



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831
July 23, 2018

The Honorable Robin Jean Davis, Justice
Supreme Court of Appeals of West Virginia
Capitol Complex
Building One, Room E-301
Charleston, West Virginia 25305

In re: Complaint No. 40-2018

Dear Justice Davis:

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 1996, took office on January 1, 1997, and have served continuously until the present time. You have been Chief Justice of the Court on six separate occasions.

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

¹ On May 20, 2018, the Legislative Audit Division released a post-audit report in which it questioned your use of a state vehicle to attend a political event. From November 13-15, 2011, you attended anti-truancy meetings in Wheeling and Parkersburg. The Director of Court Security went with you to these meetings. You spent the night of November 13, 2011, in Wheeling. You attended the anti-truancy meeting there during the day on November 14, 2011. You then traveled to Parkersburg, where you attended the political fundraiser and spent the night. You then attended the anti-truancy meeting there on November 15, 2011, before returning to Charleston later that day. You did not charge lodging to the State but paid for it yourself, and you only charged \$115.00 for meal expenses for the three days of travel. You also indicated that you made a stop at the Raleigh County Armory for what you believed was a political event incidental to court business. After a thorough review, the Commission believes that you did not violate the Code of Judicial Conduct since the primary purpose of the travel was for court-business and the political events were ancillary, did not require additional travel, or expense payments.

cases. On days where there was an all-day administrative conference, the Court also took a lunch break in the middle of the day.

Beginning in or around January 2012, the Court, then comprised of Justices Workman, 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 Workman, 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

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."

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 26 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 spent a total of approximately \$10,096.20. The average with tip included cost approximately \$16.77 per meal. You participated in three 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 26, 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 Workman, 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:

The decision to implement this practice was based upon the Court's Constitutional and inherent authority to make policy decisions for the effective management of the judicial system. As a policy matter, the Court determined that providing a modest budget for working meals for its members and supporting staff was a necessary expenditure because of the uninterrupted long hours that were spent on the Bench and in Chambers resolving the Court's business. . . .

I must also point out that I do not believe that the Court's working meal policy violates any provision of the West Virginia Governmental Ethics Act. . . . Specifically, I do not believe that the policy constitutes "personal gain," within the meaning of W. Va. Code § 6B-1-2(a). In fact, the West Virginia Ethics Commission issued an Advisory Opinion which supports the Court's policy determination. The Commission issued Advisory Opinion No. 2012-217 (June 28, 2012), wherein it was asked to determine whether a State Licensing Board could supply working meals for its members and staff with government funds. The Advisory Opinion found that the Board could use government funds for such meals. . . .

The facts giving rise to this Advisory Opinion, i.e., long meetings lasting five to six hours, working meals to facilitate the governmental business conducted during such meetings, and the necessity of support staff to complete tasks related to such meetings are exactly the same considerations that led to the Court's policy based upon the effective management of the Court's Constitutional duties and not for any personal gain to its members. I must also point out that the Advisory Opinion noted that the IRS permits such expenditures.

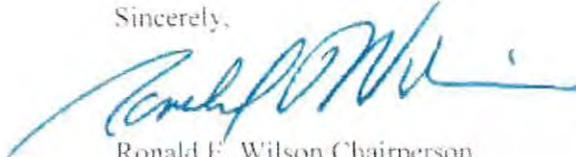
You also appropriately noted that the practice of working lunches is not limited to the Justices but is a reasonable and customary policy utilized by other divisions within the Supreme Court and by other state agencies.³

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

³ 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."

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.⁴

Sincerely,



Ronald E. Wilson Chairperson
Judicial Investigation Commission

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Complaint No. 40-2018

⁴ In an effort to be thorough, the Commission also looked into allegations concerning seven dinners hosted by you at your residence in Charleston, West Virginia, that coincided with bi-annual State Circuit Court Judicial Conferences. The dinners were held in lieu of the standard judicial banquet that would have occurred either at the conference site or some other location in the city and would have been paid for by the Court. The Commission also investigated one dinner hosted by you at your home in Jackson, Wyoming, during a national State Supreme Court Justice conference held there. You personally paid for everything associated with the majority of the dinners. However, the Court paid approximately \$900.00 in transportation costs for guests during a 2011 dinner hosted at your Charleston home and approximately \$11,300.00 for food, decorations, and tent, table and chair rentals for a dinner held there in 2013. For the 2013 dinner, you still paid for some of the costs including all drinks, alcohol, serving staff, bartender and clean-up. These were the total expenditures paid by the Court for the eight dinners. The fact that you paid for the majority of the costs for the dinners associated with the Circuit Court Conferences actually saved the state money. The costs paid for by the Court associated with the 2011 and 2013 dinners are normal costs that would have been paid by the agency for a banquet that would have been held at the hotel or at some other location in the city. After a thorough review of this evidence, the Commission also finds that there is no probable cause to charge you any violation of the Code of Judicial Conduct.