

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-379
and
CIVIL ACTION NO. 18-CI-414**

COMMONWEALTH OF KENTUCKY

ex rel. ANDY BESHEAR, ATTORNEY GENERAL, et al.

PLAINTIFFS

v.

ORDER

MATTHEW G. BEVIN, in his official capacity

as Governor of the Commonwealth of Kentucky, et al.

DEFENDANTS

This action is before the Court on the Court's own motion to address issues raised in a letter (dated May 30, 2018, copy attached) to the Court from counsel for the Governor. In the letter, Counsel for the Governor requests that this Court recuse from presiding over this action. The basis for the request is the assertion that all judges are members of the Judicial Retirement System, and that the statute governing judicial retirement provides that judicial retirement benefits for judges who became part of the system prior to changes enacted effective January 1, 2014 are beneficiaries of an "inviolable contract" under KRS 21.480(1). The Governor's counsel reasons that such membership in the Judicial Retirement System disqualifies any judge whose service pre-dates January 1, 2014 from interpreting the legality of any changes that effect the "inviolable contract." Such a ruling, the Governor's counsel argues, could have an impact on the judge's own retirement benefits in the event that a legislature might enact changes for the judicial system in the future similar to those in Senate Bill 151. The Governor's counsel notes that the case could be assigned to another judge who was elected or appointed after January 1, 2014 because the changes in the Judicial Retirement System effective on that date deleted the "inviolable contract" from the judicial retirement statute for judges whose service began after that date. *See* 2013 Ky. Acts ch. 120, sec.

31. The Governor's counsel asserts that recusal is required under KRS 26A.015(2)(d) because "the Court has more than a *de minimis* personal interest that could be substantially affected by the proceedings. *See* SCR 4.300, Rule 2.11(A)(2)(c)." The Court, being sufficiently advised, hereby **DENIES** the request for recusal, for the reason set forth below.

DISCUSSION

First, the Court notes that there are *no* changes to the Judicial Retirement System that are at issue in this case. It would stretch the concept of conflict of interest beyond any reasonable recognition to hold that a Court cannot preside over a case involving interpretation of any legal rule that could at some unknown future date be applied by the legislature to members of the judiciary. No such legislation has been drafted, introduced, considered in any legislative committee, voted on in any legislative chamber, or passed by either chamber of the General Assembly. It is beyond speculative to posit that the possibility of such legislation being enacted at some unspecified future date could create a conflict of interest for a judge considering Senate Bill 151.

Moreover, even if such speculation had any factual basis, the framers of the Judicial Article in 1975 anticipated the potential problem with legislation that would diminish the compensation of sitting judges. Section 120 of the Kentucky Constitution provides that "[t]he compensation of a justice or judge shall not be reduced during his term." Accordingly, it is clear that the legislature lacks the power to enact legislation altering the Judicial Retirement System in a manner that the Governor asserts could give rise to a conflict for those judges interpreting the meaning of the "inviolable contract" for executive branch employees. Thus, the conflict asserted by the Governor is not only remote and speculative, it is eliminated, for all practical purposes, by Section 120 of

the Kentucky Constitution, which prohibits legislation that would diminish the compensation of sitting judges.

This Court has no vested interest in any particular interpretation of the “inviolable contract” and no concerns about future legislative action regarding judicial pensions because Section 120 of the Kentucky Constitution protects judicial compensation from diminution by the General Assembly. Regardless of whether the “California Rule” or the “Prevailing Rule” is adopted in this case, any future changes to the Judicial Retirement System will be governed by the plain mandate of Section 120 of the Kentucky Constitution, a provision of law not at issue in this case. Judicial pensions are protected (or, as the letter from the Governor’s counsel puts it, “locked in”) by Section 120 of the Kentucky Constitution, not by any common law or statutory interpretation that will be adjudicated in this case.

The Court has carefully reviewed the statute and rules governing recusal, including KRS 26A.015 and Canon 3 of the Code of Judicial Conduct. The Court is mindful of the requirement to recuse when personal bias, prejudice, or the appearance of bias could give rise to a lack of public confidence in the fairness of the Court’s ruling. By the same token, the Court has an equally compelling duty to hear and decide all assigned cases. As Rule 2.7 of the Model Code of Judicial Conduct provides, “A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.” The commentary to Rule 2.7 notes that “[u]nwarranted disqualification may bring public disfavor to the court and to the judge personally.” As noted by the Court in *Hinman v. Rogers*, 831 F.2d 937 (10th Cir. 1987), “there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.” *Id.* at 939 (citations omitted). This Court has a duty to decide cases and finds that there is no reason that would justify recusal in this case.

Finally, the Court is compelled to take judicial notice that the theory of recusal advanced by the Governor in this case, if accepted, would compel the recusal of every member of the Kentucky Supreme Court in this case. All seven justices of the Kentucky Supreme Court are members of the Judicial Retirement System, whose services pre-date January 1, 2014. Under the Governor's theory, all seven justices would be required to recuse. When two or more members of the Kentucky Supreme Court recuse, Section 110(4) of the Kentucky Constitution provides that "the Chief Justice shall certify that fact to the Governor, who shall appoint to try the particular cause a sufficient number of Justices to constitute a full court for the trial of that case." The potential for the appearance of conflict asserted by the Governor here is remote and speculative, but there is a certainty that the credibility of the judicial system would be severely damaged if the Governor would be empowered to appoint the entire membership of the Kentucky Supreme Court that would hear and decide this case in which the Governor is a litigant.

As Justice John Roach noted in *Dean v. Bondurant*, 193 S.W.3d 744, 752 (Ky. 2006), quoting the Florida Supreme Court, in analyzing a recusal motion based on campaign contributions,

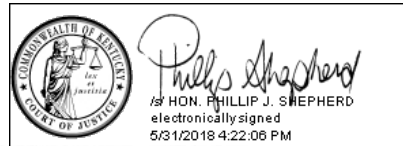
[W]e cannot operate a judicial system, or indeed a society, on the basis of the factually unsubstantiated perceptions of the cynical and distrustful. There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g. friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers. However, such allegations have been found legally insufficient when asserted in a motion for disqualification. The same is true of the ground for disqualification assert at bar.

Id. at 752 (quoting *MacKenzie v. Super Kids Bargain Stores, Inc.*, 565 So. 2d 1332, 1335 (Fla. 1990)). Only "the most cynical and distrustful" observer would believe that the Governor's alleged grounds for recusal in this case have merit. The Court finds no legal or factual basis to support the request for recusal.

CONCLUSION

For the reasons stated above, the Governor's request for this Court to recuse is **DENIED**.

SO ORDERED this 31st day of May, 2018.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

DISTRIBUTION:

Hon. Andy Beshear
Hon. J. Michael Brown
Hon. La Tasha Buckner
Hon. S. Travis Mayo
Hon. Marc G. Farris
Hon. Samuel Flynn
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

Hon. Jeffrey S. Walther
Walther, Gay & Mack, PLC
163 East Main Street, Suite 200
Lexington, KY 40588

Hon. David Leighty
Priddy, Cutler, Naake & Meade PLLC
2303 River Road, Suite 300
Louisville, KY 40206

Hon. M. Stephen Pitt
Hon. S. Chad Meredith
Hon. Matthew F. Kuhn
Office of the Governor
700 Capitol Avenue, Suite 101
Frankfort, KY 40601

Hon. Brett R. Nolan
General Counsel
Finance and Administration Cabinet
702 Capitol Avenue, Room 392
Frankfort, KY 40601

Hon. David Fleenor
Capitol Annex, Room 236
Frankfort, KY 40601

Hon. Eric Lycan
Office of the Speaker
Capitol Annex, Room 332
Frankfort, KY 40601

Hon. Brent Woosley
General Counsel
Legislative Research Commission
Room 300, Capitol Building
Frankfort, KY 40601

Hon. Mark Blackwell
Hon. Joseph Bowman
Kentucky Retirement Systems
1260 Louisville Road
Frankfort, KY 40601

Hon. Robert B. Barnes
Kentucky Teachers' Retirement System
479 Versailles Road
Frankfort, KY 40601



COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

MATTHEW G. BEVIN
GOVERNOR

700 CAPITOL AVENUE
SUITE 100
FRANKFORT, KY 40601
(502) 564-2611
FAX: (502) 564-2517

May 30, 2018

VIA HAND-DELIVERY

Hon. Phillip J. Shepherd
Judge, Franklin Circuit Court
222 St. Clair Street
Frankfort, KY 40601

RE: *Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney General, et al. v. Matthew G. Bevin, et al.* 18-CI-379 (Pension Case)

Dear Judge Shepherd:

The purpose of this letter is to request that the Court consider whether grounds exist requiring your Honor to disqualify himself from further presiding over the above-styled case. We write with great reluctance and do not in any way desire, or intend, to call into question the Court's subjective belief as to its impartiality. Rather, we believe circumstances indicate that your Honor may have a financial interest that could be affected by the outcome of the proceedings, thus giving rise to a reasonable concern as to perceptions about the Court's impartiality. *See* KRS 26A.015(2)(d). In other words, it appears that the Court has more than a *de minimis* personal interest that could be substantially affected by the proceedings. *See* SCR 4.300, Rule 2.11(A)(2)(c).

In drafting the "Combined Memorandum in Support of Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment" that was filed on May 24, we first realized that, as a member of the state judicial retirement plan, your decision in this case could directly affect your personal state pension rights in the future. In addition to the process-based claims advanced by the Plaintiffs, issues you will be called upon to decide include: (1) the meaning and parameters of the term "inviolable contract"—which is used throughout the KRS in reference to public pension benefits, *see* KRS 61.692; KRS 161.714; KRS 78.852; KRS 16.652, including in reference to judicial pension benefits, *see* KRS 21.480; and (2) whether the General Assembly

has the legal and constitutional ability to change the terms of any of those pension benefits on a prospective basis (the “Prevailing Rule,” in our Brief), or whether all state employees hired before 2014 have the right for the duration of their employment to accrue the same benefits, and at the same rates, that existed in the pension statutes when they became state employees. Since your Honor is a beneficiary of an “inviolable contract” under KRS 21.480(1), we came to realize that the ultimate decision in this case would likely have the potential to affect your Honor’s accrual of pension benefits.

KRS 21.480(1) provides that judges of the Court of Justice who came to the bench prior to January 1, 2014 have an “inviolable contract” with the Commonwealth, like the aforementioned pension statutes that are directly involved in this case. However, judges who first became members of the Judicial Retirement Plan on or after January 1, 2014, and who were not already members of another state retirement plan, have no such implicated rights since any “inviolable contract” rights afforded under KRS 21.480(1) do not apply to them. *See* KRS 21.480(2).

As your Honor may see, it appears that any judge in Kentucky who became a judge and a member of the Judicial Retirement Plan before January 1, 2014, and who is currently a member of the Judicial Retirement Plan, would have a conflict of interest in deciding the terms and parameters of the “inviolable contract,” as the judge’s decision would potentially have a real and direct effect on the judge’s own pension. For example, if the judge were to decide that the “California Rule” applies in Kentucky, then he or she would be locking in until his or her retirement those terms and conditions of the “inviolable contract” that existed when the judge became a member of the Judicial Retirement Plan. Conversely, if the judge were to interpret the “inviolable contract” according to the “Prevailing Rule,” then the judge would be permitting changes to future, not-already-accrued benefits. The decision by the judge could be affected, or be reasonably seen as being affected, by the judge’s personal financial interest. The reasonable appearance of a conflict of interest is obvious.

Fortunately, not all circuit court judges in Kentucky are hampered by this conflict. Since judges assuming the bench after January 1, 2014 (and who are not otherwise members of another Kentucky employee retirement plan) are part of the hybrid cash balance plan enacted by the 2013 General Assembly, and thus are not beneficiaries of the judicial “inviolable contract,” those judges would not have a conflict of interest in deciding this case since the outcome would not have any direct personal effect on their pensions. Because there are numerous circuit judges currently on the bench who are available to handle this case without the conflict, the “rule of necessity,” which could apply when all judges in the state have a conflict of interest, would not have to be invoked.

As your Honor is aware, the Commonwealth’s pension funds are the worst funded in the United States. Thus, the importance of SB 151, and the General Assembly’s powers in the future regarding the various “inviolable contracts,” cannot be overstated. It is vitally important to the

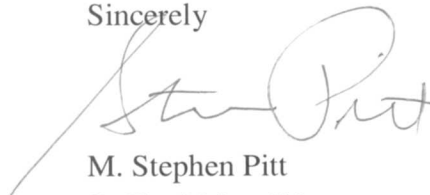
Commonwealth and its thousands of employees, including our public school teachers, that the decision in this case be free of any question of actual or perceived bias or lack of impartiality on the part of the Court. Otherwise, as demonstrated in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), a serious Due Process Clause violation can arise. Failure of the Court to step aside in this case in favor of the appointment of a judge who does not possess “inviolable contract” rights would “violate statutory mandates for impartiality,” *see Marchese v. Aebersold*, 530 S.W.3d 441, 445 (Ky. 2017), in addition to raising constitutional due process implications, *see* KRS 26A.015(2)(c) (“Any...judge...shall disqualify himself in any proceeding: ... (c) Where he knows that he ... has a pecuniary or proprietary interest in the subject matter in controversy”); *see also* SCR 4.300 Kentucky Code of Judicial Conduct, Rule 2.11 (“(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including ... [when] (3) The judge knows that he or she ... has an economic interest in the subject matter in controversy”); Judicial Ethics Opinion JE-127 (Dec. 07, 2015) (“a judge is disqualified whenever the judge’s impartiality might reasonably be questioned ...”).

With the utmost respect, this case involves a situation in which the Court’s impartiality can reasonably be questioned. This Court is not alone in that regard. Your Honor, and scores of other judges throughout the Commonwealth, are members of a retirement plan designated as an “inviolable contract.” This action will require the Court to determine the scope of “inviolable contracts” in which state employees, teachers, law enforcement officers, and others are parties. The Court’s ultimate decision is likely to determine whether, and to what extent, the Kentucky General Assembly has the power to make changes on a prospective basis in those, and perhaps other, “inviolable contracts,” including that encompassed in KRS 21.420(1), the judicial retirement “inviolable contract.” That, in the minds of reasonable people, creates a conflict of interest. That conflict of interest can, however, be avoided. Pursuant to KRS 26A.020(3)(a), “Any justice or judge of the Court of Justice disqualified under the provisions of this section shall be replaced by the Chief Justice.” Under KRS 26A.020(1), the Chief Justice is empowered to name a “regular or retired justice or judge of the Court of Justice as special judge.” Fortunately, it appears that there are numerous sitting circuit judges who took the bench and became members of the judicial retirement plan after January 1, 2014, not to speak of retired judges who do not have a conflict. Those judges, who are not considered to be parties to an “inviolable contract,” would be available for consideration by the Chief Justice for appointment as special judge in this action, thus avoiding any suggestion of lack of impartiality.

We hope your Honor understands that this request to disqualify truly gives us no pleasure. This is only the second one I remember making since I began practicing law in 1971. However, given the nature of the case, including its great importance, and the fact that your Honor’s decision in the case could have an effect on your personal pension, we feel we have no alternative but to raise the issue. We do so in this less formal way in the hope that your Honor will see fit to step aside voluntarily. If, however, your Honor does not promptly decide to do so, we will need to

consider making a motion to recuse consistent with this letter. For that reason, we hope your Honor will let us know of his decision at the earliest opportunity prior to June 7, 2018, the date of the next scheduled hearing.

Sincerely

A handwritten signature in black ink, appearing to read "M. Stephen Pitt", with a long horizontal stroke extending to the left.

M. Stephen Pitt
S. Chad Meredith
Matthew F. Kuhn

Cc: Hon. Andy Beshear
Hon. J. Michael Brown
Hon. La Tasha Buckner
Hon. S. Travis Mayo
Hon. Jeffrey Walther
Hon. David Leightty
Hon. David Fleenor
Hon. Eric Lyan
Hon. Mark Blackwell

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