

No. 33336– *In the Matter of: Magistrate Carolyn D. Cruickshanks, Magistrate for Braxton County*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, concurring, in part, and dissenting, in part:

I stand by my previously stated position¹ that this Court unquestionably has the disciplinary authority to withhold the pay of a judicial officer during suspension, but I remain equally committed in believing that the guiding force for exerting that power must be fairness determined by a balanced assessment of the circumstances. That goal was simply not reached in the majority opinion, and the new syllabus point adopted by the majority does nothing to promote such a just and balanced evaluation.

Syllabus point three in the majority opinion states:

Always mindful of the primary consideration of protecting the honor, integrity, dignity, and efficiency of the judiciary and the justice system, this Court, in determining whether to suspend a judicial officer with or without pay, should consider various factors, including, but not limited to, (1) whether the charges of misconduct are directly related to the administration of justice or the public's perception of the administration of justice, (2) whether the circumstances underlying the charges of misconduct are entirely personal in nature or whether they relate to the judicial officer's public persona, (3) whether the charges of misconduct involve violence or a callous disregard for our system of justice, (4) whether the

¹See *In Re McCourt*, 219 W.Va. 261, ___, 633 S.E.2d 17, 21 (2006) (Albright, concurring and dissenting).

judicial officer has been criminally indicted, and (5) any mitigating or compounding factors which might exist.

___ W.Va. ___, ___, ___ S.E.2d ___, ___, 2007 WL 1660864 (W.Va. June 6, 2007). With the exception of an indictment, the evaluation the majority suggests begins with the skewed assumption that when we are confronted with the decision to suspend there is evidence giving this Court some basis to believe that misconduct *actually* has occurred. At the time this Court examined the complaint against the magistrate in the instant case, the only facts of which we were made aware were that the magistrate had been arrested pursuant to a criminal complaint charging the offense of retaliation against a witness. *Id.* at *2. Nothing was before us and no consideration was given to the possibility that the magistrate could have had a meritorious defense.² On this unvarnished allegation, we determined that the magistrate should not only be suspended but that the suspension be without pay.

Any charge, true or false, that is filed against a judicial officer raises incertitude about the integrity of the judicial system. Being responsible for the regulation of the judicial system, when this Court is notified that a serious charge such as a criminal offense is lodged against a judicial officer, suspension from performing judicial duties is most certainly warranted to offset any public perception that the judicial system may be

²Even *post-conviction* bail determinations include consideration of all facts and circumstances of the individual case, not the least of which is the “likelihood that a defendant will prevail.” W.Va. Code § 62-1C-1(b); *see* Syl. Pt. 2, *State ex rel. Ghiz v. Johnson*, 155 W.Va. 186, 183 S.E.2d 703 (1971).

anything but fair and honest. The arrest in such cases establishes the probable cause to believe a serious violation of the Code of Judicial Conduct has occurred. I certainly agree that a judicial officer in such cases should be suspended from duty until the matter is fully resolved in order to maintain public confidence in the judiciary. However, the additional sanction of taking away the officer's income based on no more information than a bald allegation is simply overkill. It mutates the regulatory function this Court should perform in addressing disciplinary matters into a punitive one at the very beginning of the case. That is improper.

There indeed may be times when a judicial officer's suspension will be without pay, but that must be determined on a case-by-case basis on factors that go far beyond an examination of the type of unsubstantiated charges that have been brought against the officer. I suggest that the determination about withholding pay should not be made until after the evidence has either been examined by an independent body, for example, when the officer has been indicted, an information has been filed by a prosecuting attorney on his oath of office after review of the evidence, or it otherwise becomes apparent that the charges have some sound basis and are not motivated by politics, retaliation or other improper intent.

I am also troubled with the cursory manner in which the majority opinion dismissed the magistrate's concern of losing her only source of income, especially since magistrates are among the lowest paid members of the judiciary. Losing a regular and sole source of income deserves more serious consideration than being told you have the hope to recoup the money at the end of what can be a lengthy process.³ Likewise, to off-handedly say that a court-appointed attorney may be available if the officer does not have the resources to retain a lawyer shows no genuine appreciation for the serious problem raised. I have to wonder what message such impassive treatment of a judicial officer relays to members of the general public about how the judicial system operates or will operate if they were to come before it.

I fear that in its zeal to maintain the integrity of the judiciary, the majority actually is demonstrating unfairness in its regulation of the judicial system by acting before adequate evidence is adduced or is apparent. This fervor does little to promote public confidence in the reasoned fairness of the judiciary. As a result, while I concur with the majority opinion as to the authority of this Court to withhold the pay of a judicial officer, I steadfastly dissent from the majority's selection of criteria to make that determination and application of those factors to the magistrate in the instant case.

³There is some indication that the special prosecutor in this case will not present the matter to this term of the grand jury.

I am authorized to state that Justice Starcher joins in this separate opinion.