INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

James Marino, Former Mayor,
City of Clarksburg, West Virginia,
Respondent Below, Petitioner

v.

No. 24-ICA-487

West Virginia Ethics Commission,
Respondent.

PETITIONER'S
PETITION FOR APPEAL

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CERTIFICATE OF SERVICE

I, Edmund J. Rollo, counsel for Petitioner James Marino, do hereby certify that on the 7th day of February, 2025, I have served a copy of the foregoing PETITION FOR APPEAL by e-filing same.

/s/Edmund J. Rollo
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I. ASSIGNMENTS OF ERROR AND RULING OF THE WEST VIRGINIA ETHICS COMMISSION

A. **First Assignment of Error:** The West Virginia Ethics Commission erred and abused its discretion when it found that Mr. Marino acted unlawfully and unethically when Mr. Marino acted at all times consistent with advice he received from counsel, as more particularly set forth in the West Virginia Ethics Commission's *Final Decision and Order* entered November 7, 2024.

B. **Second Assignment of Error**: The West Virginia Ethics Commission erred and abused its discretion when it found that Mr. Marino acted unlawfully and unethically by voting to put certain Charter Amendments on the ballot for the Citizens of Clarksburg to vote upon when said Charter Amendments, if approved by the Citizens of Clarksburg, would have extended Mr. Marino's term of office by one year, as more particularly set forth in the West Virginia Ethics Commission's *Final Decision and Order* entered November 7, 2024.

II STATEMENT OF THE CASE

The facts in this matter are generally not in dispute. In June, 2019, Mr. Marino was elected to the City Council of Clarksburg, West Virginia for a four-year term commencing on July 1, 2019, and ending on June 30, 2023. [429][1] As part of the City Council, Mr. Marino was the Clarksburg mayor. Clarksburg's election day was always on the first Tuesday in June in odd-numbered years. [431] After the June, 2019, election, the City Council sought to change its election day to coincide with West Virginia's primary election day (the second Tuesday in May in even-numbered years) in order to improve voter turnout. [431]

To change its election day, the City had to amend its City Charter. [432] In order to

[1] At Page 3 of the *Final Decision and Order* entered November 7, 2024, the West Virginia Ethics Commission stated that it was "adopt[ing] the Hearing Examiner's 'Findings of Fact and Conclusions of Law,' in his Recommended Decision, which is attached hereto and incorporated herein by reference." All brackets reference the Bates Number of the Hearing Examiner's "Findings of Fact and Conclusions of Law." For simplicity, the letters "D.R." have been omitted.

amend the City Charter, the City Council first needed to pass an ordinance proposing the City Charter Amendment. [432] If this ordinance passed City Council, the proposed City Charter Amendment would then be placed on the next municipal election ballot for approval by the voters. [432]

On January 2, 2020, the City Council passed an ordinance amending the Charter, subject to the approval of the voters, to change Clarksburg's election date to coincide with West Virginia's primary election day. [433] The proposed election day change did not extend any terms of the current City Council members.

On February 20, 2020, the City Council voted to place this ordinance on the June 1, 2021, General Election ballot for the voters of Clarksburg to vote on.

Unfortunately, this ordinance was flawed because it failed to reconcile the current City Council members' terms of office with the proposal to hold the first even-numbered year election in 2022 with the next one in 2024 (again, all of which was to be done to change the Clarksburg election day with West Virginia's primary election day). [435] In other words, the proposed Charter Amendment – if passed by the voters – would have unwittingly caused four vacancies to occur on City Council between generally June, 2023 and June, 2024. [435]

In January, 2021, the City Council addressed the fact that the ordinance needed to reconcile the City Council members' terms of office with the change from odd to even year election so that there would be no vacancies. [436]

On advice from the City Attorney and the City Manager, a proposed ordinance was drafted which created two sets of five-year terms of office for the City Council members which provided, in pertinent part, that the three City Council members who were elected in June 2019

(including Mr. Marino) would have their terms extended by one year, ending on June 30, 2024, instead of June 20, 2023. [437] This proposed ordinance would serve to make certain that there were no vacancies. Of course, this related Charter Amendment would first need to be placed on the Clarksburg ballot and be ratified by the voters to effectuate this change.

On January 21, 2021, the City Council had the first reading of this ordinance. [439] Although Mr. Marino voted against this ordinance, the City Council voted in favor of adopting this ordinance. [439]

On February 4, 2021, the City Council had the second reading of this ordinance. [439] Although Mr. Marino was absent from this meeting, the City Council voted in favor of adopting this ordinance. [440]

On April 1, 2021, the City Council voted to place this ordinance on the June 1, 2021, General Election ballot on the City of Clarksburg's election day. Mr. Marino voted in favor of placing on the ballot the ordinance on the General Election ballot for the voters to decide. [441]

As a result, this ordinance, which would serve to Amend the City Charter, was placed on the June 2021 General Election ballot. [442] The General Election occurred on June 1, 2021, and was passed by the voters. [443] By adopting the Charter Amendment, the three City Council members who were elected in June 2019 (including Mr. Marino) would have their terms extended by one year, ending on June 30, 2024, instead of June 20, 2023. [444]

At some point after the June 1, 2021, General Election, the City Council determined that there were defects in this Charter Amendment. [445] Thereafter, in 2023, the City Council proposed an additional ordinance which ended the terms of these three City Council members (including Mr. Marino) on June 30, 2023 – the original expiration date for their terms of office

that began on July 1, 2019, and placed these three seats on the June 6, 2023 election ballot. [445] This ordinance called for the voters to elect three persons to serve one-year terms from July 1, 2023, to June 30, 2024. [445]. This ordinance served to maintain the Clarksburg General Election Day with West Virginia's Primary Election Day, but effectively rescinded the one-year extension for the three City Council members who were elected in June 2019 (including Mr. Marino). [446]

On February 2, 2023, the City Council had the first reading of this ordinance, which served to amend the City Charter to effectuate the changed discussed in the preceding paragraph. [447] The City Council voted in favor of this ordinance, although Mr. Marino voted against this ordinance. [447]

Also on February 2, 2023, the City Council had the first reading of an ordinance that served to amend the City Charter to hold an election for one-year terms of three City Council members for the reasons discussed above. [448] The City Council voted in favor of this ordinance, although Mr. Marino voted against this ordinance. [448]

On February 16, 2023, the City Council had the second and final reading of the ordinance to amend the Charter to end the terms of the three City Council members elected in 2019 (including Mr. Marino) on June 30, 2023. Again, the City Council voted in favor of this ordinance, although Mr. Marino voted against this ordinance. [449]

Also on February 16, 2023, the City Council had the second and final reading on the ordinance to amend the Charter in order to hold an election for the one-year terms discussed above. [450] Again, the City Council voted in favor of this ordinance, although Mr. Marino voted against this ordinance. [450]

Both ordinances were placed on the ballot for the City of Clarksburg's June 6, 2023, Election Day and the voters approved both ordinances, thereby amending the City Charter. [451-452]

The Hearing Examiner's "Findings of Fact and Conclusions of Law" provides, in pertinent part:

11. On advice from the City Manager and City Attorney, a proposed ordinance was drafted. The proposed ordinance ("Direct Election of Mayor and Extension of Terms Ordinance) created two sets of five-year terms of office for City Council members as follows:

- Those City Council members who were first elected in June 2019 would have their terms extended by one year, ending on June 30, 2019 would have their terms extended by one year, ending on June 30, 2023.
- The four City Council members to be elected in the upcoming June 2021 election would serve five-year terms, that would end on June 20, 2026. Then, in may 2026, one City Council position would be eliminated and the voters would directly elect the mayor at the 2026 election. Hence, there could be six City Council members and an elected mayor starting July 1, 2026. [430-431]

. . .

30. The witnesses testified at the public hearing that the City Attorney, Richard Marsh, and former Mayor, Ryan Kennedy, initially drafted and proposed the City Charter and ordinance changes that the City Council considered and passed in 2021. . . . [436]

31. As it relates to alleged violations occurring in 2023, it is clear that Respondent Marino and the remainder of City Council discussed potential violations under the Act. Mr.

Marsh testified that by 2023, he and City Council were aware of a complaint to or investigation by the Commission regarding the participation of Respondent Marino and two other City Council members in the votes relating to the extension of their terms. Mr. Marsh indicated that he disagreed with the allegation by voting on the Ordinances, Respondent Marino and others had violated the Act. He asserted that Respondent Marino did not experience a "gain" until the public voted on the issue. He testified that he advised Respondent Marino and others to vote on the Ordinances in 2023 — despite the pending complaint or investigation pursuant to the Act. He further acknowledged that he understood the nature of the complaint and still told Respondent Marino and others to pass the Ordinance. Indeed, at that time, Mr. Marsh was defending the ethics complaint against Mr. Marino. [436-437]

32. Mr. Marsh candidly stated that in 2021, he did not know that there could be a violation arising from the Act if Respondent Marino voted on the Ordinance. However, with charges filed in 2022, he urged Respondent Marino and others to move forward with the vote. He suggested that this advice was based, at least in part, on the desire to ensure that sufficient number of City Council members were available to vote to support the Ordinance. In other words, there were political concerns that the Ordinance might not pass without the votes of Respondent Marino and others. Thus, Mr. Marsh advised Respondent Marino and others to move forward, and vote on the Ordinance and then to defend the charges under the Act. [437]

33. Mr. Marsh noted that between the First and Second Reading of the Ordinance in 2024, he discussed this matter with an attorney for the Ethics Commission. At that time, the issue of recusal by Respondent Marino was discussed. At or about that time, Mr. Marsh discussed the possibility of recusal with Respondent Marino (who was also meeting with Mr.

Marsh, ostensibly on behalf of Respondent Junkins). Mr. Marsh indicated that voting on the Ordinances might create additional issues under the Ethics Act for Respondent Marino and Respondent Junkins. Mr. Marsh continued to believe that the charges under the Act were defensible. He further advised them to vote "yes" on the 2023 Amendments and that they would move forward to defend the charges under the Act. Thereafter, Respondent Marino and Respondent Junkins voted "yes" on the issue. [437-438]

34. At no time did Mr. Marsh advise Respondent not to vote on the matters at issue herein. [438]

. . .

36. Ultimately, the City of Clarksburg abandoned the idea of extending the terms of any of the three City Council members elected to four-year terms in 2019 by passing measures to allow the citizens to vote on who should fill the one-year slots at the June 2023 election. . . .

The Hearing Examiner stated that both Mr. Marino and Ms. Junkins did not testify. Both Mr. Marino and Ms. Junkins were *pro se* and represented themselves at the hearing before the Hearing Examiner. Both Mr. Marino and Ms. Junkins gave opening statements which set forth their positions (both are set forth below). Further, their cross-examinations of witnesses – done in their own unique ways – were sufficient to express their positions and evidence. While it is true that neither specifically "testified," it is unfair to suggest that they did not sufficiently present their positions and evidence. Their opening statements were as follows:

> Ms. Junkins: I do not dispute the underlying facts in this case. In fact everything that occurred is a matter of public record and was done openly in a public meeting. My intentions concerning this matter were purely to put power back into the hands of the people of Clarksburg.

I ran for the office of city council because for decades Clarksburg has been riddled with corruption and driven by a machine of individuals who didn't care about what was best for the citizens but instead what was best for them as individuals. I believed that fundamental changes could occur that may curb the actions of these individuals. And that was the main purpose of the charter changes that we are here about today.

After being elected to council myself and other council members expressed our desire to change and relied --- the desire for change. And we relied upon professionals and full-time employees of the city to draft and determine how those changes would be put into motion. At no time did any of those professionals, the city attorney, the city manager nor the city clerk ever advise us that we were in violation of any law or acting unethically.

Throughout my term as a public servant I took my ethical responsibilities extremely seriously and would never have knowingly done anything to prove to be unethical, illegal or dishonest in any way. The entire reason I was there was to try to put an end to these types of politics in our small city. I at no time voted --- I at no time voted to extend any term for myself. In fact, the charter amendments were designed to shorten the amount of time politicians sat on council. They also were meant to put power in the people's hands by offering them an option of initiative, referendum and recall if a council member did something egregious. We intended to align the city election with the county, state and federal elections to encourage more people in our city to have a voice and improve voter turnout. I wholeheartedly believe the purpose of the charter changes were to empower the citizens of Clarksburg. I followed the lead of the people who I had faith in. I believe I acted professionally and with integrity while maintaining full transparency in every end action I took.

Again, at no time did anyone ever advise me that the process we were given to try to enact positive change in our community and to empower the citizens of Clarksburg was unethical or illegal in any way.

. . .

Mr. Marino: I won't repeat everything that Lillie said, but we ran for changes and the change that we made, if you look at the totality of the charter changes, we had five charter changes. One was term limits, which you know is not beneficial to the politician because you could be in there — we had politicians be in there for 27- plus years. We tried to change the mindset of the voters and to prevent this from happening again. We weren't looking

for our own interests. We were looking for the interests of the people. The term limits was one. The second was initiative, referendum, and recall.

We had an issue where an elected official did some unsavory stuff, but it wasn't to the criminal effect where they could take that politician out. We gave the power back to the people. So if they get a percentage of the voters, and I believe it was 20 percent, that they can recall a politician, even though it wasn't an illegal act. So we wanted to give the power back to the people. By no means when we were looking at doing these things, these charter changes, because the charter is the roadmap. It's like the constitution of the United States. The charter that the city has is — is our roadmap to make — to go by. We tried to follow and make a road map that was beneficial to everyone.

At no time — and quite the contrary. Our legal advice said we were doing the right thing. We were never told that we could not vote on any of these issues. We were told that we had a legal — we could do these. And that's why we did we. We — listened to the advice of the professionals. You know, we have a city attorney that is paid well, we have a city manager that's paid well, we have a city clerk that's paid well. And at no time during the — when we were putting those charter changes together were we ever told that we could not vote on this. And we relied upon legal advice to do the right thing.

You know, all we basically were doing was trying to give — we want to have the elections coincide with the national, the state ticket, the county ticket to — for bigger voter turnout. We were getting 15 percent turnout. We felt if went with the county, more voters, a bigger pool of voters to make the system work better. That was our only intention. It was not to extend our term. Matter of fact, we did not have — and once we said we want the election to go with the county, we had no further involvement. We had no discussion with the city attorney, no input on how we're going to come to that. The city attorney, the city manager, drafted up the charter change. And that's what we went by upon the legal advice. And we did not want to --- we did not want to — we did not actually vote to extend our --- at no time did we vote to extend our terms. We voted to put an ordinance to put it on the ballot to let the people vote on that — on it, not for us council to vote on it. The people voted on it. We never actually took a physical vote that extended our terms. It was decided on a charter change that the people voted on.

Hearing Ex.: Let me — I want to make sure I understand that. That there was essentially an internal vote by the city council to place something on the

ballet for the public to vote on.

Is that correct?

Mr. Marino: Correct.

Hearing Ex.: Would you agree or disagree that part of what you voted on as the city council could lead to the extension of those terms for a year so that you evened up on the even year? That was part of the impact of the first vote that the public got to vote on. Do I have that wrong or right?

Mr. Marino: Right. I mean, ultimately, you know, we did. But to be honest with you, we were relying on the attorney to draft the language. We didn't — I had absolutely zero — myself and Lillie had zero input how we were to get there. I didn't know how to get there. I relied on the attorney, city manager, the paid people who were getting paid to do this. It was their job to get us to that point. Matter of fact, what we did has spurred to other municipalities, smaller municipalities in our area, to want to do the same thing, to want to go on this ticket to where you get more voter turn— if you're voting for president or —.

[71-77]

Witness Annette Wright testified. She had been the City Clerk for 28 years. [79] Ms. Wright never knew or advised Mr. Marino or Ms. Junkins that they were doing anything illegal. [110] It is clear from the full context of Ms. Wright's testimony that she never even considered that either Mr. Marino or Ms. Junkins were acting unethically or unlawfully.

Witness Edward Ryan Kennedy was a practicing attorney who was serving on the City Council at the times pertinent to this matter. [124-125] Mr. Kennedy was involved in the process of trying to effectuate the changes to the Charter Amendment to change the Election Day. [125] Mr. Kennedy was never aware that anything unethical was happening. [125] Mr. Kennedy never advised Mr. Marino or Ms. Junkins that their involvement in the process was unethical. [125] Mr. Kennedy stated that even though he was an attorney, when he was the Mayor of the Clarksburg he "relied upon the city attorney to advise [him] . . . as to what was legal

or illegal for the city." [129]

City Attorney Richard Marsh testified in pertinent part as follows:

Ms. Junkins: Did you ever at any time, Richard, tell myself or Mr. Marino that what we were doing in the process of implementing the charter change, through ordinances or any vote that was taken, that it was unethical or illegal for us to do so?
Mr. Marsh: No.
Ms. Junkins: Okay. Did Mr. Marino or myself have any involvement in the writing of the charter changes and — like, did we lobby you in any way in your drafting of that documentation --
Mr. Marsh: No.
Ms. Junkins: — to extend our terms?
Mr. Marsh: No, you did not.
[142]

Ms. Junkins: What was your stance on [the ethics complaint]
Mr. Marsh: I believe that the private gain, the argument was inappropriate, a I believe that was the answer that we originally filed for you all was, that it was not a private gain for the 2021 amendments at that time, because there was no indication you would gain anything at that time until such time that the charter amendments were actually passed by the public. And I believe that's what we put in your answer to the original complaints. . . .
[143]

Ms. Junkins: During the second vote, the second vote after there were some problems that arose with the charter change, and then this ethical complaint was filed, during the second vote what was your stance on what — did you believe and feel — I don't know if I'm asking this correctly, but that were okay to proceed? Did you feel like that it was something that we could move forward with and did you advise us in that way?

. . .

Mr. Marsh: So when that issue came about, I think I advised all of council to move forward and to pass the ordinance that was being voted upon, the second, the 2023 ordinances. Based upon our work, when I say [or] I mean myself, Mr. Tom Aman, Tim Stranko, an the secretary of state, was the suggestion was made to pass that ordinance and basically clear up the issues that bond counsel was concerned about. . . . And I advised [council] as a whole to vote yes on those amendment — those ordinances that were being passed.

[143-145]

Mr. Marino: Richard, in your time on there, you've said you never once told us not — not only not take a vote to leave the room. You never advised us to do that, did you?

. . .

Mr. Marsh: No, I did not.

Mr. Marino: Okay. And even though you were aware of the ethical violation [ethics charge], did you tell us that you could defend that?

. . .

Mr. Marsh: Yes. . . .

[147]

Mr. Marino: . . . I didn't recall you — you ever telling me to --- not to vote, because the whole time I thought you indicated we did nothing wrong and we cold continue with this, and I will defend you. Was that not your — ?

Mr. Marsh: That absolutely was correct.

[149]

Mr. Marsh: And that's why my advice to council as a whole, including the two of you [Mr. Marino and Ms. Junkins], was to vote yes on the 2023 amendment.

[150]

Mr. Marino: I think it's clear we took the advice of the attorney on all matters as it relates to the charter changes. We weren't involved. You'll agree that Lillie [Ms. Junkins] and I were never involved in any of the specifics of each charter change.

Mr. Marsh: You were not.

[161]

Hearing Ex.: . . . When you were discussing in your capacity with the city council or the city manager around the time of the '21 event, did you have any idea at that point if these folks participated in a vote that could extend their period of time on city council that it could be an ethics violation?

Mr. Marsh: No, I did not.

[164-165]

Mr. Marino and Ms. Junkins were given an opportunity to give closing arguments. They stated:

Ms. Junkins: The only thing that I would say is the facts are of public record. I am a – I'm a teacher. I'm not an attorney, and had no idea that in voting that way

that it would be unethical in any way. If I were advised or did — you know, was aware that, I would not have participated in that vote.

. . .

Mr. Marino: Well, I appreciate the time to come down here and talk with everybody. This has been weighing on Lillie [Ms. Junkins] for quite some time now. Again, she's a teacher, I'm a business owner, and we really gave out time and effort to make the city a better place. It's unfortunate, you know, that this will be our legacy, is that we weren't — we're acting unethical. So I really – it's really disappointing to think that we gave four years of our life to make the city of Clarksburg a better place for the citizens. And not one time did we think we were going to have a personal gain by having another year. Believe me, that really wasn't even a little thought in our minds. We were trying to do what was best for the citizens. And for us to be held ethically — of doing ethically wrongdoing it's just — it's really unfortunate, I think, to have to be put in this position, you know?

But, you know, we appreciate to be able to come down. And hopefully – you know, you review and we'll get everything to you that we need to and take into consideration that we really felt that we didn't act any way unethical. We weren't trying to get personal gain. That's about it.

[174-175]

The hearing transcript as a whole makes clear that at ALL times, Mr. Marino was acting on the direction and advice of counsel, the City Attorney for Clarksburg. The ordinances and Charter Amendments were prepared or reviewed by the City Attorney. The ENTIRE voting process was shepherded by the City of Attorney. The City Attorney was the guiding hand. Yet, despite Mr. Marino's complete reliance upon the advice and direction of the City Attorney, Mr. Marino was found to have violated the West Virginia Governmental Ethics Act, West Virginia Code §§ 6B-2-1 through 6B-3-11 (the "Ethics Act"). It is this finding and resulting sanctions from which Mr. Marino appeals.

Mr. Marino's contention herein is two-fold: First, under the specific circumstances

herein, Mr. Marino's reliance upon the advice and direction of the City Attorney should operate as a complete defense to any finding that Mr. Marino violated the Ethics Act. In other words, Mr. Marino did not act unethically and the West Virginia Ethics Commission was wrong in so finding. Second, Mr. Marino contends that since any extension of his term was only effectuated by a favorable vote by the Citizens of Clarksburg in approving the said Charter Amendments by ballot vote on Election Day, Mr. Marino's City Council votes did *not* extend his term. In other words, Mr. Marino's votes to place the said Charter Amendments on the ballot did not, in and of itself, extend his term. Only the Citizens of Clarksburg, by voting for the Charter Amendments, could extend his term.

III. SUMMARY OF ARGUMENT

Standard of review

West Virginia Code §51-11-4, *Jurisdiction; limitations*, provides in pertinent part:

> (b) Unless specifically provided otherwise in this article, appeals of the following matters shall be made to the Intermediate Court of Appeals, which has appellate jurisdiction over such matters:
>
> . . .
>
> (4) Final judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code;

In *Walker vs. West Virginia Ethics Commission*, 492 S.E.2d 167 (W.Va. 1997), the Court held in pertinent part:

> 1. A reviewing court must evaluate the record of an administrative agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have

reached a different conclusion on the same set of facts.

2. In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral Argument is requested pursuant to the criteria in Rule 18 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. **First Assignment of Error:** The West Virginia Ethics Commission erred and abused its discretion when it found that Mr. Marino acted unlawfully and unethically when Mr. Marino acted at all times consistent with advice he received from counsel, as more particularly set forth in the West Virginia Ethics Commission's *Final Decision and Order* entered November 7, 2024.

I. *Affirmation of the said Final Decision and Order will discourage competent person from public service*

Mr. Marino's primary contention is that he reasonably relied on the advice, direction and counsel from the City Attorney, and that because of this he should not be found to have acted unethically or otherwise in violation of the Ethics Act.

If this Court affirms the Ethics Commission's *Final Decision and Order*, it will strongly discourage competent persons, like Mr. Marino, from seeking or accepting positions in local Government. Imagine being advised, directed and counseled by a City Attorney and after reasonably and sensibly following such advise, direction and counsel, you find yourself charged, adjudicated guilty and sanctioned by the Ethics Commission for acting unethically and violating the Ethics Act.

If this *Final Decision and Order* is simply affirmed, readers will ask themselves: "What else was Mr. Marino supposed to do? Was he suppose to hire his own attorney?" Are public servants like Mr. Marino really supposed to hire their own attorneys? If the City Attorney gave Mr. Marino the wrong advice, how is Mr. Marino to know that without hiring his own attorney? Few people will be willing to serve the public if the answer is: "You need to hire your own attorney." This is unreasonable and inconsistent with the spirit of the Ethics Act statutory scheme.

Indeed, in *Belgarde v. Linn*, 134 P.3d 1082, 205 Or. App. 433 (Or. App. 2006), the Court held:

> We do not believe that local officials should be required to make complex decisions regarding expenditures of public funds without the advice of counsel and at their own risk. Such a requirement would discourage competent individuals from seeking or accepting such positions and would be a detriment to local government."

Obviously, this is not an "expenditure of funds" case, but the spirit of this statement applies. It is without dispute that the statutes within the Ethics Act of which Mr. Marino was adjudicated guilty failed to put Mr. Marino on notice that his votes were violative of these statutes. One cannot read these statutes, examine Mr. Marino's votes, observe that he acted on the advice of the City Attorney, and conclude that he acted unethically. And if that is the case, how is justice served by affirming the Ethics Commission's *Final Decision and Order*?

ii. *In Re Zisa*

The case of *In re Zisa*, 896 A.2d 1111 (N.J. 2006) is very instructive and, while not on all fours with the facts herein, has some common essential elements. As such, it deserves its own section. This case provides in pertinent part:

John F. Zisa appeals from a Final Decision of the Local Finance Board that he had violated N.J.S.A. 40A:9-22.5© and (d) of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 to-.25, and fining him $200. After reviewing the record in light of the contentions advanced on appeal, we reverse.

The City of Hackensack operates under a council/manager form of government. The City Council consists of five members, who are elected at-large, every four years. The Council, by a public vote, selects one of its members to the post of mayor. Zisa was selected as mayor by the members of the Council in 1989 and continued in that position at the time pertinent to this appeal. As a municipal official, Zisa is subject to the provisions of the Local Government Ethics Law.

In Hackensack, the positions of councilman and mayor are part time, and Zisa, in addition to serving as mayor, also maintains an insurance agency. He is also the managing member of Underwood Properties, LLC, a real estate holding company.

A persistent issue confronting Hackensack in its efforts to revitalize and maintain its central business area is the provision of adequate parking. In February 2000, Hackensack contracted to buy property located at 295 State Street for use as a parking lot. The property suffered from environmental contamination, and the contract called for the City to be responsible for remediation, in addition to paying the purchase price of $600,000. In March 2000, the City Council passed Ordinance 5-2000, which authorized the issuance of bonds in an amount sufficient to purchase the property located at 295 State Street, conduct the necessary remediation and convert it into a municipal parking lot. The City took title to the lot in May 2000. Zisa, as the mayor, participated in the discussion and voting on this question. No issue is raised before us as to the propriety of his actions in that regard.

After the City closed on its purchase of 295 State Street, Zisa negotiated the purchase of property located at 295 Main Street. On June 28, 2000, he executed a contract to buy this property. Before taking title, he engaged in negotiations with the Bergen County Special Services School District to lease space to the District in the building at 295 Main Street.

The District required, as a condition of entering such a lease, that it have the use of sixty-five parking spaces. The District did not require that those spaces be in a paved lot but did require that they be in close proximity to 295 Main Street.

Zisa knew that 295 Main Street only had twenty parking spaces available to its tenants. Hackensack had previously adopted an ordinance permitting the City to rent spaces in municipal parking lots to private parties in accordance with a specified fee schedule. On August 22, 2000, Zisa's personal attorney wrote to Hackensack's City Manager and inquired about the possibility of renting forty-five parking slots in the municipal parking lot due to be constructed at 295 State Street. Under the City's ordinance, the fee for such a

rental would be $55 per month per space, and the City agreed to rent forty-five spaces to Zisa in the as-yet unbuilt parking lot at 295 State Street. Zisa received no special consideration or terms in connection with that agreement.

Once Zisa was assured that he would able to provide the necessary parking to the District, he closed on his purchase of the property at 295 Main Street. He also was able to arrange to rent for the District forty-five parking spaces at another nearby unpaved municipal lot until the work necessary to transform the empty lot located at 295 State Street into a paved municipal parking lot was completed. These spaces also rented for $55 per month per space. Zisa and the District executed a five-year lease for 295 Main Street on September 27, 2000.

Again, no issue is raised before us as to the propriety of Zisa's purchase of this building, his rental of the forty-five parking spaces at 295 State Street or his securing of the forty-five temporary spaces.

In the interim, while Zisa was finalizing the details of his purchase and lease of 295 Main Street, the City solicited bids for the paving of 295 State Street. Only one company, F & F Occhipinti Co., Inc., submitted a bid, which was opened on October 23, 2000. Its bid was in the amount of $225,325 and was within budget. It was forwarded to the City Engineer, Kenneth Job, for review, and he recommended the City award the contract to Occhipinti. In a letter to the City Manager, Mr. Job recommended against re-advertising the job, stating it did "not appear likely that the City would obtain a significantly lower price by re-advertising and re-bidding."

The question whether to accept Occhipinti's bid and award it the contract was placed upon the agenda for the Council's regularly scheduled meeting for November 1, 2000. The agenda was circulated one day in advance of the meeting. After reviewing the agenda, Zisa contacted the City Attorney, Richard Salkin, Esq., and inquired whether he had a conflict of interest that would preclude him from voting on whether Occhipinti should be awarded the paving contract. Salkin was aware that Zisa had purchased the property at 295 Main Street and had leased forty-five parking spaces in the lot to be built at 295 State Street for the use of Zisa's tenant in 295 Main Street. Salkin said he would review this statute and consider the matter. Later that day, Salkin called Zisa and told Zisa that, in his opinion, Zisa did not have such a conflict of interest.

Four members of the Council, including Zisa, were present for the November 1, 2000, meeting. The Council, by a vote of four to nothing, adopted a resolution awarding the contract to Occhipinti. Zisa was the last to vote; by the time he cast his vote, the three other members had already voted in favor of the resolution. The Council also passed a series of subsequent resolutions approving progress payments to Occhipinti for its paving work. Zisa participated in these votes as well.

In December 2002, the Local Finance Board received a complaint from Hackensack Taxpayers Association, Inc. that Zisa had violated certain portions of the Local Government Ethics Law through his participation in the City's decision to purchase 295 State Street, his subsequent purchase of 295 Main Street, and his leasing of the forty-five parking spaces in the lot at 295 State Street. The Local Finance Board conducted a preliminary investigation and in July 2003 concluded that Zisa had acted properly when he participated in the City's decision to purchase 295 State Street, when he purchased 295 Main Street and when he leased forty-five parking spaces from the City in the lot at 295 State Street. It also concluded, however, that a sufficient basis existed to warrant authorizing an investigation into Zisa's participation in the vote of November 1, 2000, awarding the paving contract to Occhipinti, in light of the fact that he had leased spaces in the 295 State Street lot for the benefit of his tenants.

Thereafter, in March 2004, the Local Finance Board issued a Notice of Violation, setting forth its determination that Zisa, by voting on the November 1 resolution, violated N.J.S.A. 40A:9-22.5© and (d). Zisa requested that the matter be forwarded to the Office of Administrative Law, which conducted a plenary hearing. The witnesses at this hearing were David Nenno, a staff member of the Local Finance Board who participated in the Board's investigation, Zisa, and Salkin. The administrative law judge issued a written decision affirming the conclusion of the Local Finance Board. After Zisa submitted exceptions to that decision, the Local Finance Board issued a written decision in which it adopted the decision of the administrative law judge as the final agency decision. Zisa's appeal to this court followed.

Before proceeding to a detailed analysis of the issues presented, we acknowledge that this is an appeal from a final decision of an administrative body. The general standard of review governing such appeals is well-known and oft-stated; such a final decision should not be disturbed on appeal unless it is arbitrary, capricious or unreasonable. *Karins v. City of Atlantic City*, 152 N.J. 532, 540, 706 A.2d 706 (1998). An appellate court should undertake a "careful and principled consideration of the agency record and findings." *Riverside Gen. Hosp. v. N.J. Hosp. Rate Setting Comm'n*, 98 N.J. 458, 468, 487 A.2d 714 (1985). The agency's findings should be affirmed if they "could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole . . . with due regard also to the agency's expertise." *Close v. Kordulak Bros.*, 44 N.J. 589, 599, 210 A.2d 753 (1965) (quotation marks and citation omitted).

A different standard is applicable, however, when a court is called upon to review the legal conclusions of an administrative body. In that instance, a reviewing court is not bound by an agency's determination of a legal issue. *Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 513, 606 A.2d 336 (1992); *AC&C Dogs, LLC v. N.J. Dep't of Labor*, 332 N.J.Super. 330, 335, 753 A.2d 737 (App.Div.2000) (noting that the limited scope of judicial review of an administrative decision is "generally confined to review of questions of fact, as opposed to questions of law"). Here, there were no real disputed questions of

fact. The determination that Zisa's actions represented a violation of the Local Government Ethics Law was a legal conclusion by the Board to which no special deference is due by a reviewing court.

By its decision, the Board concluded that Zisa's conduct violated two separate sections of the Local Government Ethics Law. A separate analysis is required for each section at issue.

N.J.S.A. 40A:9-22.5© provides:

> No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others[.]

The administrative law judge, whose opinion the Board adopted, held that Zisa's vote on November 1, 2000, violated this subsection because the expenditure of public funds authorized by the resolution "secured the advantage of improving the parking for the respondent's tenant." There is nothing in the record, however, to show that the District required that its parking spaces be paved. While it is reasonable to conclude that a paved parking lot is better than an unpaved one, there was no advantage to Zisa in having the lot paved for his tenant.

The statute, moreover, bars a municipal official from using his position to secure an "unwarranted" privilege or advantage. An unwarranted privilege or advantage would be one that is unjustified or unauthorized, one that would permit the municipal official to obtain something otherwise not available to the public at large.

Zisa, however, leased the forty-five spaces in the 295 State Street lot on the same terms and conditions available to any member of the public. He did not obtain or seek a lesser rate or preferential terms of payment, nor did he "bump" a member of the public and secure these parking places before a member of the public who was seeking to rent parking space.

From our review of the record, we consider it clear that Zisa obtained nothing as a result of the November 1, 2000, vote that could fairly be characterized as an "unwarranted" privilege or advantage. The determination that Zisa violated N.J.S.A. 40A:9-22.5© is not supported by the record.

We turn now to the Board's determination that Zisa violated subsection (d) of the statute, which provides:

> No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement

that might reasonably be expected to impair his objectivity or independence of judgment[.]

[N.J.S.A. 40A:9-22.5(d).]

The Board adopted the conclusion of the administrative law judge that the nature of Zisa's interest in the outcome of the vote on the November 1, 2000, resolution could "reasonably be expected to impair his objectivity or independence of judgment." In our judgment, based on the record created, this analysis is incorrect. The question on which the council voted on November 1 was whether Occhipinti was qualified and should receive the contract to pave 295 State Street. The entity that had an interest in the outcome of the November 1, 2000, vote was the bidder, Occhipinti, and Zisa had no interest or connection with Occhipinti.

Further, we disagree with the Board's rejection of the defense proffered by Zisa, that he relied upon the advice of counsel. The administrative law judge concluded that it was not reasonable for Zisa to have relied upon the advice of the City Attorney in light of his interest in the development of the parking lot. While we agree with the Board that the advice of counsel is not an absolute defense to a charge of having violated the Local Government Ethics Law, we also agree with Zisa that he was entitled to the protection of that defense in the context of this case.

The administrative law judge concluded that it was not reasonable for Zisa to have relied upon the advice given to him by Salkin. He gave no reasons, however, to support that conclusion. The Board, in adopting the decision of the administrative law judge, also concluded that Zisa was not reasonable in relying upon Salkin's advice that he did not have a conflict of interest that precluded him from voting on the resolution to award the paving contract to Occhipinti. In support of its conclusion, the Board cited the following three factors: that the minutes of the November 1 meeting did not contain any notation that Salkin had advised Zisa he could vote; that Salkin had not provided a written opinion on the question; and that Zisa is an "experienced and astute public official."

We are satisfied that these factors, either singly or in combination, are not sufficient to defeat the defense of advice of counsel. As to the first, we are uncertain of its relevance in the context of this case. Neither the administrative law judge nor the Board expressed any doubt that Zisa had in fact asked Salkin for his advice on the issue, nor did they view the testimony of either man as lacking credibility in any way.

As to the second, there was no evidence that the usual practice among municipal attorneys would be to provide a written opinion in response to such a query. There is also no indication of a dispute about the advice that was given. Absent either of those two factors, we do not perceive support for the conclusion that Zisa was not entitled to rely upon Salkin's advice because it was given orally, as opposed to in writing.

We also do not perceive the significance of Zisa being an experienced public official in the context of this case. The administrative law judge noted that he considered it significant that Zisa "evidenced sensitivity to the issue of a potential conflict" of interest but did not explain why, having been sensitive to the question and sought legal advice, Zisa was not entitled to rely upon the advice that he received.

We consider instructive the approach adopted in *In re Howard*, 93 N.J.A.R.2d (Vol.5A) 1 (Executive Comm'n on Ethical Standards), aff'd as modified, 94 N.J.A.R.2d (Vol.5A) 1 (App.Div.1994). The respondent in that matter, who was employed in the Department of Corrections, was charged with violating subsections (6) and (7) of the code of ethics for state employees, N.J.S.A. 52:13D-23(e), for accepting a round trip private jet flight from New Jersey to Florida, together with ground transportation, to view the manufacturing facilities of a company holding a contract with the Department. Howard, supra, 93 N.J.A.R.2d at 1-2. The respondent asserted in defense that she had received prior approval to accept the contractor's offer from an individual who was both a legal advisor to the Commissioner of Corrections and a member of the department's Ethics Committee. Id. at 3, 7, 14.

The Executive Commission on Ethical Standards rejected that defense, finding there were four prerequisites to the defense and that respondent failed to meet all of them. Id. at 14. The four prerequisites were:

1. That the approval or advice was received prior to the action being taken. Ibid. Here, Zisa sought and received legal advice before casting his vote.

2. That the individual who offered the advice or approval relied upon possessed authority or responsibility with regard to ethical issues. Ibid. Here, Salkin, as the City Attorney, had a responsibility to render advice with regard to the Local Government Ethics Law.

3. That the individual seeking advice or approval made a full disclosure of all pertinent facts and circumstances. Ibid. Here, Salkin was fully cognizant of the details of Zisa's involvement with 295 Main Street and his leasing of parking spaces in 295 State Street.

4. That the individual comply with the advice received, including any restrictions it might contain. Ibid. Here, Salkin's advice contained no limiting restrictions.

In Howard, it was the respondent's failure to meet the third condition that led the Commission to conclude that she violated the code of ethics despite having received prior approval. Id. at 14-15. It noted, in particular, that respondent had failed to disclose all the details of the trip, failed to disclose that the contractor had an interest in expanding its

> business with the Department and that respondent would play a role in deciding whether the contractor would be successful in that regard, and failed to disclose that she had been earlier advised by another member of the Department's Ethics Committee that a similar trip to Michigan could not be approved. Ibid. Here, as we have noted, Zisa withheld nothing from Salkin.
>
> Zisa having met all the conditions to warrant the defense of advice of counsel, and the record containing nothing to support a determination that it was unreasonable to rely upon the advice, we reverse the decision of the Board that Zisa violated the Local Government Ethics Law.
>
> Reversed.

Respectfully, this Court should adopt the reasoning and analysis of *In Re Zisa* and reverse the Ethics Committee's *Final Decision and Order*.

iii. ***Mr. Marino reasonably relied upon advice of counsel***

In the next "Assignment of Error" section, Mr. Marino will argue that his votes did not violate the Ethics Act. But assuming *arguendo* that Mr. Marino violated the Governmental Ethics Act, his reliance on the City Attorney's advice, direction and counsel is an affirmative defense to any finding of any such violation. The law from State and Federal Courts around the country on this is abundantly clear and includes the following:

In *Harki v. VDOC*, Case No.: CL20-2363 (Va. Cir. Apr 15, 2020), the plaintiff filed suit against the defendant claiming that the defendant failed to timely respond to the plaintiff's FOIA request. In *Harki*, the Court held in pertinent part:

> **Courts have declined to extend civil penalties even when a public body violated FOIA when it was determined that the public body "act[ed] in good faith with the advice of counsel," holding that reliance on the erroneous advice of council demonstrated a lack of a "knowing and willful violation."** *Nageotte v. Bd. of Sup'rs of King George County*, 223 Va. 259, 269, 288 S.E.2d 423, 428 (1982). **A plaintiff must demonstrate that more than the. "letter of the law" was violated - he must show that the "spirit or the substance" of the law was violated**. *Shenandoah Pub. House, Inc. v. The Winchester City Council*, 37 Va. Cir. 149, 1995 WL 1055895, at *4 (1995).

(Emphasis added.)

In *Bd. of Selectmen of Town of Hull v. Healey*, Docket: Civil Action No. 15-00161 (Mass. Super. Dec 14, 2017), the plaintiff public body and town manager sought review of the decision made by defendant Attorney General that the plaintiff public body and town manager violated Massachusetts' Opening Meeting Law. In finding in favor of the plaintiff public body, the Court stated at Footnote No. 1:

> The Attorney General added that "[We] do not find this violation was intentional, and we acknowledge that the Board was acting on advice of counsel at the time." AR 36. (g); see also G. L. c. 30A, §23(g) ("**It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel**").

(Emphasis added.)

In *Belgarde v. Linn*, 134 P.3d 1082 (Or. App. 2006), the plaintiff taxpayer claimed that the defendant public body improperly expended public funds. The defendant public body claimed, in part, that it relied in good faith upon the legal advice of the public body's counsel. In finding for the defendant public body, the Court held in pertinent part:

> We recognize that there are significant differences between reliance on the advice of private counsel and reliance on the advice of the Attorney General. For one thing, counsel for the Authority is retained by it and is subject to dismissal by it, while the Attorney General is an elected public official who has a broader responsibility. **We believe, however, that the policy expressed in *Mott* militates in favor of allowing a defense of good faith reliance on advice of counsel to public officers such as the directors in this case. We do not believe that local officials should be required to make complex decisions regarding expenditures of public funds without the advice of counsel and at their own risk. Such a requirement would discourage competent individuals from seeking or accepting such positions and would be a detriment to local government**.

(Emphasis added.)

"Good faith reliance on the advice of counsel retained by a public officer's/employee's

public body can provide safe harbor protections from a willful violation pursuant to NRS 281A.790(5)." *In re Public Officer, Comm'n Op No. 23-009A* (Nevada Ethics Opinions, 2023)

In *Kennedy v. Local Fin. Bd.,* DOCKET NO. A-1699-16T4 (N.J. Super. App. Div. Mar 12, 2018), the Court held:

> "We recognized the [advice of counsel] defense in dictum in *In re Zisa*, 385 N.J. Super. 188, 198-99 (App. Div. 2006). . . . To establish the defense: (1) an officer must receive the advice before taking the questioned action; (2) the officer must make 'full disclosure of all pertinent facts and circumstances'; (3) the advisor must 'possess[] authority or responsibility with regard to ethical issues'; and (4) the officer must 'comply with the advice received, including any restrictions it might contain.'" *Kennedy v. Local Fin. Bd.*, DOCKET NO. A-1699-16T4 (N.J. Super. App. Div. Mar 12, 2018)
>
> "In other contexts, courts have concluded that clients should be free to rely in good faith on their attorney's advice. See *United States v. Boyle*, 469 U.S. 241, 251 (1985) (noting, in the tax context, "[w]hen an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice"); *McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. 546, 558 (1993) (noting, in applying frivolous litigation statute, "a client who relie[d] in good faith on the advice of counsel cannot be found to have known that his or her claim or defense was baseless"). The local official who is not an expert in local government ethics law should rarely be obliged to second-guess the responsible attorney. The United States Supreme Court observed, regarding taxpayers' reliance on counsel's advice:
>
> > Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place.
>
> The same holds true for a local governmental official seeking ethics advice.
>
> While the existing record does not support a finding that Kennedy acted unreasonably in relying on the advice he received, the Borough Attorney's affidavit provided insufficient detail to enable the Board to assess fairly Kennedy's compliance with the four elements of the advice-of-counsel defense articulated in *Zisa*. The attorney does not state when Kennedy sought his advice, particularly whether he sought his advice before the Council actually approved the resolutions appointing him to the several paid positions. The attorney also does not describe in any detail the facts and circumstances provided to him. Evidently, the ALJ did not explicitly analyze those factors once he concluded that

Kennedy's reliance was unreasonable.

Based upon the foregoing, this Court should find that the applicable law includes the following:

1. "It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel."

2. Courts have declined to extend civil penalties even when a public body "act[ed] in good faith with the advice of counsel," and that reliance on the erroneous advice of council demonstrated a lack of a "knowing and willful violation."

3. The Ethics Committee "must demonstrate that more than the 'letter of the law' was violated - [the Ethics Committee] must show that the 'spirit or the substance' of the law was violated.

4. "It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel"

5. The policy expressed in *Mott* militates in favor of allowing a defense of good faith reliance on advice of counsel to public officers, like Mr. Marino and Ms. Junkins should not be required to make complex decisions like whether they can or cannot vote on the Ordinance in question without the advice of counsel and at their own risk. Such a requirement would discourage competent individuals from seeking or accepting such positions and would be a detriment to local government.

Further, in *Time Oil Company v. Wolverton*, 491 F.2d 361 (9th Cir. 1974), the Court held:

> As succinctly said by the Fifth Circuit in *Johnson v. Norris*, a case cited by this court in its opinion, 'A court of bankruptcy is a court of equity seeking to administer the law according to its spirit and not merely by its letter.'..."

Mr. Marino believes that under the circumstances of this matter the Ethics Act should be administered according to its spirit and not merely by its letter.

In *Hanania v. Loren-Maltese*, 319 F.Supp.2d 814 (N.D. Ill. 2004), the Court held in

pertinent part:

> To establish an advice-of-counsel defense, a defendant must show that "(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report." *U.S. v. Cheek*, 3 F.3d 1057, 1061 (7th Cir.1993); *Liss v. U.S.*, 915 F.2d 287, 291 (7th Cir.1990).

In *Powers v. Goodwin*, 174 W.Va. 287, 324 S.E.2d 701 (W. Va. 1984), the Court held in pertinent part:

> Reliance on advice of counsel as a defense is a subject that does not appear to have been extensively discussed by the courts. It seems clear, though, that the party asserting this defense has the burden of showing that he: (1) made a complete disclosure of the facts to his attorney; (2) requested the attorney's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied upon the advice in good faith.

(Citations omitted.)

In *Bear Creek Valley Sanitary Authority ex rel. Bashaw v. Hopkins*, 631 P.2d 808 (Or. App. 1981), the Court held in pertinent part:

> We believe, however, that the policy expressed in *Mott* militates in favor of allowing a defense of good faith reliance on advice of counsel to public officers such as the directors in this case. We do not believe that local officials should be required to make complex decisions regarding expenditures of public funds without the advice of counsel and at their own risk. Such a requirement would discourage competent individuals from seeking or accepting such positions and would be a detriment to local government. We hold that the defense is available to these defendants.

iv. *"Good Faith" Immunity*

The principles related to "good faith" immunity as to public officials should apply in the determination of whether Mr. Marino has a legitimate "advice of counsel" defense. In Syllabus Point 2 of *Martin v. Mullins*, 294 S.E.2d 161 (W.Va. 1982), this Court stated

> 2. In general our standard for determining whether a public official acted in "good

> faith" for the purposes of indemnification for attorneys' fees and personal judgments is identical to the federal standard for determining whether a public official is entitled to "good faith" immunity in a federal civil rights suit. Consequently, we adopt the standards outlined in *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) and *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1973) for determining whether a public official "should reasonably have known" that his conduct was illegal. It is the existence of reasonable grounds for the belief that the official's conduct was legal formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for good faith indemnification. The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether the official himself is acting sincerely and with a belief that he is doing right. The official's belief may be based on state and local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware.

In the present matter, Mr. Marino satisfies all of the elements of "good faith" immunity. Mr. Marino had an "objectively reasonable basis for [his] belief" that he was not acting unethically or in violation of the law. At no time did Mr. Marino believe that having the Citizens of Clarksburg vote on whether they wanted to approve a Charter Amendment that would change Clarksburg's Election Day to coincide with West Virginia's Election Day could be construed as Mr. Marino personally voting to give himself an additional one year extension to his term in office, particularly when the Citizens were made aware that certain City Council members' terms of office would necessarily be extended. In other words, no reasonable City Council member would believe that he was acting unethically by letting the Citizens of Clarksburg determine if Clarksburg's Election Day should change even if it extended the City Council member's term of office.

Further, Mr. Marino acted "sincerely and with a belief that he [was] doing right." And his belief was based on "advice of counsel." If such "good faith" immunity would shield Mr. Marino from liability for "indemnification for attorneys' fees and personal judgments . . . in a federal

civil rights suit," it should also shield him from the charge by the Ethics Commission that he acted unethically and unlawfully.

In *Wells v. Dallas Independent School Dist.*, 576 F.Supp. 497 (N.D. Tex. 1983), the Court held in pertinent part:

> Although the court finds no evidence from which the extent of Wright's reliance on the advice of counsel can be ascertained, such a determination is not essential since the law at that time was unclear. Because the attorneys employed to advise the School Board and administration in this matter believed that post-termination compliance could cure any pre-termination deficiency, Wright, as a public official, could not be fairly said to "know" that the law forbade postponement of notice and some type of hearing until after Wells' discharge. See *Harlow* 102 S.Ct. at 2739. As laymen, the members of the Board and Wright clearly placed their trust in the attorneys at their elbow to shield them from liability and to ensure that they did not infringe upon Wells' rights. Cf. *Bomhoff v. White*, 526 F.Supp. 488, 492 (D.Ariz. 1981) (ignorance plus failure to consult an attorney do not justify avoidance of liability).
>
> The defendants have established the affirmative defense of good faith. Their motion for summary judgment on this issue is therefore granted. Defendants are immune in their individual capacities from liability for actual damages.

v. *Qualified Immunity*

The principles underpinning "qualified immunity" should be applied here to shield Mr. Marino from being adjudicated guilty of acting unethically and violating the law.

The case of *Wells v. Dallas Independent School Dist.*, 576 F.Supp. 497 (N.D. Tex. 1983) was a civil rights action wherein the defendant public officials was accused of fraud and mismanagement. The Court found that the defendant public officials, "[a]s laymen . . . clearly placed their trust in the attorneys at their elbow to shield them from liability and to ensure that they did not infringe upon [the plaintiff's]. . . and that the defendant public officials "have established the affirmative defense of good faith. . . Defendants are immune in their individual capacities from liability for actual damages."

In *Downs v. Locke*, Civil Action No. 18-4529 (E.D. Pa. Aug 07, 2020), public official Locke issued a Notice of Violation of a Zoning Code to the plaintiffs. The plaintiffs sued public official Locke. Public official Locke stated that the Zoning Code was a "gray area" and difficult to enforce. Before Locke issued the Notice of Violation to plaintiffs, he sought legal advice from Solicitor Kilkenny with respect to whether the evidence against plaintiffs was sufficient to issue Notice of Violation. Locke provided Solicitor Kilkenny with the evidence on the question whether plaintiffs operated an impact business. Solicitor Kilkenny testified that, after reviewing the evidence, he advised public official Locke that "[Locke] had a reasonable basis" to issue the Notice of Violation "based on the evidence and based on Judge McHugh's version of how she was interpreting the Code." Public official Locke followed Solicitor Kilkenny's advice and issued the Notice of Violation to plaintiffs.

In sum, the evidence shows that public official Locke relied on Solicitor Kilkenny's legal advice in good faith, and public official Locke's reliance upon Solicitor Kilkenny's advice was objectively reasonable under the circumstances. Thus, no official in public official Locke's position could reasonably believe that he was acting unlawfully when he issued the Notice of Violation to plaintiffs in reliance on Solicitor Kilkenny's advice. See *Ginter v. Skahill*, 298 F. App'x 161, 165 (3d Cir. 2008) (holding officer entitled to qualified immunity based on reliance on advice of counsel because officer "was deliberate in acting in accordance with the law"); *Lee v. Mihalich*, 847 F.2d 66, 72 (3d Cir. 1988) (reversing district court's denial of qualified immunity where Pennsylvania state law was unclear and the defendants "sought the advice of counsel before [acting]," thus "they could reasonably believe that their actions were lawful"); *Quiles v. Vitt*, No. 1:09-CV-580, 2010 WL 5559507, at *12 (M.D. Pa. Dec. 16, 2010) (holding

that a public official who acted on advice of counsel entitled to qualified immunity), report and recommendation adopted, No. 1:09-CV-580, 2011 WL 65758 (M.D. Pa. Jan. 10, 2011). Accordingly, upon reconsideration based on newly presented argument and citation of authority, the Court concludes that public official Locke is entitled to qualified immunity with respect to plaintiffs' First Amendment retaliation claim against him in his individual capacity. . . . (Certain internal citations omitted).

In *Behne v. Halstead*, Civil No. 1:13-CV-0056 (M.D. Pa. Apr 29, 2014), the Court held:

> It is well-settled that "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Schneyder v. Smith*, 653 F.3d 313, 318 (3d Cir. 2011) (quoting *Pearson v. Callahan*, 555 U.S. 223 (2009)). In addressing whether a right was clearly established in the law, the question before the court is whether "the state of the law . . . gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Put another way, for a right to be clearly established, its "contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (citations omitted). As the Third Circuit has explained:
>
> > [D]efendants are entitled to qualified immunity if "reasonable officials in [their] position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be lawful." Even where officials "clearly should have been aware of the governing legal principles, they are nevertheless entitled to immunity if[,] based on the information available to them[,] they could have believed their conduct would be consistent with those principles.
>
> *Larsen v. Senate of Commw. of Pa.*, 154 F.3d 82, 87 (3d Cir. 1998) (citations omitted).

In *Konop v. Northwestern School Dist.*, 26 F.Supp.2d 1189 (D. S.D. 1998), the Court held:

> "Reliance on or seeking the advice of counsel is a factor to be weighed in assessing whether a public official is entitled to qualified immunity. *Tubbesing v. Arnold*, 742 F.2d 401, 407 (8th Cir.1984)."

In *Castle v. Clymer*, 15 F.Supp.2d 640 (E.D. Pa. 1998), the Court held:

> Defendants contend that they are entitled to qualified immunity as they have "acted upon advice of counsel and with a reasonable good faith belief in the lawfulness of their actions." . . . Government officials are shielded from liability if their conduct does not violate "clearly established statutory or constitutional rights" of which a reasonable public official would be aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); see, also, *Crawford-El*, 118 S.Ct. at 1592; *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

In *State v. Chase Securities, Inc.*, 424 S.E.2d 591, 188 W.Va. 356 (W. Va. 1992), the Court held in pertinent part:

> Thus, we conclude that a public executive official who is acting within the scope of his authority and is not covered by the provisions of W.Va.Code, 29-12A-1, et seq., is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.

In *Rinne v. Camden Cnty.*, 2:21-cv-04076-MDH (W.D. Mo. Jun 27, 2024), the Court held:

> Defendants contend reliance on the advice of legal counsel is an additional factor to be weighed in favor of whether a public official is entitled to qualified immunity. *Young v. Mercer County Commission*, 849 F.3d 728 (8th Cir. 2017). Defendants argue the underlying purpose and policy of qualified immunity is to give government officials "breathing room" to make reasonable but mistaken judgments, and to protect all but the plainly incompetent or those who knowingly violate the law. *Morgan v. Robinson*, 920 F.3d 521, 524 (8th Cir. 2019) (citing *Stanton v. Sims*, 571 U.S. 3, 6, 124 S.Ct. 3, 187 L.Ed.2d 341 (2013) (citation omitted). While reliance on the advice of counsel alone does not automatically insulate Defendants from liability, it may be evidence of objective reasonableness and good faith for qualified immunity. See *Tubbesing v. Arnold*, 742 F.2d 401, 407 (8th Cir. 1984).

vi. *Powers v. Goodwin*

The Hearing Examiner cited *Powers v. Goodwin*, 324 S.E.2d 701 (W.Va. 1984).

Respectfully, the Hearing Examiner's interpretation of *Powers* was incorrect and far too narrow.

Mr. Marino is not suggesting that reliance of counsel is an *absolute* defense in this matter. An *absolute* defense would be akin to full and complete immunity. This is not Mr. Marino's argument.

While Mr. Marino is not arguing that reliance of counsel is an *absolute* defense in this matter, it is clear that the defense of reliance of counsel may by considered in determining whether, in this case, Mr. Marino violated the Ethics Act.

While the Hearing Examiner correctly noted that the defense of reliance of counsel may be considered in mitigation, *Powers* does not suggest that the defense of reliance of counsel can *only* be considered in mitigation of sanctions. If this were the case — that the defense of reliance of counsel can never be considered in the adjudication of ethics charges against public officials — then there would not exist all of the State and Federal cases cited above to the contrary.

Respectfully, a more accurate application of *Powers* would have been: "While Mr. Marino's reliance on the advice, direction and counsel from the City Attorney is not an *absolute* defense, under the circumstances herein it *is* a defense to the ethics charges against him."

And while *Powers* did state that reliance of counsel is not a defense "[i]n the contempt field," this matter is not "in the contempt field." If anything, this matter is in the "honest mistake" field, caused entirely by Mr. Marino's good faith and reasonable reliance on the City Attorney.

The Hearing Examiner stated prior to 2022 that "there is no evidence that Respondent Marino made a full disclosure of facts to his attorney[.]" This is an erroneous and unfair finding. The entire process at issue herein was guided by the City Attorney. The City Attorney was the centerpiece of the process. The City Attorney already had "full disclosure of the facts" because

the City Attorney was instrumental in developing the facts. The point of this factor is to make certain that the attorney giving advice has a complete appreciation of the relevant facts. It is clear from the record that the City Attorney had a complete appreciation of the relevant facts.

The Hearing Examiner stated that prior to 2022 "there is no evidence . . . that [Mr. Marino] requested advice as to the legality of the contemplated action[.]" This too is an erroneous and unfair finding. It is without dispute that Mr. Marino received the advice from the City Attorney as to the legality of the process because it was implicit in the City Attorney's guidance of the City Council through the process. Once the City Attorney says, "OK, City Council, here's what we have to do to amend the Charter," must Mr. Marino really then ask, "Mr. City Attorney, is this your advice to City Council?" in order to technically request the City Attorney's advice? Of course not. It is clear from the record that the City Council anticipated and received advice, direction and counsel from the City Attorney. As this Court knows, City Attorneys are hired to give legal advice.

The Hearing Examiner stated that prior to 2022 "there is no evidence . . . that [Mr. Marino] relied upon any advice of counsel." This is clearly erroneous. The record is clear: Mr. Marino and the City Council relied upon the legal advice of the City Attorney when the City Attorney guided Mr. Marino and the City Council through the process at issue. Again, the City Attorney was the centerpiece of the process.

vii. *Advisory Opinion 2010-08*

The Hearing Examiner cited the Ethics Commission's Advisory Opinion 2010-08, which deals with a question very similar to the matter herein. Interestingly, the Advisory Opinion called the facts underlying the question resolved therein "unique." Further, this Advisory

Opinion serves to reveal that in or about 2010 there was another City Attorney for another City Council that requested that the Ethics Committee issue an advisory opinion related to facts substantially similar to the alleged facts herein. Apparently this was a case of first impression for the Ethics Committee because it cited no precedential Advisory Opinions. In other words, at least as to this particular City Attorney, it was not clear as a matter of law whether a City Council could pass an ordinance that put before the voters a charter amendment that would, in effect, cause an extension of certain City Council members terms.

Further, there was no evidence that either Mr. Marino, Ms. Junkins, any other City Council member was aware of Advisory Opinion 2010-08.

Incidentally, the Advisory Opinion – which is only an opinion and is not law – is wrong. A City Council member does not extend his term by virtue of a Charter Amendment *passed by the Citizens of the community*. It is the Citizen that extend his term, not the City Council member who voted to place the Charter Amendment on the ballot. The City Council member's vote to place such a Charter Amendment on a ballot does nothing other than place the Charter Amendment on the ballot. Whatever happens after that is up to the Citizens of the community. And in this case it was the Citizens, and not Mr. Marino, that extended his term.

B. **Second Assignment of Error**: The West Virginia Ethics Commission erred and abused its discretion when it found that Mr. Marino acted unlawfully and unethically by voting to put certain Charter Amendments on the ballot for the Citizens of Clarksburg to vote upon when said Charter Amendments, if approved by the Citizens of Clarksburg, would have extended Mr. Marino's term of office by one year, as more particularly set forth in the West Virginia Ethics Commission's *Final Decision and Order* entered November 7, 2024.

As noted in the last paragraph of the last section, Advisory Opinion 2010-08 is wrong.

As to this Assignment of Error, the facts are not in dispute. There is no prevailing law on the issue and this is a question of law. The Court will simply need to decide whether a City Council member violates the Ethics Act when the following facts occur:

1. The City Council member votes to place on the ballot a Charter Amendment to change the Election Date

2. The act of placing the Charter Amendment on the ballot does not, in and of itself, change the City Council member's term of office.

3. If passed by the Citizens of the Community, the Charter Amendment would extend the City Council members term of office.

Mr. Marino is aware of his obligation to provide legal citations to support his arguments. Indeed, he did so abundantly above. However, no legal authorities were found that apply to the facts of this case as it relates to the issue of whether Mr. Marino's participation in votes related to the Charter Amendments in question constituted a vote in which he had a "financial interest" pursuant to West Virginia Code Section 6B-2-5(j)(1) or for which he received a "private gain" pursuant to West Virginia Section 6B-2-5(b)(1).

When Mr. Marino voted on the ordinance to place the Charter Amendment on the ballot, his vote on this ordinance did not, in and of itself, affect his "financial interest." Nor did the ordinance, in and of itself, provide him a "private gain."

Imagine if a City Council member owned a commercial construction company and the City Council decided to put out to bid a construction project for the City for bid. This vote did not affect the City Council member's "financial interests" nor did this vote provide the City Council a "private gain," even if this City Council member anticipated bidding on the project. Of course, the Ethics Act may later be implicated if the City Council member's construction

company decided to bid on the construction project. But the initial vote to put the project out to bid did not.

Similarly, Mr. Marino gained nothing by participating in the vote on the ordinance to put the Charter Amendment out to vote.

Finally, it is without dispute that the statutes within the Ethics Act of which Mr. Marino was adjudicated guilty failed to put Mr. Marino on notice that his votes were violative of these statutes. One cannot read these statutes, examine Mr. Marino's votes, observe that he acted on the advice of the City Attorney, and conclude that he acted unethically. And if that is the case, how is justice served by affirming the Ethics Commission's *Final Decision and Order*?

For this reason, the Ethics Committee finding's that Mr. Marino violated the Ethics Act must be reversed and set aside.

VI. CONCLUSION

For the reasons stated herein, Petitioner James E. Marino respectfully requests that this Honorable Court find that the West Virginia Ethics Commission committed reversible error by adjudicating Mr. Marino guilty of violating the Ethics Act in its *Final Decision and Order* entered November 7, 2024, and afford Petitioner James E. Marino such other relief as this Honorable Court deems fair and just.

JAMES E. MARINO,
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