

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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**JAMES MARINO,
Mayor, City of Clarksburg,
Respondent Below, Petitioner**

v.

No. 24-ICA-487

**THE WEST VIRGINIA ETHICS COMMISSION,
Respondent.**

**BRIEF FILED ON BEHALF OF THE THE WEST
VIRGINIA ETHICS COMMISSION, RESPONDENT
and**

**RESPONDENTS REQUEST
FOR COSTS OF APPEAL**

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ISSUES

- Does reliance upon the advice of counsel constitute a defense to a violation of the WV Ethics Act?
- Did Petitioner violate W. Va. Code § 6B-2-5(b)(1) and W. Va. Code §§ 6B-2-5(j)(1),(3) by her failure to recuse herself from the discussions and votes on matters before Clarksburg City Council in 2021 and 2023 affecting her term of office?

STATEMENT OF THE CASE

Procedural History

Ryan DeBarr filed a verified Complaint, dated January 12, 2022, against James Marino. The Probable Cause Review Board of the West Virginia Ethics Commission issued a Notice of Investigation on January 20, 2022. On June 21, 2023, the Probable Cause Review Board found probable cause that James Marinos' participation in votes to extend his terms of office violated the Ethics Act's voting restrictions, at W. Va. Code § 6B-2-5(j)(1) and (j)(3), and the private gain prohibition, at W. Va. Code §§ 6B-2-5(b)(1).¹

The Order directed that Statements of Charges be prepared and that the matters be scheduled for a public hearing to determine the truth or falsity of the charges. Statements of Charges were issued to Marino on June 23, 2023.² The Complaint was consolidated with an almost identical Complaint filed against Lillie Junkins for public hearing by Order dated February 12, 2024. Administrative Law Judge Jeff Blaydes conducted the public hearing on April 9, 2024 and issued a recommended decision on July 8, 2024.³ On November 7, 2024, the WV Ethics Commission heard oral

¹ D.R. 0220 - 0225

² D.R. 0241 - 0255

³ D.R. 0427 - 0457

arguments presented by the parties and issued a final decision and order.⁴ The Commission held that Petitioner had violated the WV Ethics Act and imposed the sanctions of a public reprimand, a fine of \$200, reimbursement to the Commission of the costs of the proceedings and training on the WV Ethics Act. Petitioner filed an appeal of the Commission's decision and order to the West Virginia Intermediate Court of Appeals on December 7, 2024.

Statement of Facts

James Marino ("Marino" or "Petitioner") served as the Mayor for the City of Clarksburg at all times relevant herein. As Mayor, Marino was a "public official" as defined in the Ethics Act, at W. Va. Code § 6B-1-3(k). The Ethics Commission has jurisdiction over alleged violations of the Ethics Act committed by West Virginia public officials such as Junkins.⁵

During the relevant time period, the City of Clarksburg was governed by:

- Seven elected City Council members serving four-year staggered terms.
- A Mayor and Vice Mayor elected by the City Council members from their own members to serve two-year terms.
- A City Manager who serves at the will and pleasure of the City Council.⁶

At the city election on June 4, 2019, three of the seven Council seats were on the ballot. The three new City Council members elected for four-year terms, commencing on July 1, 2019, and ending on June 30, 2023, were Lillie Junkins ("Junkins"), Gary Keith, II ("Keith"), and James E. Marino ("Marino" or "Petitioner"). The

⁴ D.R. 0458 - 0493

⁵ W. Va. Code §§ 6B-1-1 through 6B-3-11.

⁶ D.R. 0080 - 0081

four other Council positions were not up for election in June 2019 because their terms of office did not expire until June 30, 2021.⁷

The City of Clarksburg Council members, including Marino, received compensation for their service as a public official. Marion received \$3000 per year for serving on the Council.⁸ Clarksburg Council members also have the option to receive health insurance benefits and dental and vision benefits through the City and its Public Employees Insurance Agency (“PEIA”) plan or to opt out of PEIA and instead receive a monthly reimbursement to cover their health insurance premiums with another health insurance provider. Marino received the health insurance and dental and vision benefits “opt out reimbursement” valued at \$6,849.72 per year.⁹ Clearly, Marino had a personal financial interest in the extension of her term as she received compensation and benefits as a member of the city council.¹⁰ Any action he took in furtherance of acquiring or maintaining an additional one-year term of service potentially constituted use of office for private gain.

The City of Clarksburg’s Charter establishes the terms of office for its elected officials and the City’s election procedures, including the date for city elections. Historically, the City of Clarksburg held elections every two years on the first Tuesday in June in odd-numbered years. In approximately 2019, the City leaders began discussing holding its elections on the same day and year as West Virginia’s primary election day, the second Tuesday in May in even-numbered years, as a means of improving voter turnout.¹¹

⁷ D.R. 0082 - 0083

⁸ D.R. 0080 - 0081

⁹ D.R. 0080, 0083 - 0085, 0328

¹⁰ D.R. 0080 - 0081, 0083 - 0085, 0328 *See also* W. Va. Code §§ 6B-1-3(o) which provides a broad definition of “thing of value”, “other thing of value,” or “anything of value.”

¹¹ D.R. 0085 - 0087

Changing its election day and year required the City to amend the City Charter at Section 37. A City Charter amendment requires the City Council members to pass an ordinance proposing the Charter amendment. If the ordinance passes, the proposed Charter amendment is placed on the next municipal election ballot for approval by the voters.

On January 2, 2020, the City Council passed an ordinance amending Section 37 of the Charter providing for changing the election dates.¹² The ordinance (“New Election Date Ordinance”) changed the Charter so that City elections would be held on the same day and year as West Virginia’s primary election day.

On February 20, 2020, the City Council voted six to one to place the New Election Date Ordinance on the June 1, 2021, General Election ballot.¹³ No Council members were prohibited from voting on the ordinance because it did not financially impact them. The decision to change the election date, however, set the stage for subsequent events that would have resulted in the terms of office of Junkins, Keith, and Marino being extended by one year.

The New Election Date Ordinance was flawed because it failed to reconcile the current Council members’ terms of office with the proposal to hold the first even-numbered year election in 2022 and the next one in 2024. First, the terms of offices of the Council members elected in 2019 for four-year terms expired on June 30 2023, but the next City election would not occur until June 2024.¹⁴ Second, the four new members that would be elected in the 2021 election for four-year terms would have their

¹² D.R. 0087 - 0089, 0266 - 0268, 0283 - 0291

¹³ D.R. 0292 - 0296

¹⁴ D.R. 0090 - 0091

terms of office end on June 30, 2025, but the next City election would not occur until June 2026.

In January 2021, City Council took up the issue of having the citizens directly elect the Mayor. At that time, it became apparent that the New Election Date Ordinance needed to be fixed to reconcile the Council members' terms of office with the change from odd to even year elections so that there would not be vacancies.

On advice from the City Manager and the 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 Council members who were first elected in June 2019 would have their terms extended by one year, ending on June 30, 2024, instead of June 30, 2023.
- The four Council members to be elected in the upcoming June 2021 election would serve five-year terms, ending on June 30, 2026. Then, in May 2026, one council position would be eliminated and the voters would directly elect the Mayor at the 2026 election. Hence, there would be six Council members and an elected Mayor starting July 1, 2026.

The Direct Election of Mayor and Extension of Terms Ordinance uniquely affected Junkins, Keith, and Marino, the three council members elected in June 2019, by extending their terms of office by one year without them facing an election.¹⁵ Marino did not present any evidence that he asked the City's attorney or any attorney whether it

¹⁵ D.R. 0092- 0093

violated the West Virginia Ethics Act for him to vote on measures uniquely affecting her.¹⁶

Specifically, Marino took the following actions in 2021 related to the extension of his term as a council member:

- On January 21, 2021, the first reading of the Direct Election of Mayor and Extension of Terms Ordinance was on the City Council meeting agenda and considered at that meeting.¹⁷ The agenda item was listed as “Consideration of First Reading of an Ordinance of the City of Clarksburg Amending Section 5 of the City Charter to Provide for Direct Election of the Mayor.” The City Council voted in favor of adopting the Direct Election of Mayor and Extension of Terms Ordinance on the first reading by a vote of four to three. **Marino did not recuse himself and voted in opposition to the Ordinance.**

On February 4, 2021, the City Council had a second and final reading of the Direct Election of Mayor and Extension of Terms Ordinance.¹⁸ The second and final reading of the Direct Election of Mayor and Extension of Terms Ordinance passed by a vote of four to two. Marino was not present at this meeting and did not participate in the discussion or the vote.

- On April 1, 2021, the City Council voted to place the Direct Election of Mayor and Extension of Terms Ordinance on the June 1, 2021, General Election ballot¹⁹ as a proposed Amendment to the City Charter along with

¹⁶ D.R. 0148

¹⁷ D.R. 0297 - 0303

¹⁸ D.R. 0304 -0308

¹⁹ D.R. 0309 -0312

the New Election Date Ordinance and three other proposed Charter Amendments.²⁰ Marino did not recuse himself from the discussion and the vote. He voted in opposition to the Ordinance.

The title of the Direct Election of Mayor and Extension of Terms Ordinance ballot amendment was listed on the ballot as: “Amendment No. 5: To change from a 7-member Council from which council members elect a mayor to a 6-member Council plus a mayor elected by the public; imposition of term limits; and procedures for vacancies.” The ballot also contained a summary of Amendment No. 5 and the other proposed City Charter Amendments. The title and description on the ballot did not reference the one-year term extension for Council members Junkins, Keith, and Marino, but the summary did.

On June 1, 2021 the voters passed the Direct Election of Mayor and Extension of Terms Ordinance and the other Charter Amendments thereby amending the City’s Charter. The adoption of the Charter Amendment by the voters extended the terms of office by one year of Council members Junkins, Keith, and Marino. But for the City Council passing the Direct Election of Mayor and Extension of Terms Ordinance, this matter would not have been on the ballot and the terms of office of Junkins, Keith, and Marino would not have been extended.

At some point after the June 2021 municipal election, the City Council determined that there were defects in the Charter Amendments passed during that election.²¹ Thereafter, in 2023, the City Council proposed two additional measures: Charter Amendment No. 23-4 “An Ordinance of the City of Clarksburg Amending

²⁰ D.R. 0257

²¹ D.R. 0094 -0098

Sections 5, 25, and 38 of the City Charter”²² (hereinafter “Charter Amendment 23-4”) and Ordinance No. 23-5 “An Ordinance Regarding Charter Amendments and Elections”²³ (hereinafter “Ordinance Placing Three Council Seats on Upcoming Ballot”) (collectively “New Ordinances”).

Charter Amendment No. 23-4 contained a provision ending the terms of office for the three seats held by Junkins, Keith, and Marino, on June 30, 2023 - the original expiration date for their terms of office that began on July 1, 2019 - and placing those three seats on the June 6, 2023, election ballot for the voters to elect three council members to serve a one-year term. Charter Amendment No. 23-4 also adjusted the terms of the City’s elected Water Board members to facilitate the election date change from odd-numbered years to even-numbered years.

Charter Amendment No. 23-4 was placed on the June 6, 2023, election ballot for approval by the voters pursuant to W. Va. Code § 8-4-7.²⁴ The voters passed Charter Amendment No. 23-4 thereby amending the City’s Charter to provide for a one-year term for the three council seats elected in the June 6, 2023, election. Those Council seats would then be up for election again in May 2024 for a four-year term.

The second New Ordinance, Ordinance No. 23-5, Ordinance Placing Three Council Seats on Upcoming Ballot, resulted in Junkins’, Keith’s, and Marino’s seats being on the June 6, 2023, municipal election ballot. The Ordinance stated as grounds for its enactment, in part, that “objections have been made as to such Charter

²² D.R. 0273 - 0277

²³ D.R. 0278 -0279

²⁴ D.R. 0256

amendments, specifically as to the extension of certain terms of office.” Ordinance No. 23-5 at para. 6.²⁵

Specifically, Marino took the following actions in 2023 with regard to the proposed charter amendment and the proposed ordinance :

- On February 2, 2023, the City Council had a first reading of Charter Amendment No. 23-4. The first reading of Charter Amendment No. 23-4 passed five to two.²⁶ **Marino did not recuse herself from the discussion and voted in opposition to the Ordinance.** Marino’s vote constituted votes in favor of maintaining his extended term, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021. This would have allowed him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023.
- On February 16, 2023, the City Council had a second and final reading of the Charter Amendment No. 23-4.²⁷ The second and final reading of Charter Amendment No. 23-4 passed five to two. **Marino did not recuse himself and voted in opposition to the Ordinance.** Marino’s vote constituted a vote in favor of maintaining his extended terms of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021. This would have allowed him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023.

²⁵ D.R. 0278 -0279

²⁶ D.R. 0313 -0319

²⁷ D.R. 0320 - 0327

- Also on February 2, 2023, the City Council had a first reading of the Ordinance Placing Three Council Seats on Upcoming Ballot.²⁸ The first reading of the Ordinance Placing Three Council Seats on Upcoming Ballot, passed five to two. **Marino did not recuse himself from the discussion and vote. Marino voted in opposition to the Ordinance.** His vote constituted a vote in favor of maintaining his extended terms of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021. This allowed her to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023.
- Also on February 16, 2023, the City Council had a second and final reading of the Ordinance Placing Three Council Seats on Upcoming Ballot.²⁹ It passed five to two. **Junkins did not recuse herself from the discussion and voted in opposition to the Ordinance.** Her vote constituted a vote in favor of maintaining her extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing them to serve an additional year

The Clarksburg City Attorney testified that in 2023 sometime between the first and second reading of Ordinance 23-5, he had communicated to James Marino that the Ethics Commission had asserted that the involvement of Junkins and Marino in 2023 votes involving their terms of office could be problematic and that they may consider not

²⁸ D.R. 0313 - 0319

²⁹ D.R. 0320 - 0326

voting, though he thought that the votes were defensible under the Ethics Act.³⁰ The City Attorney also testified, however, that his advice to the City Council as a whole, including Marino, was to vote on the 2023 measures affecting her term of office.³¹

The passage of Charter Amendment 23-4 and Ordinance 23-5 meant the abandonment of the idea of extending the terms of any of the three city council members elected to four-year terms in 2019. It allowed the citizens to vote on who should fill the one-year slots at the June 2023 election. Marino was a candidate for one of the three one-year slots in 2023, but lost the election. Hence, he left office on June 30, 2023, the original end date for her four-year term.³²

SUMMARY OF ARGUMENT

Petitioner Marino was a member of the Clarksburg City Council and the Mayor of the city. As such he was a public official and subject to the WV Ethics Act.

Petitioner participated in the discussions and votes on matters that had the effect of extending her term in office as a member of the Clarksburg City Council. As Marino received compensation and benefits for serving on the City Council, he had a financial interest in the extension of his term in office.

W. Va. Code § 6B-2-5(b) prohibits the use of a public officer for the private gain of the public official. W. Va. Code §§ 6B-2-5(j)(1) and (3), require public officials to recuse themselves from matters in which the public official has a financial interest. Petitioner's participation in the discussions and votes on matters that had the effect of extending her

³⁰ D.R. 0147 - 0150

³¹ D.R. 150

³² D.R. 0102 - 0103

term in office as a member of the Clarksburg City Council constitute violations of W. Va. Code § § 6B-2-5(b), (j).

Petitioner asserts that the defense that he relied upon the advice of counsel. However, he did not establish the elements of this “defense” for the two incidents in 2021. Further, reliance on the advice of counsel does not provide a *per se* defense to the charge of violation of the WV Ethics Act for the four incidents which occurred in 2023. Reliance upon the advice of counsel merely serves as a factor demonstrating good faith pursuant to *Powers v. Goodwin*, 174 W. Va. 287, 292, 324 S.E.2d 701 (1984).

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to W. Va. R. App. P. § 18(a)(4), Respondent does not feel oral argument is necessary. However, Respondent does not object to the scheduling of oral argument and will participate if it is scheduled.

ARGUMENT

- **Standard of Review**

W. Va. Code § 29-5-4(g) provides in pertinent part:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996) the West Virginia Supreme Court of Appeals held that in appeals governed by Administrative Procedure Act, the reviewing court, “ ... reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” [See *Duff v. Kanawha Cnty. Comm’n*, No. 23-43, 2024 WL 1715166 (W.Va. Apr. 22, 2024)]

- **Reliance upon the advice of counsel does not constitute a defense to a violation of the WV Ethics Act.**

Petitioner asserts reliance on advice of counsel as their defense to the Ethics Act charges. The West Virginia Supreme Court has held that reliance on advice of counsel is not, except for malicious prosecution suits, an absolute defense to charges that a person is acting unlawfully or negligently. *Powers v. Goodwin*, 174 W. Va. 287, 292, 324 S.E.2d 701, 706 (1984). The *Powers* decision arose from the removal of two county commissioners for mispending public funds by authorizing the payment of legal fees to their fellow county commissioner in criminal and removal proceedings brought against that county commissioner.

The county commissioners asserted that they had relied upon the advice of an assistant prosecuting attorney and should not be removed, but the Supreme Court held:

Except for malicious prosecution suits, it is generally held that reliance on advice of counsel is not an absolute defense to charges that a person is acting unlawfully or negligently. This issue has been raised in suits involving violations of civil rights under 42 U.S.C.A. § 1983, which are treated as federal tort actions. (Citation omitted) Typical of most courts' approach in this area is this statement from *Crowe v. Lucas*, 595 F.2d 985, 992 (5th Cir.1979): “Reliance on advice of counsel does not serve as an absolute defense to a civil rights action. Rather, it is among the calculus of facts that a jury is to consider on the issue of good faith.” See also *Dellums v. Powell*, 566 F.2d 167, 185 (D.C.Cir.1974), *cert. denied*, 438

U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1977); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 517 F.2d 1141, 1145–46 (4th Cir.1975).

From the foregoing law, we conclude that the circuit court acted properly in concluding that acting on advice of counsel is not a per se defense to charges that a public official has acted unlawfully.

Powers v. Goodwin, 174 W. Va. 287, 292, 324 S.E.2d 701, 706 (1984).

In *Powers* the West Virginia Supreme Court also held 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.”³³

As will be demonstrated in the succeeding point of argument, the undisputed evidence in this case is that on six separate occasions Marino voted on matters in 2021 and in 2023 that uniquely affected him and two of the other council members. In order to have *any* benefit from her reliance upon the advice of counsel, Marino must meet the test set out above.

There is no evidence that Marino sought or received advice of counsel prior to participating in the two votes in 2021.³⁴ The Petitioner cites a long passage in his brief from City attorney Richard Marsh in which he indicates that he never advised him not to vote. However, there is no indication in Marsh's testimony that Marino ever asked for his advice on whether it was ethical for him to vote before or during the two votes in 2021.

³³ *Powers v. Goodwin*, 174 W. Va. 287, 291, 324 S.E.2d 701, 705 (1984).

³⁴ The reference to Junkins' and Mariono's opening statements in Petitioner's brief at pp. 7 - 9 should be disregarded or alternatively given minimal weight. Junkins chose not to obtain counsel for the public hearing and chose not to testify under oath where they could have been cross-examined

The situation regarding the four votes in 2023 merits a little more analysis and discussion. City Attorney Richard Marsh generally testified that in 2023, he had communicated with Marino, ostensibly for the benefit of both Mariono and Junkins. He said that the Ethics Commission had related that the Marino's and Junkins' involvement in 2023 votes involving their terms of office could be problematic and that they may consider not voting.³⁵ The City Attorney also testified, however, that his advice to the City Council as a whole, including Marino, was to vote on the 2023 measures affecting Junkins' and Marino's terms of office.³⁶ The Administrative Law Judge and the Commission concluded that Marino did not establish the elements to assert reliance upon the advice of counsel for the two votes taken in 2021, but had established those elements for the four votes taken in 2023.³⁷

The Petitioner claims he is not asserting reliance upon advice of counsel as an absolute defense. However, he then argues vigorously as if it were an absolute defense, contending that "reliance on the advice of counsel" should be considered in the determination not only of whether she acted in good faith but whether she violated the Ethics Act at all.³⁸ In making these arguments, Petitioner cites a number of decisions from other jurisdictions.³⁹

One of the cases, *Belgrade v. Linn*, 205 Or. App. 433, 134 P.3d 1082 (2006) involved the expenditure of public funds, which Petitioner admits is not the same issue as is presented by the present case. In fact, the WV Ethics Act does not even cover decisions involving public spending absent a showing of personal gain or nepotism.

³⁵ D.R. 0148 -0150

³⁶ D.R. 0150

³⁷ D.R. 0447 - 0449

³⁸ Petitioner's brief pp. 16 - 27, 32 - 33

³⁹ Petitioner's brief pp. 16 - 27

The court in *Linn* opined that public officials should not be held accountable for knowledge of complex fiscal issues. The present case does not involve complex fiscal issues. All six votes in which Marino participated involved the question of whether or not his term of office would be extended by another year.

Petitioner also leans heavily on *In re Zisa*, 896 A.2d 1111 (N.J. 2006). That case involved a public official who voted on the award of a contract for paving or building of a parking lot from which the public officials leased some spaces. The Court held that in the context of that case, the public official was entitled to protection of the defense of reliance upon the advice of counsel. The context of the case revealed a more remote link between the public official's private interests and those involved in the vote. The public official rented parking space from one entity and the vote concerned the awarding of a contract to a different entity to pave that parking lot. The connection between Marino and the votes is much more direct in the current situation, i.e., would Marino's term in office be extended by a year or not.

Petitioner cites two cases that involve protection granted to governmental entities based upon reliance on the advice of counsel. In *Harki v. VDOC*, case No.: CL20-2363 (Va. Cir. Apr. 15, 2020) the defense was held to protect a governmental entity from civil liability for failure to properly respond to a Freedom of Information Act request. There are several reasons this case may be distinguished, First the current case involves a public official and not the public body as in *Harki*. Second, the current case involves the Ethics Act and not an Open Meetings Act. Third, Marino does not seek protection from

civil liability, but rather exemption from the penalties provided by the Ethics Act including a fine.⁴⁰

In *Bd. of Selectmen of Town of Hull v. Headley*, Docket: Civil Action No. 15-00161 (Mass. Super. December 14, 2017) reliance on advice of council protected a governmental entity from the imposition of a penalty for violation of the Open Meetings Act. Again this case involved a governmental entity rather than public officials, Second, *Hull* did not involve an Ethics Act violation, but that of an Open Meetings Act.

Apart from the factual differences, these cases are from other jurisdictions have little or no precedential value. Further, given the clear pronouncement of the West Virginia Supreme Court of Appeals in *Powers*, they have little persuasive value.

Petitioner explicitly argues that the Intermediate Court of Appeals should reverse the final decision of the Commission on the basis of the reasoning in these cases from other states. Implicitly, though, the Petitioner is asking the Intermediate Court of Appeals to depart from the standard set by the West Virginia Supreme Court of Appeals. Unless and/or until overturned by subsequent case law before the West Virginia Supreme Court of Appeals or amendment of the appropriate statutes by the legislature, *Powers* set the standard for the applicability of a public official's reliance upon the advice of counsel.

In *Powers* the West Virginia Supreme Court of Appeals indicated that reliance on the advice of counsel is one of the factors considered in determining good faith. However, It is not clear that "good faith" is even a consideration when evaluating violations of the West Virginia Ethics Act except in the one circumstance mentioned at

⁴⁰ Civil liability generally relates to compensating victims for damages, while the purpose of WV Ethics Act penalties is to punish the guilty party and protect society.

the end of this section. Certainly, "bad faith" is not a necessary element in establishing a violation of W. Va. Code § 6B-2-5(b),(j) and "good faith" does not explicitly appear as an exception to the requirements of the Act.

Although the West Virginia Supreme Court of Appeals has not weighed in on the issue of "good faith" as a defense to a violation of the W. Va. Ethics Act in particular, it has provided some insight in its treatment of a related statute, W. Va. Code § 61-10-15. This section prohibits county public officials from personally holding a pecuniary interest in a public contract over which they have voice, influence or control as a public official. In *Summers County Citizens League, Inc. v. Tassos*, 179 W. Va. 261, 367 S.E.2d 209 (1988), the West Virginia Supreme Court of Appeals explained the purpose and application of W. Va. Code § 61-10-15:

W. Va. Code § 61-10-15 ... is preventive in nature; it provides an absolute standard of conduct ... **The prohibition of W. Va. Code, 61-10-15, as amended, was therefore designed ... to protect the public from the mistakes, as well as the connivance, of its officers.** ... If that policy is to be limited by exceptions, it is usually the function of the legislature, and not of this Court, to spell out such exceptions. *Mississippi Valley Generating*, 364 U.S. at 561, 565, 81 S.Ct. at 315, 317, 5 L.Ed.2d at 295, 297.
(Emphasis added)

The description of W. Va. Code § 61-10-15 seems equally applicable to W. Va. Code § 6B-2-5(j). It is preventive in nature and it sets an absolute standard of conduct. Accordingly, it should be construed, like W. Va. Code § 61-10-15, to protect the public from mistake as well as connivance.

Petitioner also argues that he should be accorded "good faith immunity" and, by Petitioner's use of the term, would amount to an absolute defense to a violation of the

WV Ethics Act.⁴¹ This assertion that acting in “good faith” confers immunity is clearly contrary to the holding in *Powers*.

In a similar vein, Petitioner argues that she is entitled to “qualified immunity”.⁴² Qualified immunity is a doctrine that protects a public official “who is acting within the scope of his authority ... from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known.” *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). The doctrine of ‘qualified immunity’, then, would seem to apply to officials who are unaware of an established law rather than those who have received incorrect advice about the law. Let us apply elements of qualified immunity to the present situation.

(a) Violation of an established law

In the next point of argument in this brief, Respondent will clearly demonstrate that the action of Junkins violated not only the Ethics Act but the state constitution as well.

(b) An established law of which the public official would be unlikely to be aware

Junkins’ contention that she could not have reasonably known of the provisions of the Ethics act is ingenuous. At bottom, W. Va. Code § 6B-2-5(j) requires a public official to recuse himself from the discussion and vote on an issue in which the public official has a private financial interest. It seems ludicrous that a reasonable public

⁴¹ Petitioner’s brief pp. 27 - 19

⁴² Petitioner’s brief pp. 29 - 32

official would be oblivious to such a potential conflict of interest. It seems that the doctrine of qualified immunity does not fit Marino's situation.

Following the guidance provided in *Powers*, Respondent asserts that reliance on the advice of the city attorney would be at most a mitigating factor in determining the appropriate sanctions to impose. It appears that this is exactly what the Administrative Law Judge and the Commission did in the current situation.

The Administrative Law Judge recommended a fine of \$1000 for the two votes taken in 2021 (\$500 for each incident) in which there was no reliance on the advice of counsel, \$1100 for the four votes taken in 2023 (\$275 per incident) in which there was reliance upon advice of counsel, and \$200 for violation of the private gain provision of the WV Ethics Act.⁴³ Note that the penalties for violations of law where reliance upon the advice of counsel was established was about one-half the rate of penalties for violations where reliance upon the advice of counsel was not established. The Commission went even further. In its final order the Commission reduced the total fine recommended by the Administrative Law Judge from \$2300 to \$200 total for all of the violations of the WV Ethics Act.⁴⁴

Finally, Petitioner asks whether she was supposed to hire his own attorney as an alternative to relying upon the advice of the city attorney. In response, it should be noted that when one faces potential personal liability, it would be a very wise thing to consult an attorney who represents you and your interests alone rather than one who represents another entity in the situation. Further, **a safe and economic alternative**, would be to simply contact the WV Ethics Commission and ask it if there are any

⁴³ D.R. 0456

⁴⁴ D.R. 0461

potential Ethics Act problems present in the situation pursuant to W. Va. Code § 6B-2-3(a), which provides:

A person subject to the provisions of this chapter may make application in writing to the Ethics Commission for an advisory opinion on whether an action or proposed action violates the provisions of this chapter or the provisions of section fifteen, article ten, chapter sixty-one of this code and would thereby expose the person to sanctions by the commission or criminal prosecution. The commission shall respond within thirty days from the receipt of the request by issuing an advisory opinion on the matter raised in the request. All advisory opinions shall be published and indexed in the code of state rules by the Secretary of State: Provided, That before an advisory opinion is made public, any material which may identify the person who is the subject of the opinion shall, to the fullest extent possible, be deleted and the identity of the person shall not be revealed. **A person subject to the provisions of this chapter may rely upon the published guidelines or an advisory opinion of the commission, and any person acting in good faith reliance on any such guideline or opinion shall be immune from the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon any such opinion or guideline in regard to the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code.**

(Emphasis added)

Following this procedure *would* have provided an absolute defense to any charges related to the WV Ethics Act.

- **Petitioner violated W. Va. Code § 6B-2-5(b)(1) and W. Va. Code §§ 6B-2-5(j)(1),(3) by her failure to recuse herself from the discussions and votes on matters before Clarksburg City Council in 2021 and 2023 affecting her term of office**

W. Va. Code § 6B-2-5(b)(1) states, in relevant part:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person

In [Advisory Opinion 2010-08](#), the West Virginia Ethics Commission addressed a situation in which a town wanted to change its election cycle for two reasons. It wished to shift its elections to coincide with the four-year cycle utilized for selection of the governor of the state and the president of the United States of America. Secondly, it wished to convert the election of its public offices from partisan to non-partisan, i.e., only one election, which would coincide with the state's primary election for governor and president. The city's next election was scheduled in 2011, and the city asked if it would violate the West Virginia Ethics Act to extend the terms of its current officials by one year so that an election for new officials could be conducted in 2012 with a return to the four-year terms at that point.

The Commission suggested that a preferable method of achieving the city's desired changes would be to conduct their elections in 2011 for five-year terms with the link up with the gubernatorial and presidential cycle to occur in 2016. The Ethics Commission held that the city's proposal, granting an extra year in office to its current public officials constituted use of public office for private gain in violation of W. Va. Code § 6B-2-5(b)(1).

The Commission also noted several constitutional and statutory problems with the city's proposal.⁴⁵ The Commission held:

Although the Ethics Commission is only empowered to interpret the Ethics Act, it may not do so in a vacuum. Thus, the Commission must take into consideration provisions of the Code and the Constitution that directly bear on this request. The requirements related to elected officials' terms of office and their compensation are established by constitutional and statutory provisions outside the Ethics Act. Specifically:

⁴⁵ The statutory and constitutional provisions cited are still effective.

Terms of office not to be extended after election. No law shall be passed after the election of any public officer, which shall operate to extend the term of his office.

W. Va. Constitution, Article VI, § 37

Salaries of officials cannot be increased during official terms. No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract made; nor shall any Legislature authorize the payment of any claim or part thereof, hereafter created against the state, under any agreement or contract made, without express authority of law; and all such unauthorized agreements shall be null and void. Nor shall the salary of any public officer be increased or diminished during his term of office, nor shall any such officer, or his or their sureties be released from any debt or liability due to the state: Provided, the Legislature may make appropriations for expenditures hereafter incurred in suppressing insurrection, or repelling invasion.

W. Va. Constitution, Article VI, § 38

In addition, the Legislature has similarly imposed restrictions upon municipal officers:

Compensation of officers and employees. Notwithstanding any charter provision to the contrary, the governing body of every municipality shall by ordinance fix or cause to be fixed the salary or compensation of every municipal officer and employee: *Provided, That the salary of any officer shall not be increased or diminished during his term.*

(Emphasis added)

W. Va. Code § 8-5-12

Clearly, extension of a public official's term of office with consequent gain of an additional year of salary and benefits constitutes use of public office for private gain.

Petitioner contends that Advisory Opinion 2010-08 is wrong. He asserts that the citizens of Clarksburg voted to extend his term of office and then later voted to restore it to its original form.⁴⁶ However, as the Commission and the Administrative Law Judge observed:

It is clear that the vote taken by City council potentially resulting in the extension of Respondent Junkins' term in office (and financial interest in

⁴⁶ Petitioner's brief p. 34 -35.

the vote) was the catalyst for her term to be extended. In other words, *but for* the vote of the city council on this issue, the amendment would not have appeared on the ballot for the consideration by the public. Indeed, Respondent Junkins' argument is contrary to law and runs the risk of rendering West Virginia Code § § 6B-2-5(j)(1) and (3) a nullity.⁴⁷

In addition to the general provision barring use of public office for private gain W. Va. Code § 6B-2-5(j)(1) states, in relevant part:

Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, **may not vote on a matter:**

(A) **In which they**, an immediate family member, or a business with which they or an immediate family member is associated **have a financial interest**. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stock of any class.
. . . .

W. Va. Code § 6B-2-5(j)(3) states:

For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. The recusal shall also be reflected in the meeting minutes.

It is self-evident that Marino had a financial interest in extending her term in office by an extra year. Marino received an annual salary of \$3000 and "opt out reimbursement" for the health insurance and dental and vision benefits valued at \$6,849.72 per year.

This financial interest required him to recuse himself from any discussion or vote on any of the measures that resulted in the extension of their term of office. It is not

⁴⁷ D.R. 0444

sufficient nor even particularly relevant that he voted against those interests on some occasions. His mere presence during the discussion may well have influenced the other members of the council. Eliminating such influence is the principle behind the requirement of recusal rather than simple abstention from voting.

REQUEST FOR COSTS

Pursuant to Rule 24(d) of the West Virginia Rules of Appellate Procedure, your Appellee, the West Virginia Ethics Commission, respectfully requests that this Court grant it an award of costs expended in preparing the record in this appeal. These costs are allowed under the rule if specifically provided for by law. W. Va. Code § 6B-2-4(u) provides that appeals of the Ethics Commission ruling are governed by W. Va. Code § 29A-5-4. Subsection (d) of that section provides in pertinent part:

Within 15 days after receipt of a copy of the petition by the agency, or within such further time as the court may allow, the agency shall transmit to such court the original or a certified copy of the entire record of the proceeding under review, including a transcript of all testimony and all papers, motions, documents, evidence, and records as were before the agency, all agency staff memoranda submitted in connection with the case, and a statement of matters officially noted; but, by stipulation of all parties to the review proceeding, the record may be shortened. The expense of preparing such record shall be taxed as a part of the costs of the appeal.

CONCLUSION

Marino participated in the discussions and votes on matters that had the effect of extending his term in office as a member of the Clarksburg City Council. Marino received compensation and benefits for serving on the City Council, which gave him a financial interest in the extension of his term in office. His failure to recuse himself on the discussions and votes on these matters violated the voting rules at W. Va. Code § 6B-2-5(j)(1) and (3) constituted use of public office for private gain, W. Va. Code § 6B-2-5(b). Reliance upon the advice of counsel does not provide a *per se* defense to the charge of violation of the WV Ethics Act. The West Virginia Ethics Commission prays that the Intermediate Court of Appeals issue a decision affirming the final order of the WV Ethics Commission.

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CERTIFICATE OF SERVICE

I, John Everett Roush, counsel for the West Virginia Ethics Commission, hereby certify that I mailed a true and complete copy of the foregoing **BRIEF FILED ON BEHALF OF THE RESPONDENT WEST VIRGINIA ETHICS COMMISSION** on March 5, 2025, by the electronic filing service, File & ServeXpress, to:

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