

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

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v.

No. 24-ICA-487

West Virginia Ethics Commission,
Respondent.

PETITIONER'S REPLY TO BRIEF FILED ON BEHALF OF
THE WEST VIRGINIA ETHICS COMMISSION, RESPONDENT
and
RESPONDENT'S REQUEST FOR COSTS OF APPEAL

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COMES NOW Petitioner James Marino (hereafter the “Mr. Marino”) by his counsel, Edmund J. Rollo, and for his Reply to Brief Filed on Behalf of The West Virginia Ethics Commission, Respondent and Respondent’s Request For Costs of Appeal, provides the following:

Mr. Marino and Ms. Junkins rely upon the facts and conclusions of law set forth in their respective *Petitions for Appeal*. In this *Reply*, Mr. Marino and Ms. Junkins respond to certain specific arguments made by the Ethics Committee in its *Response*.

I. The Ethics Committee overstates the holding in *Powers v. Goodwin*

Respectfully, the Ethics Commission has misinterpreted the holding of *Powers v. Goodwin*, 324 S.E.2d 701 (W.Va. 1984). In its *Response* the Ethics Commission cited *Powers* to state that “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 lawfully or negligently.” (Page 16 of *Response*). Further, in its *Response* the Ethics Commission relied upon *Powers* when it stated “Reliance upon the advice of counsel merely serves as a factor demonstrating good faith. . . .” (Page 15 of *Response*). Neither of these statements reflects the actual holding of *Powers*.

To the contrary, in *Powers* the Court held in pertinent part:

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. 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).

(Emphasis added.)

Powers held that advice of counsel is an absolute defense to malicious prosecution suits, and not an absolute defense to a civil rights action. But *Powers* acknowledged that there is a grey area in between when it stated that "it is generally held" that advice of counsel is not an absolute defense to charges that a person acted unlawfully or negligently. But this is not to say that advice of counsel is never an absolute defense except for malicious prosecution suits.

In fact, the *Powers* court noted that "[r]eliance on advice of counsel as a defense is a subject that does not appear to have been extensively discussed by the courts." While *Powers* was decided in 1984, the defense of "advice of counsel" has yet to be well-developed.

The point is that *Powers* does not foreclose this Court's finding that the defense of reliance on advice of counsel is an absolute defense to the charges against Mr. Marino and Ms. Junkins herein, and it should be for the very fact-specific reasons in this case.

II. Neither Mr. Marino nor Ms. Junkins voted to increase their terms of office

At no time did either Mr. Marino or Ms. Junkins 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 or Ms. Junkins voting to give themselves an additional one year extension to their terms of 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 or she 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.

The Ethics Commission overstates the impact of Mr. Marino and Ms. Junkins' votes in question. The Ethics Commission stated that their "participation in the discussions . . . had the effect of extending [their] term in office" as members of the Clarksburg City Council. (Response at Pages 14-15). Later in its Response, the Ethics Committee tempered its position and stated: "It is clear that the vote taken by City Council potentially resulting in an extension of [their] term of office (and financial interest in the vote) was the catalyst for [their] term to be extended." (Response at Pages 26-27).

As was thoroughly discussed in the Petition for Appeal, the truth of the matter is that neither Mr. Marino nor Ms. Junkins voted on any matter that extended their terms or benefitted them financially. It is without dispute that none of the ordinances on which they voted at issue herein extended their terms or benefitted them financially. The Ethics Commission would argue: But these ordinances were the "catalyst" that put the Charter Amendments before the voters of the City of Clarksburg. Exactly. It was the voters of the City of Clarksburg — and neither Mr. Marino nor Ms. Junkins — that decided to amend the City's Charter.

The Ethics Commission's best argument is that we are in a grey area. It cannot be said with a straight face that Mr. Marino and Ms. Junkins voted on any ordinance that — with nothing more than its mere passage — extended their terms or benefitted them financially. The Ethics Commission would have this Court find that the statutory scheme governing Ethics in Government should be read in a way that resolves this grey area with a finding against Mr.

Marino and Ms. Junkins. It is axiomatic that under the rule of lenity, if an ambiguity concerns a statute that imposes penalties or restrictions, the statute is interpreted in the way most favorable to the individual facing penalties.

III. *Reliance on the Advice of Counsel*

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.)

According to the Ethics Commission, if a City Attorney said to the City Council “Here are all of the facts on this issue as I understand them. My advice is for City Council to vote on this ordinance that I have prepared related to these facts,” there is no “advice of counsel” under *Powers* because the members of the City Council not make “a complete disclosure of the facts to the attorney” (the City Attorney already knew the facts) and because the City Council members did not “request the attorney’s advice as to the legality of the contemplated action” (the City Attorney simply gave his legal advice) and because the City Council members “received advice that it was legal” (the legality of the advice was clearly implied).

Respectfully, the Ethics Commission’s strict and unwavering adherence to the *Powers* standards without allowing for common sense renders the *Powers* standards ridiculous and nonsensical. Clearly the scenario presented above satisfies all of the *Powers* standards in the

spirit in which they were written.

It cannot be seriously said that Mr. Marion or Ms. Junkins did not rely on the advice of the City Attorney when he guided the City Council through the process of voting on the ordinances in question that the City Attorney prepared.

JAMES MARINO, Mayor, City of
Clarksburg,
BY COUNSEL,

/s/Edmund J. Rollo

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CERTIFICATE OF SERVICE

I, Edmund J. Rollo, counsel for Petitioner James Marino, do hereby certify that on the 25th day of March, 2025, I have served a copy of the foregoing PETITIONER'S REPLY TO BRIEF FILED ON BEHALF OF THE WEST VIRGINIA ETHICS COMMISSION, RESPONDENT and RESPONDENT'S REQUEST FOR COSTS OF APPEAL by e-filing same.

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