

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 8th day of December, 2022.

In Re: Buta Biberaj, Loudoun County
Commonwealth's Attorney, Petitioner

Record No. 220343

Upon a Petition for Writs of Mandamus and Prohibition

Buta Biberaj, the Commonwealth's Attorney for Loudoun County, petitions for writs of mandamus and prohibition directing Judge James Plowman, Jr., and the Loudoun County Circuit Court (collectively, "the respondents") to annul Judge Plowman's order that disqualified Biberaj and the Loudoun County Commonwealth's Attorney's Office from representing the Commonwealth in the prosecution of Kevin Valle ("disqualification order"). For the following reasons, we grant the petition in part and dismiss the petition in part, and order that the disqualification be annulled.

Following several burglaries, Valle incurred numerous charges in multiple counties. In Loudoun, Valle was charged with three counts of burglary, three counts of misdemeanor destruction of property, falsely identifying himself to law enforcement, receiving a stolen firearm, and conspiracy. In August 2021, Valle accepted a plea agreement under which he would plead guilty to several charges.

Valle, his counsel, and Deputy Commonwealth's Attorney Michele Burton executed the plea agreement in late December 2021 and, several days later, the parties filed the agreement and a supporting statement of facts ("SOF") with the circuit court. Judge Plowman presided at Valle's January 2022 plea hearing, and Senior Assistant Commonwealth's Attorney Shara Krogh

appeared for the Commonwealth. After accepting Valle's guilty pleas and finding him guilty, Judge Plowman questioned Krogh on several portions of the SOF that he suggested were incomplete or misleading. Judge Plowman stated the answers to his questions would have "some impact" on whether he accepted the plea agreement and commented that Burton may have to supply those answers because it appeared she drafted the SOF. Ultimately, Judge Plowman deferred accepting the plea agreement so the parties could address his concerns at Valle's sentencing hearing.

At the sentencing hearing, Deputy Commonwealth's Attorney Barry Zweig appeared in Burton's stead. Referencing a memorandum Burton prepared, Zweig attempted to address Judge Plowman's concerns regarding the SOF and plea agreement. However, Judge Plowman remained unconvinced, and he continued the matter to late May "to further consider whether the plea [was] going to be accepted or some other action [was] going to be taken." Judge Plowman added that Burton could "file anything" she wanted in support of the plea agreement, but said he was "not asking or compelling" her to do so. Subsequently, the case was continued to June 14 because Valle's counsel was ill.

On June 9, Judge Plowman entered the disqualification order without notice to Biberaj or her subordinates. In relevant part, the order characterized portions of the SOF and Burton's defense of the plea agreement as misleading and inaccurate and stated that Judge Plowman could "only conclude" the Commonwealth either negotiated the plea agreement without a "full review of the facts" and "due diligence" or was intentionally misleading the court and the public to "sell" the plea agreement for "some reason that has yet to be explained." In either event, Judge Plowman determined that the SOF and Burton's response to his concerns demonstrated Biberaj's

office could not prosecute Valle “with the detail and attention required of a criminal prosecutor and consistent with professional standards and obligations of a prosecutor.” Accordingly, citing *In re: Moseley*, 273 Va. 688 (2007), Judge Plowman “elect[ed] to exercise [his] inherent authority” to “remove[] and disqualif[y]” Biberaj and her entire office “from further prosecution as counsel of record” in Valle’s case. Judge Plowman rejected the plea agreement, recused himself from further proceedings in the case, and appointed the Commonwealth’s Attorney for Fauquier County to proceed with prosecuting Valle.¹

Biberaj filed her petition in this Court on June 14, five days after Judge Plowman entered the disqualification order. At approximately the same time, Biberaj’s petition was delivered to the offices of Judge Plowman and Judge Douglas Fleming, Jr., the Chief Judge of the Loudoun County Circuit Court.² The respondents move to dismiss the petition on several grounds.

As an initial matter, we reject the respondents’ contention that dismissal is appropriate because Biberaj violated Code § 8.01-644’s command that she file her petition after the respondents had “been served with a copy of the petition and notice of the intended application a reasonable time before such application [wa]s made.” Even if Biberaj did not provide the respondents with adequate pre-filing warning, Code § 8.01-644 does not mandate dismissal, nor have the respondents identified any circumstance indicating dismissal is a proper remedy. *See Rickman v. Commonwealth*, 294 Va. 531, 536-38 (2017) (explaining the difference between a mandatory statute and a directory statute).

¹ Although Biberaj moved for reconsideration of the disqualification order, the circuit court, Judge James Fisher presiding, denied the motion, reasoning that Biberaj is no longer “counsel of record” or “authorized to represent the Commonwealth” in Valle’s case.

² Judge Plowman and Chief Judge Fleming filed acceptances of service with this Court.

However, we agree prohibition does not lie to contest the disqualification order. Prohibition is an extraordinary remedy that issues from a superior court to an inferior one to prevent the latter from acting on matters over which it lacks jurisdiction. *In re: Vauter*, 292 Va. 761, 768 (2016). Here, the respondents have jurisdiction to adjudicate criminal proceedings such as Valle's and, in some circumstances, to regulate which attorneys may appear in those proceedings on the Commonwealth's behalf. *See, e.g., Judicial Inquiry & Rev. Comm'n v. Peatross*, 269 Va. 428, 439 (2005). Accordingly, prohibition cannot test Judge Plowman's conclusion that such circumstances justified the disqualification of Biberaj's office. *See Grief v. Kegley*, 115 Va. 552, 557 (1913) (explaining prohibition is not appropriate "[i]f the court or judge has jurisdiction to enter any order in the proceeding sought to be prohibited"); *see also In re: Hannett*, 270 Va. 223, 238 (2005); *In re: Morrissey*, 246 Va. 333, 334 (1993).

Turning to mandamus, we also agree with Judge Plowman that the petition should be dismissed as to him because he has recused himself from presiding over Valle's prosecution and cannot take the action Biberaj seeks to compel. *See* Rule 3A:8(c)(5) ("Upon rejecting a plea agreement, a judge must immediately recuse himself from any further proceedings on the same matter unless the parties agree otherwise."); *Board of Supervisors v. Combs*, 160 Va. 487, 493 (1933) ("[T]o warrant the issuance of the writ it must appear that it is within the power of the [respondent], as well as his duty, to do the act in question."). Nevertheless, as against the Loudoun County Circuit Court, Biberaj is entitled to a writ of mandamus because Judge Plowman disqualified Biberaj's office without affording her or her subordinates adequate notice or opportunity to be heard.

First, mandamus is available to resolve whether Judge Plowman failed to provide Biberaj with sufficient process before he divested her of her constitutional authority to prosecute Valle. *See In re: Hannett*, 270 Va. at 232-33; *In re: Morrissey*, 246 Va. at 333-34; *see also Davis v. Sexton*, 211 Va. 410, 411-13 (1970); James L. High, *A Treatise on Extraordinary Legal Remedies* § 220, at 222 (3d ed. 1896). Additionally, Biberaj was entitled to notice and an opportunity to respond before Judge Plowman publicly relieved her of that authority based on the conclusion that the plea agreement, the supporting SOF, and Burton's defense thereof amounted to professional neglect, ineptitude, or malfeasance that infected Biberaj's whole office. *See In re: Moseley*, 273 Va. at 699; *Judicial Inquiry & Rev. Comm'n v. Elliott*, 272 Va. 97, 114 (2006); *Peatross*, 269 Va. at 447-48; *Norfolk & Portsmouth Bar Ass'n v. Drewry*, 161 Va. 833, 836-38 (1934); *Fugate v. Weston*, 156 Va. 107, 113 (1931).

Finally, we disagree with the assertion that, by giving Burton and other members of Biberaj's office repeated chances to defend the SOF, Judge Plowman provided all the process that was due. Although Judge Plowman made statements that he believed the SOF was misleading or incomplete, he never notified Burton or anyone in Biberaj's office that he was contemplating finding that anyone in that office had committed professional misconduct or was unfit to continue prosecuting Valle's case. Further, Judge Plowman never provided notice that he might discipline Biberaj or her subordinates, whether by disqualification or otherwise, based on such findings.³ *See Peatross*, 269 Va. at 447.

Accordingly, the petition is dismissed to the extent it seeks a writ of prohibition and to the extent it seeks a writ of mandamus against Judge Plowman. Biberaj is granted a writ of

³ In reaching this conclusion, we offer no opinion on any other issue relevant to the disqualification of Biberaj and her office.

mandamus directing the Loudoun County Circuit Court to annul the disqualification order to the extent it removes Biberaj and her office from representing the Commonwealth in Valle's prosecution and appoints the Commonwealth's Attorney for Fauquier County. *See In re: Morrissey*, 246 Va. at 334.

A Copy,

Teste:

By:

Muriel-Theresa Pitney, Clerk

A handwritten signature in black ink, appearing to read 'M. Pitney', with a stylized flourish at the end.

Deputy Clerk