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(D)

Respondent Chief Justice Margaret Workman, by counsel, respectfully moves the Presiding Officer for a ruling that Article XIV(D) be dismissed insofar as there was no evidence before the House of Delegates from which that body could charge Respondent with maladministration. Article XIV(D) alleges that Respondent failed "to prepare and adopt sufficient and effective home office policies which would govern the [j]ustices' home computer use, and which led to a lack of oversight which encouraged the conversion of property." Art. XIV(D). But impeachment cannot lie for an honest, non-catastrophic mistake, or for an official act or omission amounting to ordinary lack of care. No evidence has been produced that she specifically intended the alleged misconduct.

As an initial matter, a single justice's alleged conversion of a Court-owned computer serves as the impetus for Article XIV(D). While the Court does not have a written home office policy, *see* Transcript of House Judiciary Committee Proceeding Regarding the Impeachment of West Virginia Supreme Court Justices ("Tr.") Vol. I 282:1–23, 293:14–21, 296:17–297:3 (Allred); *id.* at Vol. II 430:2–5, 447:19–448:11, 479:5–11 (Harvey); *id.* at Vol. II 597:13–14, 641:7–20 (Adkins); *id.* at Vol. III 924:23–925:7, 965:2–12 (Angus); *id.* at Vol. V 1183:18–23, 1427:17–19 (Canterbury), Steve Canterbury ("Canterbury") confirmed during the House Judiciary Committee proceeding that the Court has a standard practice of providing a computer and printer to the justices

for at-home use, particularly for security reasons. *See id.* at Vol. V 1183:18–1185:9. Scott Harvey ("Harvey"), the court's former IT Director, further stated that he personally expected the justices to use Court-provided computers at home to maintain proper security and that although there was no policy governing home computer use, the IT department "took it upon themselves to make sure if someone was [connecting] from home to the Court, that there was a VPN client that would secure that connection." *See id.* at Vol. II 463:5–13. Even more, all witnesses questioned on this topic agreed that this standard practice was reasonable. *See id.* at Vol. I 299:17–301:4 (Allred); *id.* at Vol. II 641:7–20 (Adkins); *id.* at Vol. III 965:2–12 (Angus).

All the justices but one operated within the confines of this standard practice except one, according to the evidence that was before the Judiciary Committee. But that justice's alleged actions were such that they could neither have been predicted or prevented by the institution of formal, written home office policies. He is alleged to have exploited the Court's reasoned and necessary practice to obtain an extra computer and office furniture solely for personal gain.

Examination of the evidence (or lack thereof) before the House is mandated 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 in California. *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 knew or should have known that a written, formal home office policy was necessary. As Harvey testified, no justice but one has ever requested or received such extensive IT work at their residence, and no other justice had more than one computer in his or her home. *See* Tr. Vol. II 401:18–21, 406:19–407:2, 503:24–504:3. As Canterbury explained, before 2013, no other justice took any equipment home other than a computer or printer for a home office. *See id.* at Vol. V 1185:5–9. Respondent individually abided by the standard home office practice; she had one Court-provided computer and one Court-provided printer at home. *See id.* at Vol II 413:14–16, 416:14–15. And, no evidence was presented to show that Respondent was aware of other just. In fact, the evidence indicates that one justice concealed the fact that he moved a couch and the desk to his home. *See id.* at Vol. II 565:15–567:7, 604:14–19; *id.* at Vol. V 1186:2–1187:7; *see also* Ex. 21. Thus, Respondent had no reason to suspect that any home computer practice, or lack of home office policy, was being exploited.

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

CHIEF JUSTICE MARGARET WORKMAN

By Counsel:

Benjamin L. Bailey (WVSB #200)
bbailey@baileyglasser.com
Steven R. Ruby (WVSB #10752)
sruby@baileyglasser.com
Raymond S. Franks II (WVSB #6523)
rfranks@baileyglasser.com
Holly J. Wilson (WVSB #13060)
hwilson@baileyglasser.com
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, WV 25301
T: 304-345-6555
F: 304-342-1110
Counsel for Respondent

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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(D)** 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:

Honorable John Shott
Room 418M, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Honorable Andrew Byrd
Room 151R, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Honorable Geoff Foster
Room 214E, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Honorable Ray Hollen
Room 224E, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Honorable Rodney Miller
Room 150R, Bldg. 1
1900 Kanawha Blvd. E.
Charleston, WV 25305

Benjamin L. Bailey (WVSB #200)
Steven R. Ruby (WVSB #10752)