VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

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IN RE: PETITION TO REMOVE REBECCA NEAL) CL08-00406
FROM THE OFFICE OF TREASURER OF
THE CITY OF HARRISONBURG

RESPONDENT'S SUBMISSION OF AUTHORITIES ON ISSUE OF PROOF REQUIRED FOR SUSPENSION UNDER VIRGINIA CODE §24.2-236

Comes now, the Respondent, by counsel, who submits the following legal authorities on the issue of proof for suspension under Virginia Code §24.2-236.

The existence of an indictment by a Grand Jury is not evidence

A Grand Jury proceeding is conducted in secrecy, *ex parte*, in which a determination of probable cause is made. In criminal cases, the fact that a defendant has been indicted "is not evidence" in a criminal trial and may not be considered by the finder of fact. VMJI 2.330. "It is elementary that the issuance of a warrant or the return of an indictment by a grand jury is not evidence of the guilt of the accused." Swift v. Comm., 199 Va. 420, 100 S.E. 2d 9 (1957)

In Virginia, the settled rule is that "a judgment of conviction (*emphasis added*) or acquittal in a criminal prosecution does not establish in a subsequent civil action the truth of the facts on which it was rendered" and "such judgment of conviction or acquittal is not admissible in evidence" in the civil case. Selected Risks Ins. Co. v. Dean, 233 Va. 260, 355 S.E.2d 579 (1987), citing Smith v. New Dixie Lines, 201 Va. 466, 472, 111 S.E.2d 434, 438 (1959) (citations omitted). "The reason for the rule is that the parties in a criminal proceeding are not the same as those in a civil proceeding and there is a consequent lack of mutuality." *Id.*

The present proceedings are described as quasi-criminal in nature, however, given the clear prohibition in use as evidence of a prior criminal conviction in a civil case, evidence of the mere pendency of criminal charges in a civil action would defy all logic and certainly not pass appellate scrutiny.

Judicial discretion and the burden of proof

Va. Code § 24.2-236 states:

> "In the event of a judicial proceeding under §§ 24.2-231, 24.2-232, 24.2-233, or 24.2-234, the circuit court may enter an order suspending the officer pending the hearing. The court may, in its discretion, continue the suspension until the matter is finally disposed of in the Supreme Court or otherwise. During the suspension the court may appoint some suitable person to act in the officer's place. The officer's compensation shall be withheld and kept in a separate account and paid to him if and when the judicial proceedings result in his favor. Otherwise, it shall be paid back to the county, city, town or State Treasurer who paid it."

The statute does not set forth the findings the court must make to order a suspension, nor does it detail the standard of proof necessary to suspend a constitutional officer from her elected office. Without any clear statutory directive on those issues, one can only assume that legislature intended that a Circuit Court hear some evidence and reach an informed decision, based on that evidence. Otherwise, any Court action would be arbitrary and constitute an abuse of discretion. "The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action." Berry v. Comm., 200 Va. 495, 106 S.E.2d 590 (1959)

The terms "discretion" as it appears in Va. Code § 24.2-236, refers to the authority of the Circuit Court to " continue the suspension until the matter is finally

disposed of in the Supreme Court or otherwise". Nowhere does the statute suggest that the factual findings necessary for suspension are any different than they would be for removal, nor that the Circuit Court could act with unfettered discretion and without any parameters governing the decision making process.

Accordingly, the only logical conclusion must be that to suspend a constitutionally elected official under Va. Code § 24.2-236, the Court must find, from some evidence, "neglect of duty, misuse of office, or incompetence in the performance of duties", on the part of Mrs. Neal, if "that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office". Since the only difference between removal or suspension is the finality of the relief and the case law describes the removal proceeding as "highly penal" in nature, the burden of proof for suspension must, likewise, be by clear and convincing evidence. Had the legislature intended different (or lesser) evidentiary findings or a less strict burden of proof necessary for suspension, they would have so stated in Va. Code § 24.2-236. The Respondent would be substantially prejudiced by suspension, losing the majority of her income for herself, her husband and their three children.

The Court seemed to indicate that it believed the standard of proof in a suspension under Va. Code § 24.2-236 to be a preponderance burden. In its *ore tenus* ruling on April 30th , the Court stated:

> "As I perceive the statutory provision what the Court can look at is what evidence or what findings do we have to date with this particular case. The only thing I've got before me is a Grand Jury indictment. I do have that. That means a duly constituted Grand Jury has made a decision that there is probable cause. And as I tell every Grand Juror what your obligation is, is to find probable that a crime has been committed and that the accused committed the crime. It's sort of equivalent to let's say a

preponderance is what it is." (See attached except of transcript, page 3, line 8)

Notwithstanding the Respondent's previous authority for the premise that an indictment by a Grand Jury cannot be evidence, there is a difference between a preponderance of the evidence burden and a probable cause burden used by a Grand Jury in its deliberations on returning an indictment. "Probable cause" is a lesser standard than a preponderance of the evidence trial standard.

According to McLaughlin v. Com. 48 Va.App. 243, 629 S.E.2d 724 (Va.App.,2006.), probable cause "does not "deal with hard certainties, but with probabilities." Slayton v. Commonwealth, 41 Va.App. 101, 106, 582 S.E.2d 448, 450 (2003) (citation omitted). Nor does it "demand any showing that such a belief be correct or more likely true than false." *Id.* at 106, 582 S.E.2d at 450 (quoting Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983)). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the probable-cause decision." Maryland v. Pringle, 540 U.S. 366, 371, 124 S.Ct. 795, 800, 157 L.Ed.2d 769 (2003)"

Removal of a constitutionally elected official is an extraordinary remedy, which while permitted by statute, skirts the edge of infringement on the separation of powers doctrine. Accordingly, great care should be exercised in the decision making process. The most closely related body of authority analogous to the present proceedings can be found in the law governing injunctive relief. "Whether an injunction, an extraordinary remedy, should be employed to prevent the future commission of an anticipated wrong depends, in each case, on the nature of the wrong and the likelihood the wrong will be

committed" Injunctions §2, Michie's Jurisprudence. The wrong sought to be prevented in the instant Petition is a "material adverse effect on the conduct of the office". Other than what information might be gleaned from one sided media accounts of disgruntled employees and disappointed office seekers, the Court has no information on to what degree, if any, the conduct of Treasurer' Offices has been materially affected by any potential misuse of office.

> "The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case, regard being given to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." *Id.*

Lastly, should the Court embrace the injunctive relief analogy set forth above, the Court's decision on the issue of suspension pursuant Va. Code § 24.2-236, should follow the substantive requirements of Va. Code § 24.2-233, requiring proof of "neglect of duty, misuse of office, or incompetence in the performance of duties [which] has a material adverse effect upon the conduct of the office" of City Treasurer.

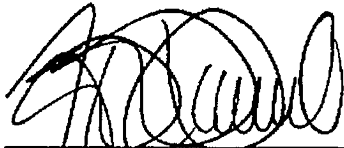
> "It is true that, on a pure bill of injunction, very summary proceedings are allowed, and are sometimes necessary, but they must be compatible with the correct decision of the case in question." Lynch v. Clinch Motor Co., 131 Va. 202, 108 S.E. 641 (1921)

Conclusion

The Court should not use the mere existence of a Grand Jury indictment to serve as evidence in support of a Motion to suspend under Va. Code § 24.2-236. A probable cause finding reached by a Grand Jury in returning a true bill on an indictment is not analogous to a preponderance standard of proof. The exercise of the extraordinary

remedy of suspension of a constitutionally elected official from office should be taken with great care and caution, in the exercise of sound judicial discretion. Rendering a decision of suspension without evidence would be an abuse of judicial discretion, constituting reversible error.

REBECCA BYRD NEAL
By Counsel



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CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was faxed to Marsha L. Garst, Rockingham County Commonwealth's Attorney, this 1st day of May, 2008.