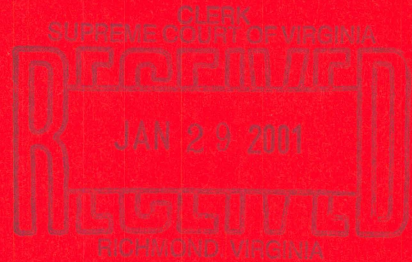


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In The  
Supreme Court of Virginia

RECORD NO. 001947



PAUL GOLDMAN  
and  
ALEXANDER B. McMURTRIE, JR.,  
*Appellants,*

v.

WILLIAM E. LANDSIDLE, COMPTROLLER  
COMMONWEALTH OF VIRGINIA,  
*Appellee.*

---

APPENDIX

---

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OFFICE OF THE  
ATTORNEY GENERAL  
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(804) 786-0781 Facsimile

*Appellant Pro Se*

*Appellant Pro Se*

*Counsel for Appellee*



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IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Paul Goldman  
and  
Alexander B. McMurtrie, Jr.  
Petitioners,

v.

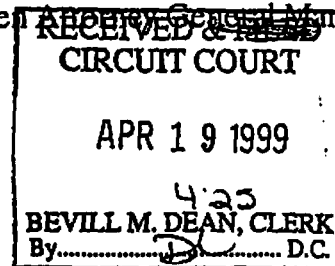
Case No. 1841

William E. Landside,  
(Comptroller, State of Virginia)  
Respondent.

AMENDED PETITION FOR A WRIT OF MANDAMUS

NOW COMES Paul Goldman and Alexander B. McMurtrie, Jr., both residents and citizens of the Commonwealth of Virginia ("Petitioners") and files this Amended Petition for a Writ of Mandamus against Respondent William E. Landside, Comptroller of the Commonwealth of Virginia, and in support state the following:

1. Petitioners have been residents of the Commonwealth of Virginia since the effective date of the Virginia Code Section 30-19.14, and since July 1, 1994, when Virginia Code Section 14.1-18.2 was in effect (now retitled as Section 30-19.14). Petitioners were credited by Attorney General Mark Earley with being the first Virginians to bring to the attention of any Attorney General several important legal issues relating to the above mentioned code sections which constitute the statutory authority permitting the State Comptroller to draw warrants for the sole purpose of giving Members of the General Assembly "reimbursement for office expenses and supplies". Based upon the legal reasoning of Petitioners, first State Comptroller William E. Landside and then Attorney General Mark



B/c of 6-14-99<sup>1</sup>

Earley, (Earley v. Landsidle, 1999 WL 107423 (Va. Feb. 26, 1999, *Petition for Writ of Mandamus*, page 6, publicly released by the Attorney General July 31, 1998), challenged the constitutionality of members of the General Assembly receiving the full amount of such reimbursement funds appropriated to such members by Item 1, paragraph A, subsection 8, of the 1998-2000 Biennial Budget (1998 Acts of Assembly, ch.464; 1998 Acts of Assembly Special Session 1, ch.1; HB 1450 as signed by the Governor with exceptions). During the recently completed 1999 Session of the General Assembly, legislators agreed to reverse their 1998 illegal pay raise. The importance of the efforts of Petitioners, as representatives of the people of Virginia, to seek to have the laws of the Commonwealth enforced and the funds entrusted to our elected representatives lawfully disbursed, has been acknowledged by newspapers across the state representing hundreds of thousands of Virginians.

2. Jurisdiction for Writs of Mandamus is controlled by Virginia Code Section 17.1-513.

3. Venue is controlled by Virginia Code Section 8.01-261(5).

4. Respondent William E. Landsidle is the State Comptroller and has held this post since December 1, 1991. His position as the proper ministerial party in this matter is clear from several statutes, especially Virginia Code Section 2.1-20.5 entitled "How salaries, expenses and other allowances paid; time of payment". This statute reads in pertinent part:

"The salaries, expenses and other allowances, including mileage, mentioned in this chapter, Chapter 5 (§ 2.1-38 *et seq.*) of this title and Chapter 1.1 (§30-19.11 *et seq.*) of Title 30 shall, except where otherwise specifically provided, be paid out of the state treasury after being duly audited, and the Comptroller shall draw his warrants on the State Treasurer for the payment thereof...Expenses shall be paid when they shall have been incurred, and the other allowances shall be paid when the services shall have been rendered...." (Emphasis added).

Prior to October 1, 1998, this statutory provision was in Virginia Code Section 14.1-1.

5. Virginia Code Section 30-19.14 states in full:

"Each member of the General Assembly shall receive as **reimbursement** for office expenses and supplies such sums as shall be set forth in the general appropriations act" (Emphasis added).

Prior to October 1, 1998, this statutory provision was in Virginia Code Section 14.1-18.2.

6. Item 1, paragraph A, subsection 4 of the 1998-2000 Biennial Budget reads in full:

"Expenses of the Speaker of the House of Delegates not otherwise reimbursed, \$16,200 each year, to be paid in equal monthly installments during the year". (Emphasis added). 1998 Acts of Assembly, ch. 464; 1998 Acts of Assembly, Special Session 1, ch. 1; HB 1450 as signed by the Governor with exceptions.

7. Item 44, paragraph 3, of the 1998-2000 Biennial Budget reads in full:

"Expenses of the Lieutenant Governor not otherwise reimbursed, on the same basis as specified in Item 1, paragraph A. 4., of this act for the Speaker of the House". (Emphasis added). 1998 Acts of Assembly, ch. 464; 1998 Acts of Assembly, Special Session 1, ch. 1; HB 1450 as signed by the Governor with exceptions.

8. Item 45 paragraph A, subsection 2 of the 1998-2000 Biennial Budget reads in full:

"Expenses of the Attorney General not otherwise reimbursed, \$9,000 each year in equal monthly installments". (Emphasis added). 1998 Acts of Assembly, ch. 464; 1998 Acts of Assembly, Special Session 1, ch. 1; HB 1450 as signed by the Governor with exceptions.

9. While not defined in the Virginia Code, the term "reimbursement" has a usual and plain meaning. In the leading case on expense reimbursement, Marsh v. City of Richmond, 360 S.E. 2d 163 (Va. 1987), the Supreme Court of Virginia cited Black's Law Dictionary as authority for defining the term "extraordinary expenses". In Black's Law

Dictionary 1287 (6th ed.) the word "reimburse" is defined as "To pay back...to repay that expended".

10. Virginia Code Section 2.1-20.2 states the term "Expenses" as used in this chapter means "all reasonable and necessary expenses incurred in the performance of duties".

11. Virginia Code Section 2.1-20.2 states the term "Salary" as used in this chapter means "a fixed compensation for services, paid to part-time and full-time employees on a regular basis".

12. The "general appropriation act" referred to in Virginia Code Section 30-19.14 is the 1998-2000 Biennial Budget, (Acts of Assembly, ch. 464; 1998 Acts of Assembly, Special Session 1, ch. 1; HB 1450 as adopted by the General Assembly and signed by the Governor, with exceptions).

13. Item 1, paragraph A, subsection 8, of the 1998-2000 Biennial Budget, as amended by the 1999 General Assembly and signed by the Governor, provides for the funds to be disbursed, in accordance with the applicable statutory procedures, to pay the reimbursement for office expenses and supplies. This item states in pertinent part:

**"Reimbursement for office expenses and supplies of members of the General Assembly in the amount of \$1,250 for each month of the calendar year. An additional \$500 for each month of each calendar year shall be paid to the Majority and Minority Leaders of the House of Delegates and the Senate and the President pro Tempore of the Senate." (Emphasis added). 1998-2000 Biennial Budget, page 6, lines 16-22.**

14. The lawyer for the State Comptroller and the Gilmore Administration for civil matters, Virginia Attorney General Mark L. Earley, concedes that the Comptroller expends funds under Virginia Code Section 30-19.14 in the following manner:

**"The reimbursement for office expenses and supplies is paid to members of**

the General Assembly every month at a fixed rate without regard to whether any office expenses have been incurred or any supplies have been purchased. In order to receive the fixed monthly payment, legislators are not required to submit invoices for office and supply expenditures or provide any vouchers or other documentation setting forth how the fixed monthly sum is spent.

Legislators may use the payment for office expenses and supplies in any manner they wish. Legislators may choose to keep the payment without spending any of it on office expenses or supplies. The payment does not have to be returned to the Commonwealth if it is not spent on office expenses and supplies.

In addition to receiving the fixed monthly amount for office expenses and supplies, legislators are provided with stationery, supplies, and other materials necessary to operating their offices by the Clerk of the House of Delegates and the Clerk of the Senate. These materials are paid for out of the sums provided annually to the Clerk's for routine operating and maintenance expenses. Legislators are not required to reimburse the Clerk's of the Commonwealth for the cost of these materials". (*Earley v. Landside Id., Petition for Writ of Mandamus*, pages 4-5, publicly released by the Office of Attorney General on July 31, 1998.) (Emphasis added).

15. The Attorney General of Virginia has conceded that expending state funds in such a manner exceeds the Comptroller's authority under Section 30-19.14 to pay reimbursement for expenses. The Attorney General stated:

"C. The "Office Expense Reimbursement" Provided To Members Of The Virginia General Assembly Amounts To A Fixed And Stated Compensation, Which Must Be Treated As Salary Within The Meaning of Article IV, Section V Of The Constitution Of Virginia". (*Earley v. Landside Id., Memorandum of Law In Support of Petition For Writ Of Mandamus*, page 23, publicly released by the Office of Attorney General on July 31, 1998.) (Emphasis in the original).

16. By refusing to pay the \$500 per month increase in office expenses and supplies passed by the 1998 Session of the General Assembly (Item 1, paragraph A, subsection 8, 1998-2000 Biennial Budget, 1998 Acts of Assembly, ch. 464; 1998 Acts of Assembly, Special Session 1, ch. 1) and questioning the constitutionality of such legislative action, the State



Comptroller has conceded that failure to require any documentation of such alleged office expenditures and allowing legislators to keep some or all of state funds for personal use amounts to paying state legislators a salary.

17. Virginia Code Section 30-19.14 only permits the State Comptroller to expend state funds for "reimbursement of office expenses and supplies".

18. Item 1, paragraph A, subsection 8 likewise, tracking as it must the language of the appropriate code section, only permits the Comptroller to expend funds to pay "[R]eimbursement for office expenses and supplies..." .

19. Virginia Code Section 2.1-20.5 instructs the Comptroller that "[E]xpenses shall be paid when they shall have been incurred".

20. The term "shall" has been considered to be a mandatory command in statutory construction. (For example, the March 15, 1999 opinion of Attorney General Earley as given to Delegate Harry Parrish.)

21. As has been his practice since becoming Comptroller and continuing to date, Mr. Landside continues to permit the payment of state funds pursuant to Virginia Code Section 30-19.14 without requiring documentation that such state funds are actually being expended for the reimbursement of office expenses and supplies as required by state law.

22. By continuing to fail to fulfill his ministerial duty to insure that state money authorized for the sole purpose of reimbursement for office expenses and supplies is not being converted to personal use, the State Comptroller continues to expend funds in violation of the law.

23. Without the appropriate documentation required by state law, it is self-evident

that the Comptroller can not determine whether state funds disbursed pursuant to Section 30-19.14 are going for reimbursement of office expenses and supplies.

24. Without the appropriate documentation required by state law, it is self-evident that the State Comptroller can not determine whether state funds disbursed to the Speaker, the Lieutenant Governor, and the Attorney General for the purpose of reimbursing them for expenses "not otherwise reimbursed" are in fact being used for this purpose as mandated by Item 1, paragraph A, subsection 4, Item 44, paragraph 3, and Item 45, paragraph A, subsection 2, respectively.

25. As referenced above, the Attorney General has already raised the possibility of state legislators being paid twice, or double, for the same expense in certain instances. Moreover, legislators are allowed under Virginia Code Section 24.2-291 to use funds given to them by political contributors for the purpose of "defraying any ordinary nonreimbursed expense related to his elective office". (Emphasis added).

26. The failure to abide by the law therefore makes it impossible for the State Comptroller to insure that legislators receiving state money under Section 30-19.14 were not otherwise reimbursed for the same expenditure. This failure likewise makes it impossible for the State Comptroller to insure that the Speaker, pursuant to Item 1, paragraph A, subsection 4, the Lieutenant Governor pursuant to Item 44, chapter 3, and the Attorney General pursuant to Item 45, paragraph A, subsection 2 have not been otherwise reimbursed for the same expenditure.

WHEREFORE, Petitioners, without adequate remedy at law, pray that a Writ of Mandamus be awarded compelling the State Comptroller, William E. Landside, to

determine, as required by law, that expenditures shall have been incurred, entitling state delegates and state senators to the reimbursement permitted by Virginia Code Section 30-19.14, before state funds appropriated for such reimbursement are expended, and that the State Comptroller likewise be compelled to determine, as required by law, that state funds given to the Speaker of the House of Delegates, the Lieutenant Governor, and the Attorney General pursuant respectively to Item 1, paragraph A, subsection 4, Item 44, paragraph 3, and Item 45, paragraph A, subsection 2, of the 1998-2000 Biennial Budget are going solely for expenses "not otherwise reimbursed".

Respectfully Submitted,



Paul Goldman, *pro se*




Alexander B. McMurtrie, Jr. *pro se*


subscribed and sworn to before me  
this 19 day of April, 99.  
by Paul Goldman  
Diana C. Lythgoe  
Notary Public  
Commission Expires: 7/31/00

**NOTICE OF APPLICATION FOR  
AMENDED PETITION FOR A WRIT OF MANDAMUS**

TO: The Honorable William E. Landside  
Comptroller of Virginia  
and  
Mark L. Earley,  
Attorney General of Virginia

Please take notice that on the 19 day of April, 1999, the undersigned, pro se, will make application to the Circuit Court of the City of Richmond for an Amended Petition for Writ of Mandamus against you, a copy of said Petition is attached hereto.

  
\_\_\_\_\_  
Paul Goldman, *pro se*

  
\_\_\_\_\_  
Alexander B. McMurtrie, Jr. *pro se*

Paul Goldman  
Alexander B. McMurtrie, Jr.  
9201 Forest Hill Avenue  
Suite 110  
Richmond, Virginia 23235  
(804) 320-4000

STATE OF VIRGINIA:

CITY OF RICHMOND, to-wit:

The foregoing Amended Petition for Writ of Mandamus was acknowledged before me by Paul Goldman this \_\_\_\_ day of \_\_\_\_, 1999.

\_\_\_\_\_  
Notary Public

My Commission Expires:

STATE OF VIRGINIA:

CITY OF RICHMOND, to-wit:

The foregoing Amended Petition for Writ of Mandamus was acknowledged before me by Alexander B. McMurtrie, Jr. this 15<sup>th</sup> day of April, 1999.

*Shirley E. Farland*  
Notary Public

My Commission Expires: 4/30/02



VIRGINIA:

IN THE CIRCUIT COURT OF CITY OF RICHMOND

PAUL GOLDMAN, et al,

Petitioners,

v.

LAW NO. F-841

WILLIAM E. LANDSIDLE, COMPTROLLER  
COMMONWEALTH OF VIRGINIA

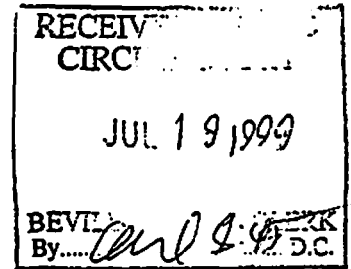
Respondent.

ANSWER TO AMENDED PETITION FOR WRIT OF MANDAMUS

COMES NOW respondent, WILLIAM E. LANDSIDLE, COMPTROLLER OF THE COMMONWEALTH OF VIRGINIA ("Landsidle" or "Comptroller"), by counsel, and answers the Amended Petition for Writ of Mandamus ("Amended Petition") as follows:

1. Respondent admits the allegations of paragraphs 2, 3, 12, 23 and 24 of the Amended Petition. Respondent admits on information and belief the allegations of paragraph 1 of the Amended Petition that Petitioners were residents of the Commonwealth at all times relevant to these proceedings. As to the remaining self-serving allegations of paragraph 1, Respondent submits that such allegations warrant neither admissions nor denials.

2. As to the allegations of paragraphs 4, 5, 6, 7, 8, 10, 11, 13, 14, 15, 19 and 25 of the Amended Petition, Respondent admits that the language quoted from the referenced statutes,



documents, or pleadings is included in such documents and is accurately quoted.

3. As to the allegations of paragraphs 22 of the Petition, Respondent denies such allegations and demands specific proof thereof.

4. As to the allegations of paragraphs 9, 16, 17, 18 and 20 of the Petition, Respondent submits that such allegations are legal conclusions or theories, which warrant neither admissions nor denials.

5. Any allegations of the Amended Petition not specifically admitted are hereby denied.

WHEREFORE, having fully responded to the Petition, Respondent WILLIAM E. LANDSIDLE, COMPTROLLER OF THE COMMONWEALTH OF VIRGINIA, respectfully asks that:

a. the Court take jurisdiction of this matter and determine whether the Petitioners are entitled to any relief;

b. following such determination by the Court and compliance with such determination by the Respondent, complete exoneration and protection be granted to the Respondent.

WILLIAM E. LANDSIDLE, COMPTROLLER  
COMMONWEALTH OF VIRGINIA

By: Donald R. Ferguson  
Counsel

Mark Earley  
Attorney General of Virginia


Francis Ferguson  
Deputy Attorney General

Michael K. Jackson  
Gregory E. Lucyk  
Senior Assistant Attorneys General

Donald R. Ferguson  
Assistant Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
804/786-5889 (telephone)  
804/786-9136 (facsimile)

**CERTIFICATE OF SERVICE**

I certify that true copies of the foregoing Answer to Amended Petition for Writ of Mandamus was mailed to Paul Goldman and Alexander B. McMurtrie, Jr., *pro se* Petitioners, 9201 Forest Hill Avenue, Suite 110, Richmond, VA 23235, this 15th day of July, 1999.

A handwritten signature in black ink, reading "Donald R. Ferguson". The signature is written in a cursive style and is positioned above the printed name and title.

Donald R. Ferguson  
Assistant Attorney General

LAW OFFICES  
**ALEXANDER B. McMURTRIE, JR.**  
9201 FOREST HILL AVENUE  
SUITE 110  
RICHMOND, VIRGINIA 23235

ALEXANDER B. McMURTRIE, JR

Telephone (804) 320-4000

Telefax (804) 272-7126

December 20, 1999

Ms. Donna Lythgoe, Clerk  
Circuit Court, City of Richmond  
400 North 9th Street  
Richmond, Virginia 23219

RE: Request for Admission  
Case Number LF 841-1

Dear Ms. Lythgoe:

Please find enclosed Petitioners' Requests for Admission to be filed with other papers of the captioned cause.

Thank you for your kind consideration. If you have any questions, please feel free to contact me at your convenience.

Very truly yours,

*A.B. McMurtre, Jr.*  
Alexander B. McMurtre, Jr.

ABM,JR:pem  
Enclosure

RECEIVED & FILED CIRCUIT COURT
DEC 21 1999
8:45
BEVILL M. DEAN, CLERK
By..... <i>DC</i> ..... D.C.



LAW OFFICES  
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December 17, 1999

Mr. Don Ferguson,  
Assistant Attorney General  
Commonwealth of Virginia  
900 East Main Street  
Richmond, VA 23219

RE: Paul Goldman and Alexander B. McMurtie, Jr.  
v. William E. Landside, Comptroller, State of Virginia  
Case: LF 841-1

Dear Mr. Ferguson:

Enclosed is our Request for Admission served on you as counsel for Mr. Landside.

If we can agree on Stipulations this will not be necessary. Therefore, because we have not agreed, I need your response within the prescribed time period.

Very truly yours,

  
Alexander B. McMurtie, Jr.

ABM,jr:pem  
cc: Paul Goldman

**VIRGINIA**

**IN THE CIRCUIT COURT OF THE CITY OF RICHMOND**

**Paul Goldman  
and**

**Alexander B. McMurtrie, Jr.**

**Petitioners,**

**v.**

**Case No.: LF841-1**

**William E. Landside,  
(Comptroller, State of Virginia)**

**Respondent.**

**REQUESTS FOR ADMISSION**

COME NOW plaintiffs, Paul Goldman and Alexander B. McMurtrie, Jr., pursuant to Rule 4:11 of the Supreme Court of Virginia, and hereby request that defendant admit the truth of the following for the purposes of this action:

1. Admit that on or about July 31, 1998, the Attorney General made the following statement in a pleading he filed in the case of Earley v. Landside:

"The reimbursement for office expenses and supplies is paid to members of the General Assembly every month at a fixed rate without regard to whether any office expenses have been incurred or any supplies have been purchased. In order to receive the fixed monthly payment, legislators are not required to submit invoices for office and supply expenditures or provide any vouchers or other documentation setting forth how the fixed monthly sum is spent.

Legislators may use the payment for office expenses and supplies in any manner they wish. Legislators may choose to keep the payment without spending any of it on office expenses or supplies. The payment does not have to be returned to the Commonwealth if it is not spent on office expenses and supplies.

In addition to receiving the fixed monthly amount for office expenses and supplies, legislators are provided with stationery, supplies, and other materials

necessary to operating their offices by the Clerk of the House of Delegates and the Clerk of the Senate. These materials are paid for out of the sums provided annually to the Clerk's for routine operating and maintenance expenses. Legislators are not required to reimburse the Clerk's of the Commonwealth for the cost of these materials". (Earley v. Landside Id., *Petition for Writ of Mandamus*, pages 4-5, publicly released by the Office of Attorney General on July 31, 1998.) (Emphasis added).

"C. The "Office Expense Reimbursement" Provided To Members Of The Virginia General Assembly Amounts To A Fixed And Stated Compensation, Which Must Be Treated As Salary Within The Meaning of Article IV, Section V Of The Constitution Of Virginia". (Earley v. Landside Id., *Memorandum of Law In Support of Petition For Writ Of Mandamus*, page 23, publicly released by the Office of Attorney General on July 31, 1998.) (Emphasis in the original).

RESPONSE:

2. Admit that since becoming Comptroller and continuing through the date hereof, Defendant continues to permit the payment of state funds pursuant to Virginia Code hereof, Section 30-19.14 without requiring documentation that such state funds are actually expended for the reimbursement of office expenses and supplies as required by state law.

RESPONSE:

Paul Goldman by GOSM  
PAUL GOLDMAN, *pro se*

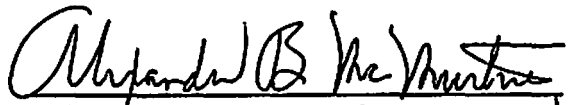
Alexander B. McMurtrie, Jr.  
ALEXANDER B. McMURTRIE, JR *pro se*

Alexander B. McMurtrie, Jr  
Paul Goldman  
9201 Forest Hill Avenue  
Suite 110  
Richmond, Virginia 23235  
(804) 320-4000



CERTIFICATE

I hereby certify that on this 20<sup>th</sup> day of December, 1999, I served a copy of the foregoing Request for Admission by first class mail postage prepaid, upon Donald R. Ferguson, Esquire, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219.

  
Alexander B. McMurtrie, Jr. *pro se*

**VIRGINIA:**

**IN THE CIRCUIT COURT OF CITY OF RICHMOND**

**PAUL GOLDMAN, et al,**

**Petitioners,**

**v.**

**LAW NO. F-841**

**WILLIAM E. LANDSIDLE, COMPTROLLER  
COMMONWEALTH OF VIRGINIA**

**Respondent.**

**RESPONSE TO PETITIONERS' REQUEST FOR ADMISSIONS**

COMES NOW respondent, WILLIAM E. LANDSIDLE, COMPTROLLER OF THE COMMONWEALTH OF VIRGINIA ("Landsidle" or "Comptroller"), by counsel, and responds to petitioner's Request for Admissions:

**REQUEST NO. 1:**

Admit that on or about July 31, 1998, the Attorney General made the following statement in a pleading he filed in the case of Earley v. Landsidle:

"The reimbursement for office expenses and supplies is paid to members of the General Assembly every month at a fixed rate without regard to whether any office expenses have been incurred or any supplies have been purchased. In order to receive the fixed monthly payment, legislators are not required to submit invoices for office and supply expenditures or provide any vouchers or other documentation setting forth how the fixed monthly sum is spent.

Legislators may use the payment for office expenses and supplies in any manner they wish. Legislators may choose to keep the payment without spending any of it on office expenses or supplies. They [sic] payment does not have to be returned to the Commonwealth if it is not spent on office expenses and supplies.

In addition to receiving the fixed monthly amount for office expenses and supplies, legislators are provided with stationery, supplies, and other materials necessary to operating their offices by the Clerk of the House of Delegates and the Clerk of the Senate. These materials are paid for out of the sums provided annually to the Clerk's [sic] for routine operating and maintenance expenses. Legislators are not required to reimburse the Clerk's [sic] of the Commonwealth for the cost of these materials." (Earley v. Landside Id., *Petition for Writ of Mandamus*, pages 4-5, publicly released by the Office of Attorney General on July 31, 1998.) (Emphasis added).

"C. The "Office Expense Reimbursement" Provided To Members Of The Virginia General Assembly Amounts To A Fixed And Stated Compensations, Which Must Be Treated As Salary Within The Meaning of Article IV, Sections V Of The Constitution Of Virginia". (Earley v. Landside Id., *Memorandum of Law in Support of Petition For Writ of Mandamus*, page 23, publicly released by the Office of Attorney General on July 31, 1998.) (Emphasis in the original).

RESPONSE: Admit, except for typographical errors in the Request.

#### REQUEST NO. 2:

Admit that since becoming Comptroller and continuing through the date hereof, Defendant continues to permit the payment of state funds pursuant to Virginia Code hereof, Section 30-19.14 without requiring documentation that such state funds are actually expended for the reimbursement of office expenses and supplies as required by state law.

RESPONSE: Deny. At a time beginning before LANDSIDLE joined the Department of Accounts, and continuing through today, it has been the policy of the Department to ensure compliance with Internal Revenue Service regulations regarding reimbursement for travel and other similar expenses. Under the IRS regulations, payments to individuals labeled "reimbursements" are considered taxable as ordinary income unless such payments are made pursuant to an accountable plan which specifies what documentation is required to show that the payments covered only legitimate expenses of the individual. The IRS does not require that an entity, in this case the Virginia General Assembly, have an accountable plan, only that if does not, then all payments are taxed. The legislative leadership has been aware of this fact and has elected not to establish an accountable plan. Therefore, these payments have been subject to withholding taxes as required by the IRS.

The practical effect of this policy is that the Department has not considered the payments to legislators to be, in fact, reimbursements because they fail the test of being governed by an accountable plan.

WILLIAM E. LANDSIDLE, COMPTROLLER  
COMMONWEALTH OF VIRGINIA

By: Donald R. Ferguson  
Counsel

Mark Earley  
Attorney General of Virginia

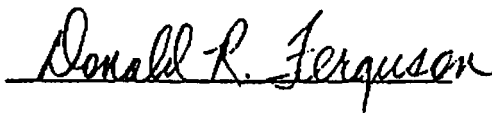
Francis Ferguson  
Deputy Attorney General

Michael K. Jackson  
Gregory E. Lucyk  
Senior Assistant Attorneys General

Donald R. Ferguson  
Assistant Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
804/786-5889 (telephone)  
804/786-9136 (facsimile)

**CERTIFICATE OF SERVICE**

I certify that true copies of the foregoing Response to Petitioners' Request for Admissions were mailed to Paul Goldman and Alexander B. McMurtrie, Jr., *pro se* Petitioners, 9201 Forest Hill Avenue, Suite 110, Richmond, VA 23235, this 13th day of January, 2000.



Donald R. Ferguson  
Assistant Attorney General

DOA/Goldman Response to Request for Admissions



VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Paul Goldman

and

Alexander B. McMurtrie, Jr.

Petitioners,

v.

Case No.: LF841-1

William E. Landsidle,

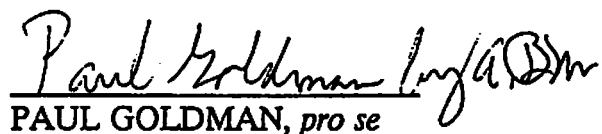
(Comptroller, State of Virginia)

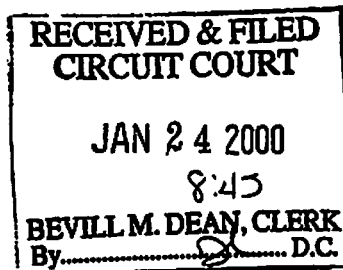
Respondent.

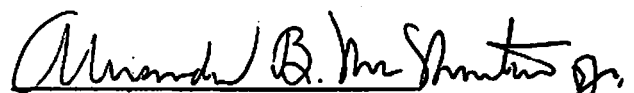
MOTION FOR SUMMARY JUDGMENT

COME NOW plaintiffs, Paul Goldman and Alexander B. McMurtrie, Jr., pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia, and move this Court for Summary Judgment with respect to Plaintiff's Amended Petition for a Writ of Mandamus.

In support thereof, Plaintiff's state that pursuant to the pleadings and the admissions herein, there is no material fact genuinely in dispute and that Plaintiff's are entitled as a matter of law to the relief they seek.

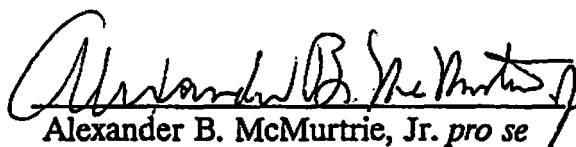
  
PAUL GOLDMAN, *pro se*



  
ALEXANDER B. McMURTRIE, JR *pro se*  
9201 Forest Hill Avenue  
Suite 110  
Richmond, Virginia 23235  
(804) 320-4000

CERTIFICATE

I hereby certify that on this 21<sup>st</sup> day of January, 2000, I served a copy of the foregoing Motion for Summary Judgment by first class mail postage prepaid, upon Donald R. Ferguson, Esquire, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219.

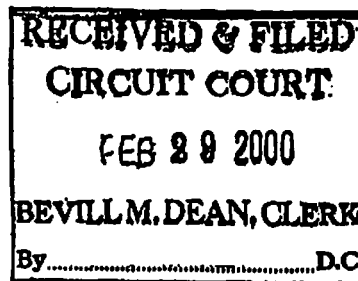
  
Alexander B. McMurtrie, Jr. *pro se*

VIRGINIA

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Paul Goldman  
and  
Alexander B. McMurtrie, Jr.  
Petitioners,  
v.

William E. Landside,  
(Comptroller, State of Virginia)  
Respondent.



**MEMORANDUM IN SUPPORT OF**  
**MOTION FOR SUMMARY JUDGMENT**

As set forth in their Amended Petition, Plaintiffs, Paul Goldman and Alexander B. McMurtrie, Jr., seek a Writ of Mandamus from this Court directing Defendant, William E. Landside, Comptroller of the Commonwealth of Virginia ("Respondent" or the "Comptroller"), to comply with § 2.1-20.5 of the Code of Virginia. Plaintiffs have filed a motion for summary judgment, since no material facts appear to be in dispute. Facts germane to determination of their motion include the following:

Plaintiffs are residents of the Commonwealth of Virginia. (Petition, ¶ 1; Answer ¶ 1).

Respondent William E. Landside is the Comptroller of Virginia. (Answer, preamble).

Code of Virginia § 2.1-20.5 states:

"The salaries, expenses and other allowances, including mileage, mentioned in this chapter, Chapter 5 (§ 2.1-38 *et seq.* of this title and Chapter 1.1 (§ 30-19.11 *et seq.*) of Title 30 shall, except where otherwise specifically provided, be paid out of the state treasury after being duly audited, and the Comptroller shall draw his warrants on the State Treasurer for the payment thereof . . . Expenses shall be paid when they shall have been incurred, and the other allowances shall be paid when the services shall have been rendered. . . ." (Emphasis added).

Code of Virginia § 30-19.14 states:

Each member of the General Assembly shall receive as reimbursement for office expenses and supplies such sums as shall be set forth in the general appropriations act." (Emphasis added).

Item 1, paragraph A, subsection 4 of the 1998-2000 Biennial Budget of the Commonwealth (the "Budget") reads as follows:

"Expenses of the Speaker of the House of Delegates not otherwise reimbursed, \$16,200 each year, to be paid in equal monthly installments during the year." (Emphasis added). 1998 Acts of Assembly, ch. 464, 1998 Acts of Assembly, Special Session 1, ch. 1; HB 1450 as signed by the Governor with exceptions.

Item 44, paragraph 3 of the Budget reads as follows:

"Expenses of the Lieutenant Governor not otherwise reimbursed, on the same basis as specified in Item 1, paragraph A.4., of this act for the Speaker of the House." (Emphasis added). 1998 Acts of Assembly, ch. 464; 1998 Acts of Assembly, Special Session 1, ch. 1; HB 1450 as signed by the Governor with exceptions.

Item 45, paragraph A, subsection 2 of the Budget reads as follows:

"Expenses of the Attorney General not otherwise reimbursed, \$9,000 each year in equal monthly installments." (Emphasis added). 1998 Acts of Assembly, ch. 464; 1998 Acts of Assembly, Special Session 1, ch. 1; HB 1450 as signed by the Governor with exceptions.

Item 1, paragraph A, subsection 8 of the Budget states in pertinent part:

"Reimbursement for office expenses and supplies of members of the General Assembly in the amount of \$1,250 for each month of the calendar year. An additional \$500 for each month of each calendar year shall be paid to the Majority and Minority Leaders of the House of Delegates and the Senate and the President pro Tempore of the Senate." (Emphasis added). 1998-2000 Biennial Budget, page 6, lines 16-22.

Code of Virginia § 2.1-20.5 instructs the Comptroller that "expenses shall be paid when they have been incurred."

Without the appropriate documentation required by Virginia law, the Comptroller

cannot determine whether state funds disbursed pursuant to § 30-19.14 of the Code of Virginia are in fact being paid as reimbursement for office expenses and supplies or whether funds disbursed to the Speaker of the House, the Lieutenant Governor or the Attorney General for expenses "not otherwise reimbursed" are in fact being paid for such purpose. (Petition, ¶ 22-23; Answer, ¶ 1). Notwithstanding the statutory mandate to the Comptroller, reimbursement for office expenses and supplies is paid to members of the General Assembly at a fixed rate without regard to whether any office expenses have been incurred or any supplies purchased, since the Comptroller requires no submission of invoices or vouchers or other documentation prior to issuing such payments. (Petitioners' Request for Admission No. 1 and answer thereto). The Department of Accounts has not considered these payments to legislators to be reimbursements since the Comptroller receives no documentation showing that such payments covered only legitimate expenses of individual legislators. (Answer to Petitioners' Request for Admission No. 2).

### DISCUSSION

Based on the uncontroverted facts set forth above, the Comptroller clearly is in gross and flagrant violation of his statutory duties, since, notwithstanding the foregoing, the Comptroller pays "expense reimbursement payments," as described in Code of Virginia § 30-19.14, without requiring that members of the General Assembly comply with Code of Virginia § 2.1-20.5 and other applicable statutes. As admitted by the Comptroller in his answer to Plaintiff's Request for Admission No. 2:

"The reimbursement for office expenses and supplies is paid to members of the General Assembly every month at a fixed rate without regard to whether any office expenses have been incurred or any supplies have been purchased. In order to receive the fixed monthly payment, legislators are not required to

submit invoices for office and supply expenditures or provide any vouchers or other documentation setting forth how the fixed monthly sum is spent.

Legislators may use the payment for office expenses and supplies in any manner they wish. Legislators may choose to keep the payment without spending any of it on office expenses or supplies. . ."

The Comptroller has attempted to justify his failure to comply with the statute by casting the blame on the General Assembly. In his answer to Plaintiff's Request for Admission No. 2 he states:

"At a time beginning before LANDSIDLE joined the Department of Accounts, and continuing through today, it has been the policy of the Department to ensure compliance with Internal Revenue Service regulations regarding reimbursement for travel and other similar expenses. Under the IRS regulations, payments to individuals labeled "reimbursements" are considered taxable as ordinary income unless such payments are made pursuant to an accountable plan which specifies what documentation is required to show that the payments covered only legitimate expenses of the individual. The IRS does not require that an entity, in this case the Virginia General Assembly, have an accountable plan, only that if [it] does not, then all payments are taxed. The legislative leadership has been aware of this fact and has elected not to establish an accountable plan. Therefore, these payments have been subject to withholding taxes as required by the IRS.

The practical effect of this policy is that the Department has not considered the payments to legislators to be, in fact, reimbursements because they fail the test of being governed by an accountable plan."

Stated another way, the Comptroller has, for whatever reason, failed to adhere to his statutory duties with respect to Code of Virginia §§ 2.1-20.5 and 30-19.4 to audit the General Assembly's expense vouchers to determine that the expenses have been incurred. As a result, Plaintiffs are entitled to a Writ of Mandamus from this Court commanding the Comptroller to comply with the statutes. Article 2, Chapter 25, Title 8.01 of the Code of Virginia governs writs of mandamus. The function of a writ of mandamus is to enforce the

performance of duties growing out of the discharge of public functions, or imposed by statute. Richmond Ry. & Elec. Co. v. Brown, 97 Va. 26 (1899). Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law. A ministerial act is one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of his own judgment upon the propriety of the act being done. Richlands Medical Assoc. v. Commonwealth ex rel. State Health Commissioner, 230 Va. 384, 386 (1985), (citation omitted).

"If the public official has discretion, his actions are not subject to review by mandamus. Ibid. 'The function of a trial court in a mandamus proceeding is to command and execute, and not to inquire and adjudicate.' Railroad Co. v. Fugate, 206 Va. 159, 164, 142 S.E. 2d 546, 550 (1965)" Richlands Medical Assoc. 230 Va. 387.

Although mandamus will not lie to control the manner in which a public official exercises his discretion<sup>1</sup>, it is the proper remedy to compel prospective compliance by a public official with his legally imposed official duties.

In the present case no discretion is required or called for on the part of the Comptroller. Code of Virginia § 2.1-20.5 is quite clear that expenses mentioned both in Chapters 2.1 and 5 of Title 2.1 of the Code of Virginia and Chapter 1.1 of Title 30 of the Code of Virginia shall be paid out of the State Treasury after being audited (emphasis added). Furthermore, Code of Virginia § 2.1-227 states:

**Conditions to issuance of disbursement warrants.** – The Comptroller shall not issue a disbursement warrant unless and until he shall have audited, through the use of statistical sampling or other acceptable auditing techniques the bill, invoice, account, payroll or other evidence of claim, demand or charge and

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<sup>1</sup> See Funeral Directory Assoc. v. Groth, 202 Va. 792, 797 (1961).

satisfied himself as to the regularity, legality and correctness of the expenditure or disbursement, and that the claim, demand or charge has not been previously paid. If he be so satisfied, he shall approve the same; otherwise, he shall withhold his approval. In order that such regularity and legality may appear, the Comptroller may, by general rule or special order, require such certification or such evidence as the circumstances may demand. (Code 1950 § 2-202; 1966, c. 677; 1972, c. 205).

The General Assembly has directed the payment of "expenses" to itself through the procedures of Code of Virginia §30-19.14 and, therefore, in conformity with the protections for public funds afforded by the statutory scheme of which this section forms a part. As set forth above, the Comptroller has certain mandatory duties with respect to any expenses authorized pursuant to §30-19.14, and the statutes provide him with no discretion in this regard. However, notwithstanding these mandatory statutory protections, as his answers to Plaintiff's Request for Admission make clear, it is uncontroverted that the Comptroller is not complying with the law.

As previously stated, the Comptroller admits his failure to perform his ministerial duty but attempts to foist the blame onto the General Assembly, stating that his failure to perform his duty occurs because the General Assembly "has elected not to establish an accountable plan." But the mandatory statutory scheme pursuant to which the Comptroller makes such payments does not allow him discretion to pick and choose which payments to subject to the clear statutory requirements the General Assembly has imposed upon his office. The duty to examine and audit submissions for "reimbursement" is a duty to perform a purely ministerial act, for the willful failure to comply with which a writ of mandamus should issue. Accordingly, this Court should grant the prayer of Plaintiffs, grant their motion for summary judgment and issue a writ of mandamus to the Comptroller directing



him to perform his ministerial duty, imposed by statute, to examine and audit the requests for reimbursements or expenses submitted by members of the General Assembly pursuant to Code of Virginia §2.1-20.5 before authorizing payment thereof.

**PAUL GOLDMAN**

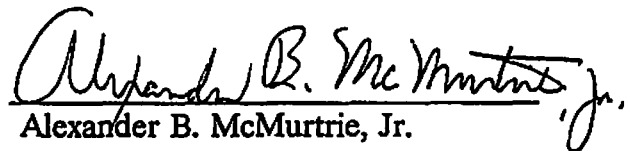
Paul Goldman (by A.B.M.)

**ALEXANDER B. MCMURTRIE, JR.**

Alexander B. McMurtrie Jr.

CERTIFICATE

I hereby certify that on this 29th day of February, 2000, I served a copy of the foregoing Memorandum in Support of Motion for Summary Judgment by first class US Mail to Donald R. Ferguson, Esquire, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219.

  
Alexander B. McMurtrie, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF CITY OF RICHMOND

PAUL GOLDMAN, et al,

Petitioners,

v.

LAW NO. F-841

WILLIAM E. LANDSIDLE, COMPTROLLER  
COMMONWEALTH OF VIRGINIA

Respondent.

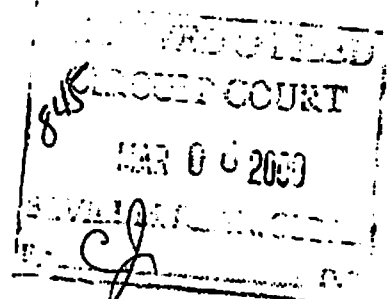
CROSS-MOTION FOR SUMMARY JUDGMENT

COMES NOW WILLIAM E. LANDSIDLE, respondent herein, pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia, and move this Court for Summary Judgment with respect to Petitioner's Amended Petition for Writ of Mandamus and his Answer filed thereto. In support thereof, respondent states that pursuant to the pleadings, admissions, and Petitioner's Motion for Summary Judgment filed herein, there remains no material fact genuinely in dispute and respondent is entitled to judgment as a matter of law.

WILLIAM E. LANDSIDLE, COMPTROLLER  
COMMONWEALTH OF VIRGINIA

By: Donald R. Ferguson  
Counsel

Mark Earley  
Attorney General of Virginia



Francis Ferguson  
Deputy Attorney General

Michael K. Jackson  
Senior Assistant Attorney General

Donald R. Ferguson  
Assistant Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
804/786-5889 (telephone)  
804/786-9136 (facsimile)

**CERTIFICATE OF SERVICE**

I certify that true copies of the foregoing Cross-Motion for Summary Judgment and Notice of Hearing were mailed to Paul Goldman and Alexander B. McMurtrie, Jr., *pro se* Petitioners, 9201 Forest Hill Avenue, Suite 110, Richmond, VA 23235, this 3<sup>rd</sup> day of March, 2000.

A handwritten signature in black ink that reads "Donald R. Ferguson". The signature is written in a cursive style and is positioned above the printed name and title.

Donald R. Ferguson  
Assistant Attorney General

VIRGINIA:

IN THE CIRCUIT COURT OF CITY OF RICHMOND

PAUL GOLDMAN, et al,

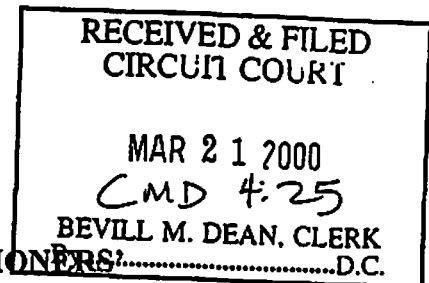
Petitioners,

v.

LAW NO. F-841

WILLIAM E. LANDSIDLE, COMPTROLLER  
COMMONWEALTH OF VIRGINIA

Respondent.



MEMORANDUM IN OPPOSITION TO PETITIONERS'  
MOTION FOR SUMMARY JUDGMENT AND  
IN SUPPORT OF RESPONDENT'S  
CROSS-MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF FACTS

There are no disputed issues of material facts in this matter, and summary judgment is appropriate. Landsidle serves as Comptroller of the Commonwealth, and has held that position at all times relevant to these proceedings. As Comptroller, Landsidle heads the Department of Accounts, and is responsible for the disbursements of funds to members of the General Assembly, the Speaker of the House of Delegates and the Attorney General for the reimbursement of office expenses and supplies.

The reimbursement for office expenses and supplies is paid to members of the General Assembly every month at a fixed rate without regard to whether any office expenses have been incurred or any supplies have been purchased. In order to receive the fixed monthly payment, legislators are not required to submit invoices for office and supply expenditures or provide any vouchers or other documentation setting forth how the fixed monthly sum is spent.

Legislators may use the payment for office expenses and supplies in any manner they wish. Legislators may choose to keep the payment without spending any of it on office expenses or supplies. The payment does not have to be returned to the Commonwealth if it is not spent on office expenses and supplies.

It has been the longstanding policy of the Department to ensure compliance with Internal Revenue Service regulations regarding reimbursement for travel and similar expenses. Under the IRS regulations, payments to individuals labeled "reimbursements" are considered taxable as ordinary income unless such payments are made pursuant to an accountable plan which specifies what documentation is required to show that the payments covered only legitimate expenses of the individual. Under these regulations, the General Assembly is not required to have an accountable plan. However, the result of *not* having a plan is that all payments are taxed as ordinary income. Consistent with these guidelines, the "reimbursements" paid to the General Assembly have been viewed as ordinary income and subjected to withholding taxes.

Section 30-19.14 (Formerly Section 14.1-18.2) of the Code of Virginia provides:

Each member of the General Assembly shall receive as reimbursement for office expenses and supplies such sums as shall be set forth in the general appropriations act.

The language of this provision has been in effect in the above form since 1984. From its enactment in 1976 until 1984, however, § 14.1-18.2 actually set the specific amount of the reimbursement. During this time period, § 14.1-18.2 provided:

Each member of the General Assembly shall receive the sum of two hundred dollars for each month he is a member of that body as reimbursement for office expenses and supplies; provided, however, such office expenses shall not be paid during a regular or special session of the General Assembly or an extension thereof.

In 1982, language was added to the proposed budget to increase the office expense and supply reimbursement from the \$200 then provided for in § 14.1-18.2 to \$250 for each month of each calendar year. Item 1(5)(h), 1982 Acts of Assembly, Ch. 684. As stated in the 1982 budget act:

Notwithstanding the provisions of § 14.1-18.2 of the Code of Virginia, members of the General Assembly shall receive two hundred and fifty dollars for each month of each calendar year as reimbursement for office expenses and supplies.

Since 1982, this amount has been increased three more times. In 1988, the General Assembly raised the figure to \$500 per month. Item 1(8), 1988 Acts of Assembly, Ch. 800. In 1994, the amount was raised to \$750 per month. Item 1A8, 1994 Acts of Assembly, Ch. 966. In 1998, the General Assembly passed an increase raising the amount to \$1,250. Item 1A8, 1998 Acts of Assembly, Ch. 464.

## **II. ARGUMENT**

**A. The "Office Expense Reimbursement" Provided To Members Of The Virginia General Assembly Amounts To A Fixed And Stated Compensation Which Must Be Treated As Salary Within The Meaning Of Article IV, Section 5 Of The Constitution Of Virginia.**

Prior to the enactment of 1998 Acts of Assembly, Chapter 464, members of the General Assembly were paid \$750 a month, or \$9,000 per year, as "reimbursement for office expenses and supplies." See Va. Code § 14.1-18.2; Item 1A8, 1996 Acts of Assembly, Ch. 912. Chapter 464 increased this amount to \$1,250 per month, or \$15,000 per year.

Any payment or remuneration to members of the General Assembly out of public funds, in order to be constitutionally permissible, must be treated either as "salary" or "allowance." No prior decisions of the Virginia Supreme Court have considered whether a sum labeled as a

"reimbursement" by the General Assembly constitutes salary or an allowance. Thus, the issue remains unresolved under state law.

The Virginia Constitution is "the charter by which our people have consented to be governed." Coleman v. Pross, 219 Va. 143, 152, 246 S.E.2d 613, 618 (1978). Therefore, the constitution is the fundamental law in Virginia. The object of constitutional construction is to give effect to the intent of the framers, and of the people in adopting it. "It is settled by very high authority that in placing a construction on a Constitution or any clause or part thereof, a court should look to the history of the times and examine the state of things existing when the Constitution was framed and adopted, in order to ascertain the prior law, the mischief, and the remedy..." Almond v. Day, 197 Va. at 787, 91 S.E.2d at 664.

The question of whether a particular payment constitutes "salary" is not dependant solely on the label chosen by the General Assembly. As the Supreme Court noted in Gilmore v. Landside, 252 Va. at 398-99, 478 S.E.2d at 313, the General Assembly's designation of an item is not "determinative," where that item has some other meaning in a fixed constitutional sense. Accordingly, in reaching its decision whether this "reimbursement" amounts to "salary," the Court should scrutinize carefully the object intended to be accomplished by the payment and the result effected by the appropriation. See, e.g., Scroggie v. Bates, 48 S.E.2d 634,639 (S.C. 1948) ("[W]here money is appropriated by the legislature for the benefit of its own members, it thus becomes the duty of the Court to scrutinize the statute with great care in order to determine whether or not the appropriation is constitutional.").

There are a number of undisputed facts relevant to this inquiry. First, although the monthly payment is labeled a "reimbursement," members receive the same fixed amount every month



regardless of whether any such expenses actually have been incurred and regardless of whether any such supplies have been purchased. The members are not required to invoice their expenditures or provide any vouchers or documentation setting forth how the fixed monthly sum is spent. Furthermore, there is no requirement to return any sums not used for office expenses or supplies. Members can use the money in whatever manner they wish. Petitioners submit that those facts, standing alone, are conclusive and that no further inquiry is necessary. However, there are additional facts and considerations which, when properly noted, lead to the conclusion that the payments are, in fact, *not* reimbursements.

It is also noteworthy that all sums paid are deemed to be "creditable compensation" for purposes of determining benefits payable to members under the Virginia Retirement System. See Va. Code § 51.1-124.3.<sup>1</sup>

It should also be noted that when the Constitution of 1971 was adopted, there was no specific code provision or appropriations act item that authorized payment to members for "office expense and supplies." At most, the practice appears to have been, according to Delegate McMurren, to provide "special allowances from time-to-time."<sup>2</sup> It is especially apparent that such payments, to the extent any were made, were not treated as "creditable compensation" for retirement purposes at least until 1977. The question then, in view of the state of things existing when the Constitution was framed, is whether the framers would have considered this present lump

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<sup>1</sup> It should be emphasized that Section 1.1-124.3 defines as creditable compensation only salary, per diem, and reimbursement for office expenses and supplies. All other compensation and payments made to members for "other expenses (§ 30-19.13), mileage allowances (§ 30-19.15) and the like are not deemed to be creditable compensation.

<sup>2</sup> Proceedings and Debates of the Virginia House of Delegates Pertaining to the Amendment of the Constitution, 51 (Ex. Sess. 1969, Reg. Sess. 1970).

sum, fixed annual \$15,000 payment, which members can use for any reason they wish, which is treated as taxable income, and which applies to enhance their pension benefits, as "salary" or and "allowance."

The Virginia Supreme Court has not had occasion to define the terms "salary" and "allowance" as used in Article IV, Section 5 of the Virginia Constitution. However, prior opinions of the Attorney General have considered the terms. In an opinion to the Honorable John C. Buchanan, Member of the Senate of Virginia, dated June 21, 1972, and virtually contemporaneous with the constitutional change, the Attorney General addressed this constitutional provision as follows:

It should be noted that the constitutional provision in question distinguishes "salary" from "allowances" by providing that "salary and allowances [shall be as] prescribed by law, but no increase in salary shall take effect..." No decisions in Virginia have been found which define "allowance" or contrast it with the term "salary." However, the multitude of decisions in other states dealing with these terms usually contrast the word "allowance" with "salary" on the ground that the former term is variable and uncertain while *the term "salary" involves a stated compensation paid on a fixed basis*. Some decisions in other states have held the terms to be synonymous; however, in light of the phraseology of Article IV § 5, a conclusion that the framers of the Virginia Constitution were using terms which they perceived as synonymous would be impermissible.

1971-72 Op. Va. Att'y Gen. 213 (Italics added). It is noteworthy that the Attorney General's opinion is entirely consistent with Delegate McMurren's view expressed in the Constitutional Debates, i.e., that "allowances" are "special" and occur from "time-to-time." See, supra, note 2.

Using this approach, and in light of the undisputed facts relating to the present day treatment of legislative reimbursement for office expenses and supplies, it is clear that such reimbursements are more in the nature of a salary (stated compensation on a fixed basis) rather than an allowance (a variable and uncertain sum).

Other state courts have employed this analysis to invalidate additional compensation appropriated under the label of expense money. In Rock v. Burris, 564 N.E.2d 1240 (Ill. 1990), the Illinois Supreme Court considered the validity of increased appropriations for state legislators occupying "leadership positions" in the Illinois General Assembly, under state constitutional language virtually identical to the Virginia provision. The plaintiffs contended that the compensation should be considered an allowance, rather than a salary, because it was limited only to those in leadership positions who "necessarily incur greater expenses than do other members." The Illinois Supreme Court rejected this analysis, stating:

The "additional amounts" are merely a lump sum amount that would go into the pockets of individual members regardless of how it would be used. It is not designed to be vouchered or itemized, as required by Section 9 of the State Comptroller Act. There is no attempt, moreover, to justify these "additional amounts" as being designed to cover additional expenses, nor is there a sincere attempt to attest to the genuineness of these added expenses.

564 N.E.2d 1244 (citations omitted).

**B. Federal Regulations Require That The Payments To Members Be Treated As Ordinary Income Or "Salary."**

It is undisputed that the General Assembly has not adopted an accountable plan, as required by Internal Revenue Service regulations. Therefore, the payments must be treated as ordinary income to the members.<sup>3</sup> Thus, both federal and state income taxes are withheld from

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<sup>3</sup> See IRS Regs. § 1.62-2T, which provide, in pertinent part:

**Payments Under Nonaccountable Plans**

If an arrangement does not meet one or more of the requirements of the regulations, *all payments under the arrangement are included in the employee's gross income, are reported as wages on Form W-2, and are wages for purposes of withholding and payment of employment taxes.*

(Italics added.)

all amounts paid to members under this provision. Even if the Commonwealth wanted to treat the payments as reimbursements, it could not do so and be consistent with federal tax regulations.<sup>4</sup> The federal regulations *compel* the Commonwealth to treat the payments as ordinary income, despite whatever label is attached to them by the Comptroller or the General Assembly. Since the payments must be treated as ordinary income, it would be pointless to require the Comptroller to subject the payments to the same administrative and audit procedures as required with expense reimbursements.

**C. The Comptroller Enjoys Broad Discretion Over Matters Concerning Financial Reporting and Financial Controls.**

The Comptroller is given broad discretion under the provisions of §§ 21.-196.1 and 2.1-227 of the Code to establish policies governing internal controls over all expenditures. Specifically, § 2.1-196.1 authorizes the Comptroller to establish an "efficient system of checks and balances," and a system of accounting for all agencies and departments of the Commonwealth "suitable to their respective needs."

Section 2.1-227 directs the Comptroller satisfy himself "as to the regularity, legality and correctness" of any disbursed amounts. As a financial officer of the Commonwealth, the Comptroller must assure that all disbursements comply with federal regulations. Therefore, since the General Assembly has elected not to adopt an accountable plan pursuant to IRS Reg. 1.62-2T, the Comptroller must treat the payments as ordinary income (salary) rather than expense reimbursements. In this regard, the Comptroller has satisfied himself that the payments are correctly treated under applicable state and federal law. See Southern Spring Bed. Co. v. SCC, 205

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<sup>4</sup> This practice has been long known by the General Assembly, which has taken no steps to override the same. Therefore, the legislature has acquiesced to the policy.

Va. 272, 275, 136 S.E.2d 900, 902 (1964) (construction given to a statute by public official administering it entitled to great weight, and in doubtful cases, regarded as decisive).

### III. CONCLUSION

The reimbursement for office expenses and supplies are treated as ordinary income or salary to the members. Members are required to pay withholding taxes on this income, and the income is not in the nature of an expense reimbursement. The Comptroller should not be forced to subject members to administrative and audit procedures as a mere exercise of formality. The General Assembly has been well aware of the policies of the Comptroller and has not taken action to change them. Therefore, summary judgment is appropriate in favor of the Comptroller and the Petition should be dismissed.

WILLIAM E. LANDSIDLE, COMPTROLLER  
COMMONWEALTH OF VIRGINIA

By: Donald R. Ferguson  
Counsel

Mark Earley  
Attorney General of Virginia

Michael K. Jackson  
Senior Assistant Attorney General

Donald R. Ferguson  
Assistant Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
804/786-5889 (telephone)  
804/786-9136 (facsimile)

**CERTIFICATE OF SERVICE**

I certify that true copies of the foregoing Memorandum In Opposition To Petitioners' Motion For Summary Judgment And In Support Of Respondent's Cross-Motion for Summary Judgment were mailed to Paul Goldman and Alexander B. McMurtrie, Jr., *pro se* Petitioners, 9201 Forest Hill Avenue, Suite 110, Richmond, VA 23235, this 21<sup>st</sup> day of March, 2000.



Donald R. Ferguson  
Assistant Attorney General

**VIRGINIA:**

**IN THE CIRCUIT COURT OF CITY OF RICHMOND**

**PAUL GOLDMAN, et al**

**Petitioners,**

**v.**

**LAW NO. F-841**

**WILLIAM E. LANDSIDLE, COMPTROLLER  
OF THE COMMONWEALTH OF VIRGINIA,**

**Respondent.**

**ORDER**

THIS MATTER came to be heard on the Court's regular calendar on March 28, 2000, the Honorable Melvin Hughes, presiding.

Upon the parties' cross motions for summary judgment, consideration of the arguments presented by respective counsel, and upon review of the Amended Petition for Writ of Mandamus ("the Amended Petition") and Answer thereto, and supporting memoranda filed herein, the Court, being mindful of the doctrine of separation of powers, finds that it has no jurisdiction to enter an order granting the relief requested by the Amended Petition and further finds that Respondent has not abused his discretion granted under state law.

WHEREFORE, it is hereby ORDERED that Petitioners' Motion for Summary Judgment is DENIED and the Amended Petition is hereby DISMISSED. Respondent's Motion for Summary Judgment is GRANTED, and Summary Judgment is hereby GRANTED William E. Landside, Comptroller of the Commonwealth.

The Clerk of Court is directed to send a copy of this Order to each counsel of record.

*Plaintiffs' exceptions are noted*

ENTER: 5/12/00

By: 

Judge

We ask for this:



Donald R. Ferguson  
Assistant Attorney General  
900 East Main Street  
Richmond, VA 23219  
804/786-5889  
804/786-0781 (fax)

Seen [and objected to for reasons stated  
in papers filed herein and at oral argument]:

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DRF\DOA\Goldman Final Order



## **ASSIGNMENTS OF ERROR**

- I. The Circuit Court erred in holding that it had no jurisdiction to issue a writ of mandamus directing the Comptroller to adhere to the requirements of Code of Virginia §2.1-20.5.
  
- II. The Circuit Court erred in determining that a writ of mandamus would not issue because the Comptroller had not abused his discretion.