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(B)

Respondent Chief Justice Margaret L. Workman ("Respondent"), by counsel, respectfully moves the Presiding Officer to dismiss Article XIV(B) because there was no evidence before the House of Delegates from which that body could charge Respondent with maladministration or any other impeachable offense. Article XIV(B) alleges that Chief Justice Workman (1) failed "to report taxable fringe benefits, such as car use and regular lunches on Federal W-2s, despite full knowledge of the Internal Revenue Service Regulations"; (2) "subjected subordinates and employees to a greater burden than the Justices, in this regard"; and (3) "failed to speedily comply with requests to make such reporting consistent with applicable law." Art. XIV(B). But impeachment cannot lie for an honest mistake (absent catastrophic results) or an official act or omission amounting to ordinary lack of care. No evidence has been produced that Respondent intended the alleged misconduct.

As an initial matter, the misconduct at issue here simply is not attributable to Respondent. Article XIV(B) was drafted in response to other justices' alleged misuse of cars and the failure for such use to be reported on their W-2s. In 2012, One justice allegedly began using the Court's 2007 silver Buick to commute to work. *See* Transcript of House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices ("Tr.") Vol. V 1163:8–11. He continued commuting in the state car until 2016, but his car use for commuting purposes was

allegedly never included as a taxable fringe benefit on his W-2. *See* 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 6 (Apr. 16, 2018) [hereinafter Report]; *see also id.* at Vol. I 80:14–24. Simultaneously, a different justice is alleged to have frequently and consistently used the Court's cars for personal use. Between 2013 and 2016, that justice reserved a state car on 212 days. *See id.* at Vol. I 38:13–15. For three consecutive years, he reserved a state car for prolonged periods over the Christmas holiday. *See id.* at Vol. I 40:13–17. This use was allegedly never reported on that justice's W-2s. *See* Report at 12.

Examination of the evidence (or lack thereof) before the House is governed 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. *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 had any knowledge that the payroll division was not reporting other justices' car use. Notably, the justices were not responsible for handling W-2s or reporting income. That responsibility lies strictly within the purview of the payroll division. Tr. Vol. I 149:14–17 ("Essentially, the Supreme Court's personnel that handle[] payroll and process[] the W-2 forms

would ultimately be responsible for reporting [taxable fringe benefits], if they were aware of it."); *id.* at Vol. I 150:8–13 (stating that "payroll officers" are the "ultimate authority . . . for compliance with the law [regarding taxable fringe benefits]"). And Justin Robinson of the Legislative Auditor's Office ("Robinson") testified that there was "no indication" to him that there was a "voted-on decision by the Justices" to exclude a justice's car use from his W-2s. *Id.* at Vol. I 149:7–8. He also never "receive[d] any information that [payroll] was directed not to include [Ketchum's car use] on a W-2." *Id.* at Vol. I 151:2–5.

Additionally, no evidence was ever presented regarding the contents of Respondent's W-2s, presumably because Article XIV(B) speaks to alleged conduct by other justices. Therefore, the evidence presented is woefully insufficient to show that Respondent failed "to report taxable fringe benefits." Art. XIV(B). Nevertheless, Respondent did not need to include lunches or car use on her W-2s and likewise had no occasion to "speedily comply with requests to make such reporting consistent with applicable law." Art. XIV(B). Unlike another justice, Respondent did not use a state car for commuting purposes. *See* Tr. Vol. V 1163:16–20 ("Q. Since that time in 2012 when Justice Ketchum began using that vehicle, were you aware of any other justices, our current justices now, that ever used a vehicle . . . for commuting purposes? [Canterbury] A. No."). And the working lunches at issue are not taxable fringe benefits. According to I.R.C. § 119(a), the value of any meals "furnished on the business premises of the employer," "for the convenience of the employer," are excludable from an employee's gross income. I.R.C. § 119(a). The evidence shows that for the meals at issue, a runner would typically retrieve lunch for the Justices to eat "at the [c]ourt" during conferences and arguments. Tr. VII 1615:16–23; *see id.* at Vol. III 706:2–707:1; *see also* House Judiciary Comm. Ex. 43.

Further, there was no evidence presented that Respondent "subjected subordinates and employees to a greater burden than the Justices" regarding reporting taxable fringe benefits. Art. XIV(B). Although Robinson pointed out that one employee used a state car for commuting and that it was reported on his W-2, neither Robinson—nor any other witness—testified that the justices were exempt from IRS reporting requirements. *See* Tr. Vol. I 65:11–15. As required by the Internal Revenue Code, the payroll division must report commuting by state car as a taxable fringe benefit for all employees, including justices.

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

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 XIV(B)** 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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