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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 IV AND ARTICLE
VI FOR LACK OF STATUTORY VIOLATION**

Respondent Chief Justice Margaret Workman, by counsel, respectfully moves the Presiding Officer for a ruling that Article IV and Article VI be dismissed insofar as West Virginia Code § 51-9-10, upon whose alleged violations the articles are premised, was not contravened as a matter of law by the execution and processing of Forms WV-48 to retain and compensate senior status judges on a contract basis. Respondent simply cannot be removed from office absent a predicate act of wrongdoing.

Although § 51-9-10 acknowledges the essential utility of senior judges and recognizes that they should receive “reasonable payment” for their services, it purports to curtail the amount they may earn from appointment in that a senior judge’s “per diem and retirement compensation” may not “exceed the salary of a sitting judge.” W. VA. CODE § 51-9-10 (1991). The first step in applying a statute is to assess its plain language to determine whether manifest or latent ambiguities compel resort to canons of interpretation. The statute does not define “salary,” but its intended meaning seems reasonably clear from a companion Code provision: “[B]eginning July 1, 2011, the annual salary of a circuit court judge shall be \$126,000.” *Id.* § 51-2-13 (2011).

“Compensation” is likewise undefined, but the meaning of that term is not nearly as apparent. A retirement pension is typically considered a benefit and not compensation for

employment or services rendered. *See, e.g.*, I.R.C. § 219(f)(1) (explaining that, for purposes of calculating tax deductions applicable to retirement contributions, “[t]he term ‘compensation’ does not include any amount received as a pension or annuity”). The term must be construed to mean something, however, if at all possible. *See, e.g., Wiseman Const. Co. v. Maynard C. Smith Const. Co., Inc.*, 236 W. Va. 351, 358, 779 S.E.2d 893, 900 (2015) (emphasizing that “each word of [a] statute should be given some effect and undefined words will be given their common, ordinary and accepted meaning” (citation omitted)). As used in § 51-9-10, “compensation” is inherently ambiguous. The term could mean simply a senior judge’s pension benefit (the functional equivalent of a sitting judge’s “salary”), which, for most circuit judges having served prior to July 1, 2005, is “seventy-five percent of the annual salary of the office from which he or she has retired” (currently \$126,000 x .75, or \$94,500), payable in monthly installments. W. VA. CODE § 51-9-6a (2005). Or it could include, perhaps, other common retirement subsidies such as PEIA or Social Security.

“Per diem,” also not expressly defined, is commonly understood to mean “for or by the day.” Bryan A. Garner, *A DICTIONARY OF MODERN LEGAL USAGE* 650 (2d ed. 1995). The sentence in § 51-9-10 mandating “reasonable payment” provides that such “shall be made to [senior] judges and justices on a per diem basis.” Presumably, that means senior judges are to be paid by the day, as opposed to receiving — for example — an hourly rate. The evidence before the House of Delegates was that the per diem payment to senior judges is \$435.00. *See* Transcript of House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices at 1746, 1754-55, 1756 (testimony of Sue Racer-Troy).

Putting everything together, the ambiguous term “compensation” renders the entire sentence uncertain of meaning, permitting a host of plausible interpretations. Complicating

matters further is that the term “per diem” is by definition a daily construct, “salary” is usually (but not always) an annual construct, and “compensation” can be calculated as a function of either interval or some different one, depending on the context. Literally, the statute reads: “[T]he per diem [\$435.00] and retirement compensation [\$94,500, taking the narrow view] of a senior judge shall not exceed the salary [\$126,000] of a sitting judge.”

One could argue that the statute contemplates an apples to apples comparison. Thus, perhaps the otherwise unambiguous term “per diem” was intended to mean “cumulative” per diem, or “calendar” per diem, or the oxymoronic “annual” per diem, or some other modifier that the Legislature could easily have included, but obviously did not. Even then, however, there is no compelling reason to extrapolate “per diem” to a yearly sum, as opposed to segmenting “compensation” and “salary” into daily components. That is, if the work year is 250 days, such that a retired judge’s compensation is \$378.00 [$\$94,500/250$] per day, and the daily circuit judge salary is \$504.00 [$\$126,000/250$], then § 51-9-10 should be interpreted to provide that the per diem payment cannot be more than \$126.00 [$\$504.00 - \378.00]. That would mean, of course, that the \$435.00 per diem rate that has been paid for years — and that no one thinks is an unreasonable payment for the work done by senior judges — is yet illegal at the threshold, regardless of how much money the judges receive over time.

The point is that the statute is confusingly drafted, with terms that are inherently or latently ambiguous and in tension with each other. Because no adversarial proceeding has yet arisen in which the Supreme Court of Appeals could definitively construe § 51-9-10, no one can say for sure what the statute means. The same situation in the law enforcement context would, in conformance to the rule of lenity, require a criminal statute to “be strictly construed . . . in favor of the defendant.” Syl. pt. 5, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257

(1995). Here, under the literal, non-extrapolated construction of § 51-9-10, there has been no violation of the statute.

Just as importantly, if there *has* been a violation of the statute, it has not been because of the conduct charged by the House, *i.e.*, in Article IV by Respondent choosing to “sign and approve the contracts necessary to facilitate” any overpayment of senior judges, or in Article VI by her opting to “sign certain Forms WV 48.” If the judges were overpaid, then they were overpaid *regardless of whether they were officially on the State’s payroll as an “employee,” or whether they were a contract vendor.* Assuming, *arguendo*, that the judges received a per diem in supplementation of their pension that caused their total compensation to exceed the salary of sitting circuit judges, then it makes no difference how the daily stipend was classified: the check still cashed. The allegations of Article IV and Article VI that the judges were overpaid *because* Respondent signed something — anything — are simply false. For that reason and the others set forth above, the two articles should be dismissed.

WHEREFORE, Respondent respectfully requests that the Presiding Officer grant this motion and rule that Article IV and Article VI each be dismissed insofar as they are premised on alleged statutory violations that, as a matter of law, could not have occurred in the manner set forth therein.

CHIEF JUSTICE MARGARET WORKMAN

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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 IV AND ARTICLE VI FOR LACK OF STATUTORY VIOLATION** 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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