2017, the Court, for the first time, was asked about paid lunches in a FOIA request from a local television reporter. The Court's Finance Director was tasked with gathering the information about the lunches for 2016 and 2017. From January 5, 2016, through November 15, 2016,² the Court purchased lunches for the Justices and various staff members for a total of approximately 550 lunches on 51 separate days from some upscale Charleston restaurants and spent a total of approximately \$9,107.12. The average with tip included cost approximately \$16.56 per meal. You participated in 41 of these lunches. From January 4, 2017, through November 14, 2017, the Court purchased lunches for the Justices and various staff members for a total of approximately 602 lunches on 52 separate days and

² Given that the practice was well known, the Commission's statute of limitations would only allow us to look back two years. Rule 2.12 of the Rules of Judicial Disciplinary Procedure provides that "[a]ny complaint filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct, shall be dismissed by the Commission."

spent a total of approximately \$10,096.20. The average with tip included cost approximately \$16.77 per meal. You participated in 50 of the paid lunches.

On or about April 18, 2018, Judicial Disciplinary Counsel opened a complaint against you alleging the aforementioned facts and potential Code violations. By letter dated April 30, 2018, you denied violating the Code of Judicial Conduct. You also voluntarily submitted to an interview on May 21, 2018.

You stated that when you first served on the Court there was a regularly scheduled time for the lunch break. When you returned to the Court, the break time was "an ever-changing phenomenon, depending on how long the arguments went and who the chief justice was." Thereafter, you requested a return to a regularly scheduled lunch break. The following then occurred:

One of the other Justices suggested that, rather than having an out-of Court break, we hear all arguments prior to leaving the bench and have lunch brought in to eat while working on decisions. The purpose of this was to accommodate lawyers who traveled from northern West Virginia or the Eastern Panhandle, as well as litigants who then didn't have to pay additional attorney fees for lawyers sitting around waiting. I don't believe that any decision was ever made formalizing this plan, so much as it just became a practice that was done to promote efficiency. . . .

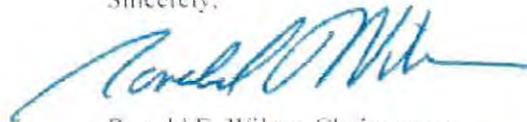
As to my administrative assistant, in addition to the regular work hours, she is required to be present anytime I am at the Court. Especially on argument, decision and administrative conference days, there is often a need to get copies of a brief, a case, or other information from the voluminous amount of material that flows through the Court on a daily basis. Consequently, on Court and administrative conference days, my assistant was not permitted to take an out-of-office break and therefore lunch was also provided to her.

Like Justices Benjamin and Davis, you also indicated that the Court's power to control its own administrative business is established by Article VIII, § 3 of the West Virginia Constitution. You stated that a court has the power to do all things reasonably necessary for the administration of justice within the scope of its jurisdiction. You also indicated that the Court's inherent power extends not only to the facilitation of the prompt and efficient administration of its own docket, but also the administration of court system as a whole. You recognize that the Court's inherent powers are not limitless and may be limited by constitutional provisions. However, you also correctly noted that a court's inherent powers have been held to be broad especially in the area of court administration and case flow management and that a court's inherent power may supersede legislation to the contrary. You further noted that the Court is a governmental entity and as such, it has implied power to reasonably expend public funds where doing so is consistent with its public mission and where there is a commensurate benefit to the governmental body and to the public. You also

appropriately noted that the practice of working lunches is not limited to the Justices but is a reasonable and customary policy utilized by other state agencies³

In applying the foregoing facts to the alleged Rule violations, the Commission finds that there is no probable cause to believe that you violated the Code of Judicial Conduct. You employed an already well-established policy utilized by other State agencies to make the Court run more efficiently and effectively on argument docket and administrative conference days. Perhaps, the only criticism that the JIC can make is that you failed to reduce the policy to writing – with well-established guidelines for the purchase of the working lunches. By failing to do this, you unnecessarily opened the door to unfair public criticism of an otherwise appropriate method for conducting the business of the Court. As no further action is warranted, the complaint against you is dismissed, and the file in this matter has been closed.

Sincerely,



Ronald E. Wilson Chairperson
Judicial Investigation Commission

REW: tat
Complaint No. 39-2018

³ The Internal Revenue Service recognizes working lunches to be a legitimate business expense when such activities are related to a legitimate business purpose and is not a non-work-related perk. Similarly, the IRS recognizes the legitimacy of working lunches in furtherance of public entities where such meals are furnished at the work sight and are for the convenience of the agency. In his March 1, 2008 Charleston Gazette-Mail article entitled "WV Ethics Commission Chews on Issues," Phil Kabler stated that the use of working lunches is a "fairly common practice of state agencies and other public bodies." Relying in part on the IRS Guide for Public Employers, the Ethics Commission found that "[g]enerally the expenditure of public funds is permissible if there is a legitimate government purpose for the expenditure." W. Va. Ethics Advisory Opinion 2012-27 (06/28/2012). Thus, a public Board properly had a working lunch where it felt that doing so ensured its ability to accomplish its work. *Id.* Factors which the Board considered in making its decision included the amount of its work for the day, the anticipated length of time it would take to accomplish its work, the travel requirements of its members, the convenience of the Board, and whether having a working lunch permitted the Board to accomplish its mission more effectively, thereby serving the public. *Id.* Where there was a legitimate business or governmental reason for such a practice and where the meal was provided on-premises, the State Ethics Commission found no ethical violation when a governmental entity "provide[s] a working meal to its members and any staff who are required to be present at the meeting as part of their job duties, when the meal is provided for the benefit of the Board, i.e. to accomplish its work." *Id.*