

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:
Gary Keith,
City Council, City of Clarksburg

COMPLAINT NO. VCRB 2022-03

Conciliation Agreement

The West Virginia Ethics Commission and Gary Keith freely and voluntarily enter into the following Conciliation Agreement pursuant to W. Va. Code § 6B-2-4(t) to resolve all potential charges arising from allegations in the above-referenced Complaint.

Findings of Fact

1. Gary Keith ("Respondent") served as a City Council member of the City of Clarksburg at all times relevant herein.
2. As a City Council member, the Respondent is 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 the Respondent. W. Va. Code §§ 6B-1-1 through 6B-3-11.
3. The City of Clarksburg is currently governed by:
 - Seven elected City Council members who serve four-year staggered terms.
 - A Mayor and Vice-Mayor elected by the City Council members from their own members to serve a two-year term.
 - A City Manager who serves at the will and pleasure of the City Council.

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4. In 2021, the citizens of Clarksburg voted to amend the City Charter to change the City's current form of government and its election day. The events leading up to the Charter Amendment serve as the basis for the allegations in this matter. The relevant procedural history follows.

5. On June 4, 2019, there was a City election, and three of the seven Council seats were on the ballot. The three new City Council members elected for four-year terms were the Respondent, James Marino, and Lillie Junkins. The four other Council positions were not on the June 2019 ballot as their terms of office did not expire until June 30, 2021.

6. The City of Clarksburg's Charter sets forth the terms of office for its elected officials and the City's election procedures, including the election day. City of Clarksburg elections were, historically, held every two years on the first Tuesday in June in odd-numbered years. The City Council determined that to improve voter turnout, the City should hold its elections on the same day and year as West Virginia's primary election day which is the second Tuesday in May in even-numbered years.

7. To change its election day and year, the City had 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 then placed on the next municipal election ballot for approval by the voters.

8. On January 2, 2020, the City Council passed an ordinance amending Section 37 of the Charter, subject to approval by the voters, to provide for new election

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dates. The ordinance ("New Election Date Ordinance") changed the Charter so that City elections would be held on the same date 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.

9. The passage of the New Election Date Ordinance 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. The terms of offices of the Council members elected in 2019 for four-year terms would expire in 2023, but the next City election would not occur until 2024, an even-numbered year. Further, the four new members that would be elected in the 2021 election for four-year terms would have their terms of office end in 2025, one year prior to the 2026 election.

10. 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 corrected to reconcile the council members' terms of office with the change from odd to even year elections.

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. 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. Whereas the four council members to be elected in June 2021 would serve five-year

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terms. Then, in May 2026, one council position would be eliminated and the voters would directly elect the Mayor at the 2026 election.

12. The council members elected in June 2019, who would have their terms extended by one year, included the Respondent, James Marino, and Lillie Junkins.

13. On January 21, 2021, the first reading of the Direct Election of Mayor and Extension of Terms Ordinance was placed on the City Council meeting agenda. 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 Ordinance on the first reading by a vote of four to three. The Respondent, James Marino, and Lillie Junkins, voted in opposition to the Direct Election of Mayor and Extension of Terms Ordinance, and did not recuse themselves from the discussion and vote.

14. On February 4, 2021, the City Council then had a second and final reading of the Direct Election of Mayor and Extension of Terms Ordinance. The second and final reading of the Direct Election of Mayor and Extension of Terms Ordinance passed four to two. The Respondent and Lillie Junkins, voted in opposition to the Direct Election of Mayor and Extension of Terms Ordinance at the second and final reading, and did not recuse themselves from the discussion and vote. James Marino, the other council member whose term would be extended by the ordinance, was absent from the meeting and did not, therefore, participate in the discussions or vote.

15. 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 ballot.

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The vote to place the Direct Election of Mayor and Extension of Terms Ordinance on the ballot passed unanimously. The Respondent and James Marino voted in favor of placing the Direct Election of Mayor and Extension of Terms Ordinance on the ballot. The other council member whose term would be extended by the ordinance, Lillie Junkins, was absent from the meeting and did not vote.

16. The Direct Election of Mayor and Extension of Terms Ordinance was placed on the June 2021 General Election ballot as a proposed Amendment to the City Charter along with the New Election Date Ordinance and three other proposed Charter Amendments. 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.

17. The voters passed the Direct Election of Mayor and Extension of Terms Ordinance and the other Charter Amendments at the June 2021 municipal election thereby amending the City's Charter.

18. The adoption of the Charter Amendment by the voters extended the Respondent's term of office by one year. 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.

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19. 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. Thereafter, in 2023, the City Council proposed two additional ordinances: Charter Amendment No. 23-4 "An Ordinance of the City of Clarksburg Amending Sections 5, 25, and 38 of the City Charter" (hereinafter "Charter Amendment 23-4") and Ordinance No. 23-5 "An Ordinance Regarding Charter Amendments and Elections" (hereinafter "Ordinance Placing Three Council Seats on Upcoming Ballot") (collectively "New Ordinances").

20. 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.

21. 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. 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.

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22. The second New Ordinance, Ordinance No. 23-5, Ordinance Placing Three Council Seats on Upcoming Ballot, resulted in Junkins, Keith, and Marino's seats being on the June 6, 2023, municipal election ballot.

23. Both Ordinance Nos. 23-4 and 23-5 went before City Council for a first and second reading. The Respondent did not recuse himself and voted in favor of and against his own interest to all votes relating to Ordinance Nos. 23-4 and 23-5.

24. The Respondent has a financial interest in his term of office because he receives compensation and benefits for serving on City Council. The Respondent did not, however, recuse himself from the discussions and vote on the Direct Election of Mayor and Extension of Terms Ordinance. For recusal to be proper, a public official must fully disclose his or her interest in the matter and physically remove himself or herself from the room during the discussion and vote.

25. Respondent also maintains that he relied upon advice of counsel regarding whether he may vote. The West Virginia Supreme Court has held, "[e]xcept 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." *Powers v. Goodwin*, Syl. pt. 3, 174 W. Va. 287, 324 S.E.2d 701 (1984).

Relevant Legal Provisions

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:

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(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.

Advisory Opinion 2010-08:

In Advisory Opinion 2010-08, the Ethics Commission held that city officials may not vote to extend their terms of office. The Opinion states, in relevant part: "Here, instead of amending the charter to apply to future elected officials . . . the City Officials seek to extend their own terms by a year and thereby obtain an extra year of compensation. This would constitute use of public office for private gain."

Conciliation of Violation

I, Gary Keith, the Respondent, admit that I violated the voting provision in the West Virginia Governmental Ethics Act, at W. Va. Code § 6B-2-5(j), when I did not recuse myself from the discussions and votes on an ordinance authorizing the voters to consider an amendment to the City Charter that would extend my term of office for one year. I acknowledge that I have a financial interest in my term of office as a City Council member being extended because I am compensated for serving on City Council and receive benefits.

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I acknowledge that I should not have voted to place the ordinance on the June 2021 General Election ballot and that I failed to recuse myself which required a full disclosure of my interest in the matter being considered and for me to leave the room during the discussion and vote.

In order to resolve this matter, I am entering into this Conciliation Agreement. I understand that for this Agreement to be finalized, the Ethics Commission must approve it and determine which sanctions to impose.

In consideration for the settlement of this matter, I agree to the Commission's imposition of the following sanction:

1. The Respondent shall undergo training on the West Virginia Governmental Ethics Act within 30 days of the entrance of the Order approving the Conciliation Agreement;
2. The Respondent shall pay a fine in the amount of \$1,000 to the West Virginia Ethics Commission within 30 days of the entrance of the Order approving the Conciliation Agreement.

I understand and agree that if the Ethics Commission fails to approve this Conciliation Agreement, then this Conciliation Agreement is null and void and the Complaint against me will proceed before the Probable Cause Review Board, where it will be processed in accordance with the West Virginia Code and Ethics Commission's Legislative Rules.

If the Ethics Commission approves the Agreement, it will enter an Order in which it approves the Agreement and sets forth the sanctions listed above.

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Both parties understand that, pursuant to West Virginia Code § 6B-2-4(t), this Conciliation Agreement and Commission Order must be made available to the public.

SEP 07 2023

Date



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

8-31-23

Date



Gary Keith, Respondent

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BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:

COMPLAINT NO. VCRB 2022-03

**Gary Keith,
former City Council Member,
City of Clarksburg**

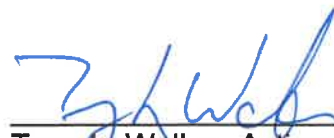
COMMISSION'S ORDER

After considering the Findings of Fact, Relevant Legal Provisions, and Conciliation of Violations in the Conciliation Agreement, the West Virginia Ethics Commission finds that the Conciliation Agreement is in the best interests of the State and Gary Keith, as required by W. Va. Code § 6B-2-4(t). In accordance with W. Va. Code § 6B-2-4(s), the Commission imposes the following sanctions:

1. Respondent shall undergo training on the West Virginia Governmental Ethics Act, either in person, virtually, or by viewing the training provided on the Ethics Commission's website at ethics.wv.gov, within 30 days of the entrance of this Order and shall provide written confirmation of the completion of this training to the Ethics Commission within five business days of completing it.
2. Respondent shall pay a fine in the amount of \$1,000 to the West Virginia Ethics Commission within 30 days of the entrance of this Order.

SEP 07 2023

Date



Terry L. Walker, Acting Chairperson
West Virginia Ethics Commission