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37 - 70 MAP 2023 (Consolidated cases)

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 37-70 MAP 2023
(CONSOLIDATED)

In re: Appeal of Prospect Crozer, LLC FROM THE DECISION OF THE BOARD OF ASSESSMENT APPEALS OF DELAWARE COUNTY, PA

Appeal of: Chester Upland School District

REPLY BRIEF OF APPELLANT CHESTER UPLAND SCHOOL DISTRICT

Appeal from the Order of the Commonwealth Court
entered at Nos. 1596-1629 CD 2019 (Consolidated), on September 28, 2022,
vacating the order of the Delaware County Court of Common Pleas entered
at Docket No. CV-2016-010884 (Consolidated) on October 15, 2019

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 1

ARGUMENT.. 3

I. The Pennsylvania Constitution Determines Federal Offices and State Offices Incompatible and the General Assembly Determines Which State Offices are Incompatible 3

A. Pa. Const. Art. VI, § 2 expressly determines which offices are incompatible 3

B. Prospect erroneously relies on an abrogated common law rule in support of its claim that two state offices of trust or profit are incompatible 7

II. Judge Braxton Did Not Forfeit His Judicial Authority 12

A. Judges who violate Art. V, § 17 do not automatically forfeit their judicial office 12

B. Prospect wrongly claims CUSD characterizes Prospect's appeal as a disciplinary proceeding.............14

C. An alleged violation of Art. V, § 2 does not constitute structural error that is non-waivable 16

III. The Petition Was Not Improvidently Granted..................................21

CONCLUSION 23

CERTIFICATION OF COMPLIANCE 24

TABLE OF AUTHORITIES

CASES

Arizona v. Fulminante,
499 U.S. 279 (1991) 17

Bandimere v. SEC,
844 F.3d 1168 (10th Cir. 2016) 16

Com. ex. rel. Fox v. Swing,
186 A.2d 24 (Pa. 1962) ....Passim

Com. ex. rel. Schermer v. Franek,
166 A. 878 (Pa. 1933) 7, 8, 10, 12

Commonwealth ex. rel. Crow v. Smith,
23 A.2d 440 (Pa. 1942) 4

Commonwealth v. Conyngham,
65 Pa. 76 (1870) 10

Commonwealth v. Hawkes,
123 Mass 525 (1878) 6

Commonwealth v. Sandusky,
77 A.3d 663 (Pa. Super. 2013) 17

Daniel v. Wyeth Pharmaceuticals, Inc.,
15 A.3d 909 (Pa. Super. 2011) 22

De Turk v. Commonwealth,
18 A. 757 (Pa. 1889) 2, 5, 13, 14

Hornick v. Bethlehem Mines Corporation,
165 A. 36 (Pa. 1933) 22

In re F.C. III,
2 A.3d 1201 (2010) 21

In re T.S.,
192 A.3d 1080 (Pa. 2018) 19

Intercollegiate Broadcasting Systems, Inc. v. Copyright Royalty Board
796 F.3d 111 (D.C. Cir. 2015) 16

Interest of S.K.L.R.,
256 A.3d 1108 (Pa. 2021) 22

Lomas v. Kravitz,
170 A.3d 380 (Pa. 2017) 20

Opinion of the Justices,
647 A.2d 1104 (Del. 1994) 5

Pascal v. City of Pittsburgh Zoning Bd. of Adjustment,
259 A.3d 375 (Pa. 2021) 18

Pombo v. Fleming,
32 Haw. 818 (1933) 6

Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority,
489 A.2d 1291 (Pa. 1985) 15

Scott v. Strobach,
49 Ala. 477 (1873) 6

Simmons v. Tucker,
281 A.2d 902 (Pa. 1971) 4

State ex. rel. Johnson v. Nye,
135 N.W. 126 (Wis. 1912) 6

Stubbs v. Lee,
64 Me. 195 (1874) 6

Williams v. Pennsylvania,
579 U.S. 1 (2016) 17, 18

STATUTES

65 P.S. § 1 .... 1, 11

65 P.S. § 4 11

65 P.S. § 5 11

65 P.S. § 14 11

OTHER AUTHORITIES

Pa. Const. Art. V, § 17 .... Passim

Pa. Const. Art. V, § 18 .... 2, 12

Pa. Const. Art. VI, § 1 .... 9, 11

Pa. Const. Art. VI, § 2 .... Passim

Pa. Const. Art. XII, § 2 .... 5, 9, 10

Pa. Const. Art. V, § 10 15

Pa. R.E. 801 21

Pa. R.A.P. 2135 24

SUMMARY OF THE ARGUMENT

Prospect's entire argument is based upon the erroneous assumption that the Trial Court's order on appeal is void because Honorable John L. Braxton (Ret.) accepted and began serving in a purportedly incompatible position before entering the order. The Pennsylvania Constitution specifically declares any office of trust or profit under the government of the United States and a paid state office as incompatible. Pa. Const. Art. VI, § 2. Prospect's reliance on case law finding federal office incompatible with state office is therefore misplaced.

Next, Prospect erroneously relies on old common law for the proposition that two state offices of trust or profit are incompatible. However, this Court subsequently held that the 1874 constitutional amendments abrogated the common law and determined that the Pennsylvania Constitution provides that the General Assembly may by law declare what state offices are incompatible with each other. *Com. ex. rel. Fox v. Swing*, 186 A.2d 24 (Pa. 1962). Although the General Assembly has declared many state offices incompatible, a judicial officer and member of BRT is not among them. 65 P.S. §§ 1, *et seq.*

Next, Prospect wrongly asserts that a judicial officer who violates Pa. Const. Art. V, §17 automatically forfeits his/her judicial office as a matter of law. This is wrong for three reasons. First, Pa. Const. Art. V, §17 identifies prohibited activities by judicial officers, not incompatible offices. Second, Prospect ignores the plain language set forth in the Pennsylvania Constitution that establishes the only circumstances when a judicial officer automatically forfeits his judicial office and an Art. V, §17 violation is not one of the defined circumstances. Pa. Const. Art. V, § 18(d)(3) and (4). If a judicial officer violates Art. V, § 17, he may only be removed from office following proceedings conducted pursuant to Art. V, §18 the Court of Judicial Discipline. Pa. Const. Art. V, §18 (d)(1). Third, this Court specifically held—in a case relied upon by Prospect in opposition—that the Pennsylvania Constitution "does not prescribe a penalty, or declare a forfeiture" of office when an individual purportedly holds two incompatible offices. *De Turk v. Commonwealth*, 18 A. 757, 758 (Pa. 1889).

Based upon Prospect's erroneous forfeiture assumption, Prospect argues that Judge Braxton's automatic forfeiture of his judicial office

constitutes a structural error because Prospect has a right to trial by a validly sitting judicial officer. However, the Commonwealth Court was not empowered to conclude that Judge Braxton was no longer vested with judicial authority at the time he entered his final orders.

ARGUMENT

I. The Pennsylvania Constitution Determines Federal Offices and State Offices Incompatible and the General Assembly Determines Which State Offices are Incompatible

A. Pa. Const. Art. VI, § 2 expressly determines which offices are incompatible

Prospect's entire argument is based upon the erroneous assumption that service as a part time, per diem judge completing these appeals and serving on the BRT are incompatible offices under the Pennsylvania Constitution. Specifically, Prospect wrongly asserts that Art. V, § 17(a) declares that the two public offices are constitutionally incompatible. (Brief at p. 36.) The Pennsylvania Constitution specifically defines which incompatible offices in Art. VI, § 2. In contrast, Art. V, § 17 identifies prohibited activities for judicial officers that, if violated, a judicial officer may be subject to sanctions.

The Pennsylvania Constitution specifically declares the following public offices as incompatible:

> No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible.

Pa. Const. Art. VI, § 2. Thus, only federal offices of trust or profit with paid offices in this state are designated as incompatible under the Pennsylvania Constitution.

In its appellate Brief, Prospect relies on case law involving only incompatible federal offices of trust or profit and state offices of trust or profit. *See Commonwealth ex. rel. Crow v. Smith*, 23 A.2d 440 (Pa. 1942) (holding that by virtue of the plain language in Art. XII, § 2, a commissioned officer in the United States Army is incompatible with that of an office of mayor of a city in this Commonwealth); *Simmons v. Tucker*, 281 A.2d 902 (Pa. 1971)(holding that although the offices of Common Pleas judge and federal district judge are incompatible under Art. VI, § 2, judicial officer did not vacate his state judicial position by operation of law).

In particular, Prospect claims this Court's holding in *De Turk v. Commonwealth*, 18 A. 757 (Pa. 1889) is on point and controlling. (Brief at p. 40.) However, the public offices at issue in *De Turk* were a federal postmaster (a federal office of trust or profit) and a county commissioner (a state office of trust or profit). This Court held that Art. XII, § 2[1] of the Pennsylvania Constitution "plainly prohibits any person holding an office of trust or profit under the United States from holding at the same time an office in this state to which a salary is attached." *De Turk,* 18 A. at 758. The decision in *De Turk* and the cases listed above are easily distinguishable from the instant matter: they were all determined by the plain language of the Pennsylvania Constitution declaring federal offices and state offices incompatible offices.

Prospect's reliance on out-of-state case law—presumably as persuasive authority—is similarly unavailing. Each of these decisions were based upon their respective state's constitutional or statutory provisions. *Opinion of the Justices*, 647 A.2d 1104 (Del. 1994)(holding

[1] Pa. Const. Art. XII, § 2 has since been repealed and replaced with the exact same language in Pa. Const. Art. VI, § 2 titled "Incompatible offices".

the an Amtrak director is not an office of the United States and therefore, not incompatible with office of the Governor under Delaware Constitution); *Stubbs v. Lee*, 64 Me. 195 (1874)(holding under Maine law that a trial justice and office of sheriff are incompatible); *Scott v. Strobach*, 49 Ala. 477 (1873)(holding the Alabama Constitution prohibits holding two inconsistent offices which would result in the same individual's exercising power and discharging duties pertaining to different branches of the government); *Pombo v. Fleming*, 32 Haw. 818 (1933)(holding under Hawaiian law that a person could not have performed duties as chairman that were imposed by law if he had remained in the office of supervisor and therefore, the offices were incompatible); *State ex. rel. Johnson v. Nye*, 135 N.W. 126 (Wis. 1912)(finding a determination of whether the office of member of assembly and grain commissioner are incompatible was not needed because the officer resigned through his actions which was permitted under Wisconsin statutory law); *Commonwealth v. Hawkes*, 123 Mass 525 (1878)(holding that a judge of any court legally vacates his judicial office upon acceptance of a seat in the House of Representatives under Massachusetts Constitution).

B. Prospect erroneously relies on an abrogated common law rule in support of its claim that two state offices of trust or profit are incompatible

Prospect also claims that two state offices are incompatible under Pennsylvania's common law. (Brief at pp. 1, 3, 30 39, 41.) In support of its contention, Prospect again relies on this Court's opinion in *De Turk* as on point and controlling.

Specifically, Prospect claims that the common law rule noted in dictum in *De Turk* stating that where two offices are derived from a common source, that "an acceptance of the second office was an implied resignation and vacation of the first" is controlling. (Brief, at p. 39.) However, the common law rule mentioned in *De Turk* was abolished by the constitutional amendments in 1874 as set forth in *Com. ex. rel. Schermer v. Franek,* 166 A. 878 (Pa. 1933) and *Com. Ex. Rel. Fox v. Swing*, 186 A.2d 24, 25 (Pa. 1962).

In *Schermer*, this Court found that the office of justice of the peace and mayor of a city—two state offices—are not incompatible offices. This Court determined that the Pennsylvania Constitution provides that the General Assembly

may by law declare what state offices are incompatible with each other. *Id*. at 880.

This Court held:

> [w]e have been pointed to no statute which declares the office of justice of the peace and mayor incompatible. Inasmuch as the Constitution has provided a method of declaring what offices are incompatible, thereby announcing the public policy of this state in regard thereto, the courts are not permitted to hold offices incompatible merely because the Legislature has failed to act, even though other states may have held such offices incompatible where the duties of one conflict with those of the other. The Legislature of this commonwealth has determined in several instances certain offices to be incompatible, and it would be a transgression of the power of this court to hold the offices of mayor and justice of the peace incompatible when the Legislature has not seen fit to act in the matter.

Id.

Almost thirty years later, this Court affirmed its holding in *Schermer* in *Fox*. In *Fox*, the District Attorney of Delaware County filed a complaint in quo warranto against Mr. Swing alleging that the offices of township treasurer and county commissioner are incompatible. The lower court held that public offices may be determined incompatible by legislative enactment or under common law principles and then found that the offices

were incompatible. *Fox,* 186 A.2d at 25. This Court explicitly disagreed and held that the common law was completely abrogated by Pa. Const. Art. XII, § 2. *Id*.

This Court noted that Pa. Const. Art. XII, § 2 provides:

> No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office of this State to which a salary, fees or perquisites shall be attached. *The General Assembly may by law declare what offices are incompatible*[2].

Id. (emphasis added).

This Court explained that by virtue of this constitutional provision, the General Assembly has "seen fit to declare many offices (other than federal and state office mentioned in the first sentence of the constitutional enactment) incompatible." *Fox,* 186 A.2d at 25. Because the offices of township treasurer and county commissioner were not declared to be incompatible in any statute, the Court reversed the lower court's decision finding the offices incompatible. *Id*. at 26.

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[2] Pa. Const. Art. XII, § 2 has since been repealed and the same constitutional provision is now set forth in Pa. Const. Art. VI, § 2.

Prospect also mistakenly relies on *Commonwealth v. Conyngham,* 65 Pa. 76 (1870) for the same common law proposition. However, this case was decided before the constitutional Amendment of 1872 (effective in 1874) adding Art. XII, § 2 giving authority to the General Assembly to declare what state offices are incompatible. (1874 Pennsylvania Constitution, Art. XII, § 2[3]). Accordingly, this case was decided under abrogated common law explicitly determined by this Court in 1933 and affirmed in 1962. *Schermer*, 166 A. at 347; *Fox*, 186 A. 2d at 25.

Today, Art. VI, § 2 vests the power to determine whether two state public offices are incompatible with each other exclusively with the General Assembly. Pa. Const. Art. VI, § 2; *Com, ex. rel. Fox v. Swing*, 186 A. 2d 24, 25 (Pa. 1962). The General Assembly has declared many offices incompatible—other than federal and state offices mentioned in the first sentence

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[3] A copy of the 1874 Pennsylvania Constitution may be found at Thomas R. Kline School of Law of Duquesne University, https://www.paconstitution.org/texts-of-the-constitution/1874-2/, site last visited September 24, 2023).

of Art. VI, § 2—and a judicial officer and member of BRT is not one of them. 65 P.S. §§ 1, *et seq*.

For example, an office of magisterial district judge and office of prothonotary or clerk of any court are incompatible offices. 65 P.S. § 4. Further, an office of associate judge and office of magisterial district judge are incompatible offices. 65 P.S. § 5. Further, members of councils and any city or county offices are incompatible. 65 P.S. § 14. However, there is no statute declaring a state judicial office is incompatible with service on the BRT.

Finally, serving as part time, per diem judge presiding over the completion of Prospect's tax assessment appeals and serving as a member of the BRT are not incompatible. Neither Prospect's appeals from the Board of Assessment of Appeals of Delaware County to the Delaware Court of Common Pleas nor Judge Braxton's Orders are appealed to the BRT. Similarly, any decisions by the BRT are not appealed to Delaware Court of Common Pleas.

II. Judge Braxton Did Not Forfeit His Judicial Authority

A. Judges who violate Art. V, § 17 do not automatically forfeit their judicial office

In defending the Order on appeal, Prospect wrongly asserts that a judge who violates Art. V, § 17 automatically forfeits his judicial office as a matter of law. (Brief at p. 39.)

First, Prospect argues that the prohibited activities in Pa. Const. Art. V, § 17 declares state public offices incompatible offices. As set forth above, Pa. Const. Art. V, §17 identifies prohibited activities by judicial officers, not incompatible offices. In contrast, Art. VI, § 2 explicitly declares federal and state offices incompatible and grants authority to the General Assembly to declare which state offices are incompatible. *Schermer*, 166 A. at 880; *Fox*, 186 A.2d at 25-26. There is simply no statutory provision declaring a part time, per diem judicial office is incompatible with service on BRT.

Second, the Pennsylvania Constitution establishes the *only* circumstances for forfeiture of, or the procedures for removal from, judicial office. Pa. Const. Art. V, § 18(d). Under the plain

language of Art. V, § 18, a violation of Art. V, § 17(a) does not establish an automatic forfeiture of judicial office.

If, however, following proceedings conducted pursuant to Art. V, §18 the Court of Judicial Discipline finds clear and convincing evidence that a judge violated Art. V, § 17(a), it may remove them from office. Pa. Const. Art. V, §18 (d)(1). The Commonwealth Court does not have this same authority and its decision established a new administrative procedure and new remedy for judges who violate Art. V, 17(a).

Third, Prospect again misconstrues the opinion in *De Turk* as holding that the acceptance of an incompatible office results in an automatic forfeiture of the first position. To the contrary, this Court found that the Pennsylvania Constitution does not mandate forfeiture at all. *De Turk*, 18 A. at 758.

The Court in *De Turk* explained that although it did not have authority to declare vacant or remove the incumbent from his federal position, it did have authority to enforce the constitutional provision by removing him from his state office. *Id*. After determining that the offices were incompatible under

the plain language of the constitution, this Court specifically held that although the Pennsylvania Constitution identifies incompatible offices, it does <u>not</u> mandate forfeiture of the first office. *De Turk*, 18 A. at 758.

This Court aptly stated: "[t]his case depends entirely upon the construction of the constitutional provision against the holding of incompatible offices…The constitution makes these offices incompatible; but it does not prescribe a penalty, or declare a forfeiture." *Id.*

B. Prospect wrongly claims CUSD characterizes Prospect's appeal as a disciplinary proceeding

In its appellate Brief, Prospect contorts CUSD's argument that the Commonwealth Court was not authorized to find Judge Braxton forfeited his judicial office and claims CUSD characterizes Prospect's appeal as a disciplinary proceeding.

CUSD does <u>not</u> claim that the proceeding before the Commonwealth Court was a disciplinary proceeding. To the contrary, CUSD argued that under the Pennsylvania Constitution, the Pennsylvania Constitution vests this Court with the exclusive right to

supervise the conduct of all courts and judicial officers. Pa Const. Art. V, § 10(c).

Prospect alleged, and the Commonwealth Court found, that Judge Braxton's violation of Art. V, § 17(a) resulted in an automatic forfeiture of his judicial office and vacated his final orders. As discussed above, the Pennsylvania Constitution provides a mechanism for the enforcement of Section 17's prohibited activities. Pa. Const. Article V, § 18; *Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority*, 489 A.2d 1291, 1299 (Pa. 1985). This procedure does not allow for an intermediate appellate court to make a finding that a judicial officer does not have the authority to enter orders.

Prospect also asserts that "merely because a judge's conduct is at issue does not prevent an order from being reviewed through normal appellate jurisdiction." (Brief at p. 28.) CUSD agrees that an appellate court may always investigate a party's claim of judicial misconduct when partiality, prejudice, bias, or ill-will by that judicial officer is. *Reilly by Reilly,* 489 A.2d at 1299. Notably, Prospect has never asserted any partiality, prejudice, bias or ill-will by Judge Braxton. (R. 301a.) Prospect did not seek, and the Commonwealth Court did not

investigate, whether Judge Braxton's alleged violation of Art. V, § 17(a) caused any partiality, prejudice, bias or ill-will or the appearance of bias.

C. An alleged violation of Art. V, § 2 does not constitute structural error that is non-waivable

Prospect's circular reasoning ends where it began: because Judge Braxton forfeited his judicial office, Prospect was "denied the right to have this case decided by a judge validly holding judicial office." (Brief at p. 49). Prospect argues, and the Commonwealth Court held, that Judge Braxton's forfeiture of office constitutes a structural error which cannot be waived. This is wrong for several reasons.

First, as discussed above, the Commonwealth Court is not empowered to conclude that Judge Braxton was no longer vested with judicial authority at the time he entered his final orders. That authority rests with this Court and the Court of Judicial Discipline. Pa. Const. Art. V, §18.

In opposition, Prospect relies on *Intercollegiate Broadcasting Systems, Inc. v. Copyright Royalty Board,* 796 F.3d 111, 123 (D.C. Cir. 2015) and *Bandimere v. SEC*, 844 F.3d 1168, 1181 n. 31 (10th Cir. 2016), for the proposition that an Appointment Clause violation is a

structural error that warrants reversal. These cases are inapposite for the simple reason that Judge Braxton was a validly appointed and sitting judicial officer who retired from the bench after he entered his final orders. (R. 402a).

Second, a structural error is a class of constitutional error that deprives an individual of a constitutional right—such as deprivation of due process—where deprivation of that right strikes at fundamental societal values. *Arizona v. Fulminante*, 499 U.S. 279, 294, 306-312 (1991); *Commonwealth v. Sandusky*, 77 A. 3d 663, 671(Pa. Super. 2013). Very few constitutional errors qualify as structural error because structural errors are not subject to a harmless-error analysis because they are constitutional deprivations that amount to a defect "affecting the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 309-10; *Sandusky,* 77 A.3d at 671. None of the structural errors identified by the United States Supreme Court, or by this Court, are at issue in these matters.

Prospect's reliance on *Williams v. Pennsylvania*, 579 U.S. 1 (2016) is misplaced. There, a justice's failure to recuse himself violated

a criminal defendant's due process rights causing a structural error. *Id*. Here, Prospect does not assert that its due process rights were violated.

Next, Prospect's reliance on *Pascal v. City of Pittsburgh Zoning Bd. of Adjustment*, 259 A.3d 375 (Pa. 2021) is misplaced for the same reason. In *Pascal*, a member of the zoning hearing board who voted in favor of the zoning relief, was on the board of directors of the entity bringing the zoning appeal. This Court rightly held that the member's participation in a ruling in an action "brought by an organization on whose board she sat at all relevant times so clearly and obviously endangered the appearance of neutrality that her recusal was required under well-settled due process principles that disallow a person to be the judge of his or her own case or to try a matter in which he or she has an interest in the outcome." *Id*. at 385. Prospect has not asserted that Judge Braxton had any interest in the outcome of these appeals. Accordingly, Prospect's due process rights were never implicated.

Finally, Prospect argues, and the Commonwealth Court found, that Judge Braxton's "forfeiture" of judicial office constituted the type of structural error which cannot be waived equating it—without citation

to any law—with the principle that parties cannot agree to confer subject matter jurisdiction. (Opinion, p. 21).

In opposition, Prospect relies on *In re T.S.*, 192 A.3d 1080 (Pa. 2018) for the proposition certain species of structural errors are non-waivable. In *In re T.S.,* this Court held that the depravation of counsel to represent children's interests in a parental rights matter was the type of structural error that was non-waivable. *Id*. at 1087. This Court found that the right to counsel belonged to the child, not the parent, and because there was no attorney appointed, no attorney could raise the objection, nor could the children themselves. *In re T.S.,* 192 A.3d. at 1087. After specifically finding that structural error does not always imply non-waivability, this Court noted, for example, that a "violation of the right to a public trial is a type of structural error which is waivable" and that "non-waivability is more closely aligned with jurisdictional defects than with whether an error is structural." *Id*. (citations omitted). Needless to say, Prospect is not an unrepresented minor unable to raise an objection and subject matter jurisdiction is not implicated.

Because an alleged Art. V, § 17(a) violation does constitute a constitutional structural error and is, accordingly, waivable. Tellingly, Prospect relies on case law involving judicial recusal by equating it to structural error. (Brief, pp. 51-52). A party's recusal issue can be time-barred and waived. *Lomas v. Kravitz*, 170 A.3d 380, 390 (Pa. 2017).

Prospect's position essentially seeks a post-final order "disqualification" or "recusal" of Judge Braxton which may be waived. Prospect admits that no later than no later than June 24, 2019, Prospect knew that Judge Braxton was appointed to serve on the BRT. According to Prospect, it knew no later than December 18, 2019 that Judge Braxton was already sitting as a member of the BRT which was *before* he issued his final orders in three companion cases[4]. (R. 288a-289a, 396a, 398a.)

Despite having numerous opportunities to do so over an eight-month period, Prospect waited until March 6, 2020 – well after it lost at trial in all companion matters–to raise this issue—for the first time—

[4] The Orders in the Community Hospital exemption appeals were docketed on January 21, 2019 (R. 406a-409a.); Orders were docketed in the North Campus appeals and CCMC tax exemption appeals on February 10, 2019. (R. 288a-289a.)

in an Application to Vacate filed before Commonwealth Court. (R. 18a.) Prospect failed to object or preserve the issue on appeal. *In re F.C. III,* 2 A.3d 1201, 1211–12 (2010).

III. The Petition Was Not Improvidently Granted

Prospect wrongly asserts that CUSD's Petition for Allowance of Appeal was granted improvidently. This Court granted CUSD's petition to determine a matter of first impression of substantial public importance: whether an appellate court is empowered to find that a judicial officer who violates Art. V, § 17 automatically forfeits his judicial office.

Prospect also wrongly accuses CUSD of improperly criticizing the Commonwealth Court's decision. However, CUSD has been forced to correct the factual record in light of Prospect's false statements of purported "fact". For example, Prospect falsely claims as fact that "former Judge Braxton had already vacated his office but had actively misled the parties about that fact". (Brief at p. 54). Judge Braxton never "actively misled the parties" and the Trial Court specifically found otherwise.

Further, CUSD properly argued that the Commonwealth Court egregiously admitted and relied upon classic hearsay: the affidavit of Joseph Mittleman ("Affidavit"). The Affidavit was offered by Prospect for the truth of the alleged facts asserted in the Affidavit and the statements were made outside of trial and were not subject to cross examination. Pa. R.E. 801. Further, the Commonwealth Court clearly relied on Prospect's false claim that the affiant was not available at the hearing. (Opinion, 16.) The record does not support Prospect's false claim. (R. 275a-387a.) Importantly, Pennsylvania does not allow consideration of purported after-discovered evidence—the Affidavit clearly was—for the purpose of impeaching the credibility of a witness. *Hornick v. Bethlehem Mines Corporation,* 165 A. 36, 37 (Pa. 1933); *Daniel v. Wyeth Pharmaceuticals, Inc*., 15 A.3d 909, 916 (Pa. Super. 2011).

Furthermore, the Commonwealth Court utterly dismissed the Trial Court's finding on remand that Judge Braxton's candid and credible testimony regarding his conversations with representatives of AOPC—which was properly allowed as non-hearsay—understood that the AOPC authorized him to complete his conflict cases. (R. 337a,

339a-345a, 361a, 365a-366a, 371a-372a, 499a-500a.) It is well-established that an appellate court is required to accept a trial court's finding of facts and credibility determinations if they are supported by the record. *Interest of S.K.L.R.*, 256 A.3d 1108, 1127 (Pa. 2021).

CONCLUSION

For the reasons set forth above and in Chester Upland School District's Opening Brief, this Court should reverse the Commonwealth Court's September 28, 2022 Order and affirm the Trial Court's October 15, 2019 Adjudication.

Most respectfully,

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CERTIFICATION OF COMPLIANCE

I hereby certify that this reply brief complied with the word count limits in Pa.R.A.P. 2135 because it contains less than 7,000 words.

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