

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:

EUGENE R. THORN

COMPLAINT NO. CIC 2014-14

FINAL DECISION AND ORDER

This matter came for consideration before the West Virginia Ethics Commission during its regularly scheduled meeting on November 3, 2016, following a public hearing conducted before the Commission's duly appointed hearing examiner on July 18, 2016.

The Commission, with seven of the Commissioners present and voting, thoroughly considered the record and the "Findings of Fact, Conclusions of Law and Recommendation of Hearing Examiner" [*hereinafter "Hearing Examiner's Recommendation"*]. Prior to the meeting, Commission members were provided with the hearing transcript; the hearing exhibits; the "Complainant's Proposed Findings of Fact; Discussion of Evidence; Legal Arguments, and Conclusions of Law;" the Respondent's "Amended Findings of Fact and Conclusion [sic] of Law;" the Hearing Examiner's Recommendation and the Respondent's "Brief in Opposition to the Recommended Decision of the Hearing Examiner." During the meeting, both parties, through counsel, presented oral arguments.

The Hearing Examiner's Recommendation is attached hereto and is incorporated herein by reference with the following exceptions, additions and/or modifications:

PROCEDURAL HISTORY

The Commission adopts the section of the Hearing Examiner's Recommendation entitled "Procedural History" with the following modifications and additions:

1. In the first paragraph, "March 11, 2014" is modified to "August 11, 2014."
2. In the second paragraph, "comments regarding" is modified to "response to."
3. In the third paragraph, "April 26, 2016" is modified to "April 25, 2016" and "noted" is modified to "alleged in three separate counts that there was probable cause to believe."
4. In the fourth paragraph, "[s]imultaneously" is modified to "On April 26, 2016."
5. In the fifth and sixth paragraphs, "Thorne" is modified to "Thorn."

6. In the seventh paragraph, “per violation” is added after “\$5,000” and the following is added after “reimbursement of costs:” “of investigating and prosecuting the violation.”
7. The eighth paragraph is modified to reflect that the Commission presented as witnesses Urika Browning, Billie Jo Donovan and Robert Silvester and introduced 14 exhibits into the record, and that Respondent Thorn presented Sandra Thorn as a witness and introduced no exhibits.
8. In footnote number 1, “violation” is modified to “material violation.”

ISSUE

The Commission adopts the section of the Hearing Examiner’s Recommendation entitled “Issue.”

EXHIBITS

The Commission adopts the section of the Hearing Examiner’s Recommendation entitled “Exhibits” with the following modifications:

1. “C2 Thorne Response” is modified to “C2 Thorn Response.”
2. “C12 Recording of statements made by Respondent Eugene R. Thorn to the WV Ethics Commission” is modified to “C12 Audio recording of oral response to Complaint by Eugene R. Thorn before the Probable Cause Review Board.”

FINDINGS OF FACT

The Commission adopts each of the 45 “Findings of Fact” set forth in the Hearing Examiner’s Recommendation with the following modifications, exceptions and additions. The Commission hereby adopts those proposed Findings of Fact, Conclusions of Law and arguments advanced by the parties that were expressly adopted in the Hearing Examiner’s Recommendation. To the extent that the following Findings or Conclusions are consistent with those advanced by the parties and adopted in the Hearing Examiner’s Recommendation, the same are adopted. Conversely, to the extent that the same are inconsistent with these Findings and Conclusions, they are rejected. To the extent that these Findings or Conclusions are inconsistent with any other proposed Findings and Conclusions submitted by the parties, the same are hereby adopted and, conversely, to the extent that the same are inconsistent with these Findings and Conclusions, they are rejected. To the extent that the testimony of any witness is not in accord with these Findings and Conclusions, the testimony is not credited. Any proposed Finding of Fact, Conclusion of Law or argument proposed and submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

1. Throughout the Findings of Fact, “Sylvester” is modified to “Silvester.”

2. In Findings of Fact No. 1, "supervisor/Wildlife Biologist" is modified to "Wildlife Center Biologist" and "Hearing Exhibit Nos. 2,8 and 2" is modified to "Hearing Exhibit Nos. 2, 8 and 12."
3. In Findings of Fact No. 2, "concessionaire's" is modified to "gift shop concessionaire's" and "main" is not adopted.
4. In Findings of Fact No. 3, "gross sales from the gift shop" is modified to "total gross receipts from the gift shop and the snack bar" and "concessionaire sales and admission fees" is modified to "weekly admission fees."
5. In Findings of Fact No. 5, "people the she knew" is modified to "people who knew her parents" and "[s]he met him" is modified to "[s]he may have met him."
6. In Findings of Fact No. 6, "No. 2, p. 2" is modified to "No. 2, pp. 1-2."
7. In Findings of Fact No. 7, "p. 2" is modified to "p. 1."
8. In Findings of Fact No. 8, "p. 3" is modified to "p. 2."
9. In Findings of Fact No. 9, "about Sandra Thorn working as a partner with Ms. Browning in" is modified to "about her and Sandra Thorn evenly splitting the work and the proceeds from."
10. In Findings of Fact No. 9, "pp. 16 through 22" is modified to "pp. 18 through 22."
11. In Findings of Fact No. 10, "response to the Commission's inquiries" is modified to "written response to the Complaint" and "new the precise percentage of gate fees used" is modified to "knew that the '15% gate fees' were used."
12. In Findings of Fact No. 11, "Ulrika Browning and Sandra Thorn verbally agreed" is modified to "Ulrika Browning testified that she and Sandra Thorn verbally agreed."
13. In Findings of Fact No. 12, the first sentence is modified to read: "The West Virginia Division of Natural Resources sent a Request for Proposals to prospective bidders for the concessionaire at the Wildlife Center at French Creek."
14. In Findings of Fact No. 13, the references to Exhibit Nos. 2 and 12 are not adopted.
15. In Findings of Fact No. 14, "pp. 65, 67; Exhibit No. 12" is modified to "pp. 63-68."
16. In Findings of Fact No. 16, "Hearing Transcript, p. 29" is added as a reference.
17. In Findings of Fact No. 17, in the first sentence, "Hearing Transcript, p. 47 and Hearing Exhibits 4 and 5" are added as references. In the second sentence, "Hearing Transcript, pp. 44 and 46" is added as a reference.
18. In Findings of Fact No. 18, "Hearing Transcript, pp. 80-81" is added as a reference.
19. In Findings of Fact No. 20, "Respondent testified" is modified to "Respondent stated in his unsworn oral response to the Complaint;" and "on his part and a handshake deal" and the reference to Hearing Transcript p. 42 are not adopted.

20. In Findings of Fact No. 21, the words "Center to whom" are modified to "Center; who was the person to whom."
21. In Findings of Fact No. 22, "odd" is modified to "strange" and "would be the one to any" is modified to "and Silvester would have either seen or experienced."
22. In Findings of Fact No. 24, "was paid \$100" is modified to "later was paid \$100" and "[t]he Respondents assert" is modified to "[t]he Respondent asserts." "Hearing Transcript, pp. 31-33, 79-82" is added as a reference to the end of Findings of Fact No. 24.
23. In Findings of Fact No. 26, the first sentence is modified to read: "Ulrika Browning testified that after the gift shop failed to earn a net profit, Sandra Thorn wanted to be paid, so she started paying Sandra Thorn \$100 in cash per day." In the second sentence in Findings of Fact No. 26, "had" is modified to "said she had to have money" and the transcript references at the end of Findings of Fact No. 26 are modified to read "Hearing Transcript, pp. 31-33, 57-58."
24. Findings of Fact No. 27 is modified to read: "Billie Jo Donovan testified that she ran the gate admissions and the gift shop register and saw Ms. Browning pay Sandra Thorn in cash one time 'and that was when she was going away for her anniversary.' She stated that Mrs. Thorn 'was at Ulrika's desk and asked to get her money early because she was going away.' Hearing Transcript, pp. 59-60."
25. In Findings of Fact No. 28, "could no longer work in the gift shop" is modified to "had to go."
26. In Findings of Fact No. 29, "she told Sandra Thorn that she would no longer be participating with her in the operation of the gift shop" is modified to "she ended her relationship with Sandra Thorn" and the references are modified to "pp. 34-35, 47-49, Exhibit No. 6."
27. In Findings of Fact No. 30, the reference to p. 54 is not adopted.
28. Findings of Fact No. 31 is modified to read: "Ms. Browning gave Robert Silvester, DNR District Biologist, copies of the repayment plan and the cashier's checks which she had given Respondent."
29. Findings of Fact Nos. 32, 33, 34 and 35 are not adopted.
30. In Findings of Fact No. 36, "October 18, 2013" is modified to "October 15, 2013."
31. In Findings of Fact No. 37, "Hearing Exhibit No. 2" is added as a reference.
32. In Findings of Fact No. 38, "he" is modified to "Silvester" and the following is added as a reference: "See September 26, 2013, letter attached to Complainant's Proposed Findings of Fact; Discussion of Evidence; Legal Arguments and Conclusions of Law."
33. In Findings of Fact No. 39, "Thorne" is modified to "Thorn" and "March 11, 2014" is modified to "August 11, 2014."
34. In Findings of Fact No. 40, "comments regarding" is modified to "response to."

35. In Findings of Fact No. 41, "April 26, 2016" is modified to "April 25, 2016" and "noted" is modified to "alleged."
36. In Findings of Fact No. 44, "parties" is modified to "Complainant."

DISCUSSION

The Commission does not adopt the section of the Hearing Examiner's Recommendation entitled "Discussion." The Commission states in lieu thereof the following:

The Commission hereby finds that based upon the Hearing Examiner's Findings of Fact, as modified herein, the evidence does not establish beyond a reasonable doubt that Respondent Eugene R. Thorn violated W.Va. Code § 6B-2-5(d)(1) of the Ethics Act as set forth in Count One of the Probable Cause Order. The evidence does not establish beyond a reasonable doubt that Respondent's wife, Sandra Thorn, and Ulrika Browning had agreed to share the net profits from the operation of the gift shop in exchange for Sandra Thorn working at the gift shop. The evidence accordingly is insufficient to establish that Respondent Eugene R. Thorn, or a member of his immediate family, had a prohibited interest in the profits or benefits of a contract over which his public position gave him control in violation of W.Va. Code § 6B-2-5(d)(1).

With respect to Count Two of the Probable Cause Order, the Commission concludes that the evidence establishes beyond a reasonable doubt that the Respondent's immediate family member, his wife, Sandra Thorn, had a prohibited financial interest in a public contract because Sandra Thorn loaned \$5,000, from a joint checking account with Respondent, to Ulrika Browning to pay for a surety bond required by the gift shop contract. The evidence further establishes that such interest was not a "limited interest" and was in violation of W.Va. Code § 6B-2-5(d).

Finally, the Commission concludes that the evidence establishes beyond a reasonable doubt that Respondent Eugene R. Thorn used his public position for his and his wife's private gain, in violation of W.Va. Code § 6B-2-5(b)(1), to influence Ulrika M. Browning to immediately repay the \$5,000 loan with 18 percent interest, as alleged in Count Three of the Probable Cause Order.

CONCLUSIONS OF LAW

The Commission adopts the Hearing Examiner's recommended "Conclusions of Law" numbered 1, 2, 3, 4, 5, 6, 9, 10, 11, 12 and 13 with the following modifications:

1. In Conclusions of Law No. 1, "§ 6B-2B-6" is modified to "§ 6B-3-11."
2. In Conclusions of Law No. 9, "costs and" is not adopted and the last sentence is modified to read: "Ulrika Browning repaid Respondent and his wife the \$5,000 loan, and paid them \$450 in interest and \$180 in fees."

The Commission does not adopt "Conclusions of Law" Nos. 7 and 8.

ORDER

The Commission does not adopt the Hearing Examiner's "Recommendedation" [sic].

Based on the foregoing Findings of Fact and Conclusions of Law, the West Virginia Ethics Commission ORDERS the following sanctions against Eugene R. Thorn:

1. A public reprimand shall be issued against Respondent Eugene R. Thorn;
2. Respondent Eugene R. Thorn shall pay a fine of \$5,000.00 (\$2,500 for Count Two and \$2,500 for Count Three) to the West Virginia Ethics Commission on or before February 3, 2017;
3. Respondent Eugene R. Thorn shall reimburse the West Virginia Ethics Commission the amount of \$2,362.92 for the actual costs of prosecuting his violations of the Ethics Act on or before February 3, 2017;
4. Before holding a public service position or public employment in the future, Respondent Eugene R. Thorn shall complete training on the West Virginia Ethics Act and shall notify the Commission in writing of his completion of the training.

This Order was entered on the 3rd day of November, 2016.



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

**WEST VIRGINIA ETHICS COMMISSION,
Petitioner,**

v.

CASE NO. 2014-014

**EUGENE R. THORNE,
Respondent**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF
HEARING EXAMINER**

This is a matter involving an ethics complaint filed against the Respondent Eugene R. Thorne, an employee of the State of West Virginia, by the West Virginia Ethics Commission (“the Commission.”) In its Complaint, the Commission alleged that the Respondent used his position as a public employee for his personal gain and for the gain of others, in violation of the provisions of the *West Virginia Governmental Ethics Act*, W.Va. Code § 6B-1-1, *et seq.* (the “Ethics Act.”) The Probable Cause Review Commission determined that there was probable cause to believe that the Respondent violated the provisions of the *Ethics Act* by acquiring a prohibited interest in the profits or benefits of a contract over which his public position gave him control; by obtaining a financial interest in said contract, and by using his public position for his and his wife’s private gain to influence a state contractor.

PROCEDURAL HISTORY

On March 6, 2014, the Commission initiated a Complaint against Eugene R. Thorn pursuant to the provisions of *W.Va. Code* § 6B-2-3a. The Complaint filed on March 11, 2014, alleged that the Respondent, Eugene Thorn, a Wildlife Biologist at the West Virginia State Wildlife Center, violated provisions of the *West Virginia*

Governmental Ethics Act, W.Va. Code §6B-2-5. In particular, the Commission alleged that the Respondent violated the provisions of *W.Va. Code § 6B-2-5(b)(1)*, which prohibits a public employee from knowingly and intentionally using his office or the prestige of his office for his own private gain or that of another person. The Commission also alleged that the Respondent violated the provisions of *W.Va. Code § 6B-2-5(d)(1)*, which prohibits a public employee or a member of his immediate family from having an interest in the profits or benefits of a contract which the employee may have direct authority to enter into or over which he may have control. (Hearing Exhibit No. 1.)

The Respondent submitted his written comments regarding the Complaint to the Commission by letter dated November 10, 2014. (Hearing Exhibit No. 2.)

On April 26, 2016, the Probable Cause Review Board of the West Virginia Ethics Commission issued a Probable Cause Order, finding that there was probable cause to believe that the Respondent violated the provisions of the *Ethics Act*. (Hearing Exhibit No. 13.) The Probable Cause Order noted that the Respondent had a prohibited interest in the profits or benefits of a contract over which his public position gave him control in violation of the provisions of *W.Va. Code §6B-2-5(d)(1)*; that the Respondent had a financial interest in a contract with a state vendor, in violation of the provisions of *W.Va. Code §6B-2-5(d)*; and that the Respondent used his public position for his and his wife's private gain to influence a state vendor, in violation of the provisions of *W.Va. Code §6B-2-5(b)(1)*.

Simultaneously, the Commission issued a Notice of Hearing scheduling the matter for public hearing on July 18 and July 19, 2016.

The Respondent Eugene R. Thorne appeared before the West Virginia Ethics Commission on May 20, 2015, and presented his narrative response to the Complaint, which was duly recorded and submitted at the full hearing as Exhibit No. 12. This narrative was not made under oath and was not made subject to cross-examination.

The undersigned Hearing Examiner conducted the public hearing on July 18, 2016, at the offices of the West Virginia Ethics Commission in Charleston, West Virginia. The Commission appeared by and through its counsel, Kimberly Weber and Meridith Johnstone. The Respondent, Eugene Thorne, appeared in person and by and through his counsel, John H. Tinney, Jr. of Hendrickson & Long.

Pursuant to the provisions of *C.S.R*§158-17-7, the Hearing Examiner advised the Respondent that he had the right to obtain counsel and of the possible sanctions that could be imposed in the event of a finding that he committed a material violation of Chapter 6B of the *West Virginia Code*, including public reprimand, a cease and desist order, an order of restitution for money, things of value or services taken or received, fines not to exceed \$5,000 and reimbursement of costs. The Hearing Examiner further advised the Respondent that in addition to said sanctions, the Commission could institute a civil proceeding to enforce the sanctions imposed by its final decision.

The parties proceeded to offer witnesses and exhibits in support of their respective positions. Upon the conclusion of the hearing the parties established a briefing schedule, with simultaneous filings due on or before August 1, 2016.

Upon motion of the Respondent and with no objection by the Commission, the Hearing Examiner extended the briefing period to August 15, 2016. Both parties timely submitted their proposed findings of facts, conclusions of law and arguments on August

15, 2016. On August 17, 2016, the Respondent filed amended findings of facts, conclusions of law and argument, noting the correct burden of proof¹.

ISSUE

Whether the Respondent Eugene R. Thorne violated any provisions of *W.Va. Code* § 6B-2-5 by obtaining a prohibited interest in the profits or benefits of a contract over which his public position gave him control; whether the Respondent had a financial interest in a state contract, and whether the Respondent used his public position for his and his wife's private gain to influence a state vendor, all in violation of the policies, procedures, statutes and rules of the State of West Virginia and the Commission.

EXHIBITS

Commission Exhibits

- C1** Complaint
- C2** Thorne Response
- C3** Contract between West Virginia Department of Commerce, Division of Natural Resources, Wildlife Resources Section, and Ulrika M. Browning.
- C4** Check No. 3291 from Eugene R. Thorn and Sandra K. Thorn to First Community Bank for \$5,000.
- C5** Cashier's Check No. 35022636 drawn on First Community Bank, payable to WV Division of Natural Resources for \$5,000.00.
- C6** Loan repayment schedule
- C7** West Virginia Division of Personnel invitation for application for Wildlife Biologist.

¹ The actions that formed the basis of the Complaint occurred during the period February through October 2013. The provisions of *W.Va. Code* § 6B-2-4(r)(1) then required that the Commission find evidence beyond a reasonable doubt that there was or was not a violation of any provisions of the West Virginia Ethics Act. That statute was amended during the 2016 Regular Session, and the burden of proof was changed to clear and convincing evidence. Given the recent change, the Respondent's amended pleadings that corrected the burden of proof are accepted as if the same were timely filed.

- C8** Letter dated August 7, 2013, to Gary Foster, Game Management Supervisor, WV Division of Natural Resources Wildlife Resources Section from Robert A. Silvester, District Wildlife Biologist.
- C9** Briefing Report dated August 9, 2013
- C10** Briefing Report dated September 3, 2013
- C11** Letter from Eugene Thorn to Benjamin P. Visnic, Staff Attorney, WV Ethics Commission, dated January 23, 2014, including written answers to inquiries by the Commission.
- C12** Recording of statements made by Respondent Eugene R. Thorn to the WV Ethics Commission on May 20, 2015.
- C13** Probable Cause Order, Statement of Charges
- C14** Original loan repayment plan with State Treasurer Safekeeping receipt.

FINDINGS OF FACT

1. Respondent Eugene R. Thorn ("Respondent" or "Thorn") at all pertinent times herein was employed as a supervisor/Wildlife Biologist at the West Virginia State Wildlife Center ("Wildlife Center"), a zoological facility in French Creek which is operated by the West Virginia Division of Natural Resources ("DNR"). He was an employee of the State of West Virginia for 30 years, seven months prior to his retirement in October 2013. The Respondent is married to Sandra Thorn. (Hearing Exhibit Nos. 2, 8 and 2.)
2. The Wildlife Center has a gift shop on its premises. As part of the Respondent's job duties, he oversaw the concessionaire's contractual agreement with the Division and the maintenance of the building in which it was located. He further oversaw reports submitted to the main office. (Hearing Transcript, pgs. 61 through 63).
3. In the fall of 2012, the Wildlife Center began the process of bidding out a contract for the operation of the Wildlife Center's gift shop, snack bar and admission booth (hereinafter referred to as "gift shop contract"). The contract provided that the

successful bidder would receive 85 percent of the gross sales from the gift shop and 15 percent of the concessionaire sales and admission fees. (Hearing Exhibits No. 2 and No. 3.)

4. Ulrika Browning is a resident of Rock Cave, Upshur County, West Virginia. She was graduated from West Virginia University with a major in foreign literature and studio art. She taught at West Virginia Wesleyan College for one year and then started to pursue her vocation as an artist. (Hearing Transcript p. 16.)
5. The Respondent and his wife knew Ulrika Browning for several years, having met her at various craft shows and festivals throughout the state. The Respondent stated that he and his wife did not have a close relationship with Ms. Browning, but knew her enough to talk to her at the craft shows. (Hearing Exhibit No. 12.) Ms. Browning agreed that she knew who Mr. Thorn was, since he played in a music band together with people she knew. She met him in passing once or twice but did not know him personally. (Hearing Transcript p. 17.)
6. Ulrika Browning was working as a craft vendor at a craft show in Buckhannon, West Virginia, in November 2012. The Respondent and Sandra Thorn attended the craft show and the Respondent told Ms. Browning that the Wildlife Division was looking for someone to run the gift shop. The Respondent mentioned the contract to several other vendors at the craft show as well. Browning expressed her possible interest in bidding on the gift shop contract. (Hearing Transcript, p. 16; Hearing Exhibit No. 2, p.2.)

7. Based upon their conversation at the craft show, the Respondent gave Ms. Browning a bid package that had been issued by the Wildlife Division through the West Virginia Purchasing Division. (Hearing Exhibit No. 2, p.2.)
8. The Respondent had discussions with, and sent bid packages to, three other persons who also had expressed interest in the gift shop contract. (Hearing Exhibit No. 2, p.3.)
9. After the discussion at the craft show Ms. Browning, the Respondent and Sandra Thorn had multiple discussions about Sandra Thorn working as a partner with Ms. Browning in the operation of the gift shop if Ms. Browning was awarded the contract. She met with the Thornes in their house on the grounds of the DNR and showed them her proposed floor plans, equipment and operating plans. (Hearing Transcript, pp. 16 through 22, 42.)
10. The Respondent assisted Ms. Browning in developing a business plan for the proposed gift shop. In his response to the Commission's inquiries, Eugene Thorn stated that his wife, Sandra Thorn, offered her expertise and ideas for the business plan and agreed to help get her started. He met with Ms. Browning and insurance agents regarding the surety bond. He put together a contingency plan for the Wildlife Center to collect gate fees if Ms. Browning could not get the required bond. He was very cognizant of his wife's activities at the gift shop, and knew the precise percentage of gate fees used to purchase inventory. He knew that a gift shop vendor extended Ms. Browning credit for her first order of items and that all money made from sales was put back into the business. (Hearing Exhibit No. 2.)

11. Ulrika Browning and Sandra Thorn verbally agreed that if Browning was awarded the contract, Sandra Thorn and Ms. Browning would split the work and profits equally. (Hearing Transcript, p. 19.)
12. The West Virginia Division of Natural Resources published a Request for Proposals through the West Virginia Purchasing Division seeking a concessionaire to operate the gift shop at the Wildlife Center at French Creek. Ulrika Browning was the only vendor to submit a bid. (Hearing Transcript, p. 63.)
13. The DNR Director, Frank Jezioro, formed an interview committee, which included the Respondent, Gary Foster, a DNR supervisor from Elkins, and Robert Sylvester, the District Biologist at the French Creek office of the Division of Natural Resources. The committee was charged with reviewing applications submitted in response to the bid and to interview the bidders for the gift shop contract. This committee interviewed Ms. Browning, who was the sole bidder, in January 2013. (Hearing Transcript, pp. 23, 63; Exhibit No. 2, p. 2; Exhibit No. 12.)
14. The DNR Director Jezioro required a recommendation from the interview committee before selecting the contractor for the operation of the gift shop. The interview committee, Mr. Foster, Mr. Silvester and Mr. Thorn, unanimously recommended that Ms. Browning be awarded the contract. (Hearing Transcript, pp. 65, 67; Exhibit No. 12.)
15. The DNR Director, Frank Jezioro, awarded the contract to Ms. Browning based upon the recommendation of the committee. Mr. Jezioro and Ms. Browning executed the contract dated February 11, 2013. (Exhibit No. 3). The contract required that Ms. Browning provide a \$5,000 performance bond. (Hearing Transcript, p. 29.)

16. Ms. Browning was unsuccessful in acquiring the security bond from a bonding company due to credit issues. She told the Respondent and Sandra Thorn that since she could not get the bond, "she wasn't going to do the Wildlife Center." (Hearing Transcript, p. 46.)
17. The Respondent and Sandra Thorn loaned Ms. Browning \$5,000 to use as security for the contract. (Hearing Transcript, p. 46.) The Respondent told Ms. Browning that he would borrow \$5,000 from his retirement account and loan it to her to be used as the performance bond required by the DNR contract. (Hearing Transcript, pp. 30, 45.)
18. Eugene Thorn and Sandra Thorn held a joint checking account at First Community Bank. Sandra Thorn wrote a check from the joint account on April 26, 2013, for the sum of \$5,000, which was used to purchase a cashier's check from said bank. The cashier's check was made payable to the Division of Natural Resources on behalf of Browning for the performance bond required by the gift shop contract. (Hearing Exhibits 4 and 5.)
19. Ms. Browning met Sandra Thorn at a Dollar Store where she handed Ms. Browning the check for \$5,000 wrapped in a newspaper. (Hearing Transcript, p.30.)
20. Ms. Browning, the Respondent and Mrs. Thorn did not reduce their agreement regarding the loan to writing. Nevertheless, all of the parties agreed that the transaction was a loan to Ms. Browning and that she would repay the same. The Respondent testified that it was an "act of kindness" on his part and a handshake deal, with "no legal contract." Ms. Browning testified that "We didn't reach any agreement, we just agreed that it would be done." (Hearing Transcript pp. 42, 47, 51; Exhibits No. 2, 12.)

21. Ulrika Browning provided the performance bond required by the DNR contract and began operating the gift shop at the Wildlife Center. Ms. Browning testified that the Respondent oversaw the administration of the contract and monitored or supervised the services provided under the contract. She testified that the Respondent was the representative of the DNR who (1) approved changes to the normal hours of operation of the Wildlife Center to whom she submitted her daily collection fees reports; (2) approved her inventory; (3) approved her advertising of the gift shop in places other than a newspaper; (4) and oversaw the gift shop's maintenance and cleanliness. She stated that the Respondent was her "superior officer" and was her boss. (Hearing Transcript, pp. 25 – 28; 33.)

22. Robert Silvester, was a district biologist and the Respondent's boss. He testified that he did see Sandra Thorn at the gift shop, but did not know what her status was there. He did find it odd that he overheard the two ladies discussing whether items they were ordering would sell. Mr. Silvester testified that the Respondent would not have had the authority to end the contract with Ms. Browning, but he could have recommended that Ms. Browning's contract be terminated. His recommendation would carry some weight, since he would be the one to any problems. (Hearing Transcript, pp. 65 - 69.)

23. The gift shop failed to earn net profits. (Hearing Transcript, p. 31.)

24. The parties disagree as to what role Sandra Thorn played in the operation of the gift shop. The Complainant asserts that Sandra Thorn was an equal partner in the operation and was paid \$100 per day by Ms. Browning, which was more than the daily rate of pay for other gift shop employees. The Respondents assert that Mrs. Thorn was a volunteer and received no payments.

25. Regardless of her status, all parties agreed that Sandra Thorn provided her skill and labor to the gift shop from May through July 2013.
26. Ulrika Browning testified that she paid Sandra Thorn \$100 in cash per day, taking money of the top of her portion of the contract proceeds. Ms. Browning testified that she paid Sandra Thorn because Mrs. Thorn worked from nine to five in the gift shop and had to make her car payment. "I felt pressure to do this." (Hearing Transcript, pp. 32, 41, 53, 57.)
27. Another employee of the gift shop, Billie Jo Donovan, testified that she worked at the Wildlife Center gift shop and saw Ms. Browning pay Sandra Thorn in cash one time. She stated that Mrs. Thorn "was at Ulrika's desk and asked to get her money early because she was going away." (Hearing Exhibits No. 2, No. 9; Hearing Transcript p. 60.)
28. The relationship between Sandra Thorn and Ms. Browning quickly deteriorated. In late July 2013, Ms. Browning told Sandra Thorn that she could no longer work in the gift shop. (Hearing Transcript, p. 33; Exhibit No. 2.)
29. Ulrika Browning testified that immediately after she told Sandra Thorn that she would no longer be participating with her in the operation of the gift shop, the Respondent presented her with a written payment schedule and advised her that she needed to pay back the \$5,000 loan. The payment plan required Ms. Browning to make weekly payments in the amount of \$500 from August 2, 2013, through October 11, 2013, plus an additional payment of \$130 due by October 18, 2013. The plan also included a 3% "transaction fee" of \$150; a \$25 "expedited transfer fee" and \$450 in interest,

calculated at eighteen percent (18%) interest for a total repayment amount of \$5,630. (Hearing Transcript, pp. 34, 48; Exhibit No. 6.)

30. Ms. Browning testified that she could not afford these payments, but made them anyway, knowing that they were to be paid back into the Respondent's retirement fund. She did not expect to pay any interest, and was surprised at the 18% rate that Mr. Thorn presented her with on the payment schedule. Ms. Browning had to make part of these payments with her personal funds and funds from her crafting business. (Hearing Transcript, pp. 34-35, 54)

31. Ms. Browning discussed this matter with Robert Sylvester, DNR District Biologist, and gave him a copy of the repayment plan on or about August 6, 2013. (Hearing Exhibit No. 6; Hearing Transcript p. 34.)

32. By letter date August 7, 2013, Robert Sylvester reported to Gary Foster, Game Management Supervisor of the West Virginia DNR Wildlife Resources Section, on his meetings with Ulrika Browning and Eugene Thorn. He noted that on July 29, 2013, Ms. Browning requested a meeting with him to discuss the issue of a disruptive employee, namely Sandra Thorn. He further reported attending a meeting with Ms. Browning and Eugene Thorn, during which Ms. Browning expressed dissatisfaction with the performance of Sandra Thorn, who refused to complete assignments and made inappropriate comments concerning inventory items in the shop while customers were present. Mr. Thorn stated that if Ms. Browning no longer wanted Mrs. Thorn's help, that would be fine. (Hearing Exhibit No. 8.)

33. The report from Mr. Sylvester further noted that three days later he received an inquiry from a realtor, Tom Thacker, who noted that he had been told that the current

concessionaire was not working out and that the contract would be re-bid. Mr. Sylvester advised Mr. Thacker that he was misinformed and that the Division was pleased with the current vendor.

34. Mr. Sylvester also noted in his report that Ms. Browning told him that she was afraid of repercussions from Mr. and Mrs. Thorne since they paid her surety bond. He also noted his surprise at hearing of this and his actions in notifying his supervisor about the meeting and the transaction. Mr. Sylvester concluded his report by stating that the discussions clearly suggested that the Respondent used his position to secure personal gain from the contract with Ms. Browning. (Hearing Exhibit No. 8.)

35. On August 23, 2013, Gary M. Foster, Game Management Supervisor, submitted a Briefing Report reflecting a meeting in Elkins with the Respondent, Rob Sylvester and himself. The report noted that the Respondent advised Mr. Foster that the \$5,000 loan to Ms. Browning was from a cash advance on Sandy Thorn's personal credit card and was made to enable Ms. Browning to comply with the requirement for a surety bond. The report further outlines the activities of Ms. Browning, the Respondent and Sandra Thorn in conjunction with the operation of the gift shop. (Hearing Exhibit No. 10.)

36. On October 18, 2013, Ms. Browning completed the payment plan having paid \$5,630 to the Respondent. (Hearing Exhibit No. 6, payment schedule)

37. The Respondent retired from his employment with DNR later in October 2013 after Ms. Browning repaid the loan.

38. Based upon the report from Robert Sylvester, the Department of Natural Resources conducted an internal investigation into the activities of the Respondent in relation to the operation of the gift shop. Subsequently, DNR Director Frank Jezioro requested

that the West Virginia Ethics Commission conduct a separate investigation. He provided several reports and other documents that were admitted into evidence at the hearing without objection. (Hearing Exhibits Nos. 8, 9 and 10).

39. The Commission initiated a Complaint against Eugene Thorne, which was filed on March 11, 2014. The Complaint alleged that the Respondent, Eugene Thorn, violated provisions of the *West Virginia Ethics Act*, namely *W.Va. Code § 6B-2-5(b)(1)*, which prohibits a public employee from knowingly and intentionally using his office or the prestige of his office for his own private gain or that of another person, and *W.Va. Code § 6B-2-5(d)(1)*, which prohibits a public employee or a member of his immediate family from having an interest in the profits or benefits of a contract which the employee may have direct authority to enter into or over which he may have control. (Hearing Exhibit No. 1.)

40. The Respondent submitted his written comments regarding the Complaint to the Commission by letter dated November 10, 2014. (Hearing Exhibit No. 2.)

41. On April 26, 2016, the Probable Cause Review Board of the West Virginia Ethics Commission issued a Probable Cause Order, finding that there was probable cause to believe that the Respondent violated the provisions of the Ethics Act. (Hearing Exhibit No. 13.) The Probable Cause Order noted that the Respondent had a prohibited interest in the profits or benefits of a contract over which his public position gave him control in violation of the provisions of *W.Va. Code § 6B-2-5(d)(1)*; that the Respondent had a financial interest in a contract with a state vendor, in violation of the provisions of *W.Va. Code § 6B-2-5(d)*; and that the Respondent used

his public position for his and his wife's private gain to influence a state vendor, in violation of the provisions of *W.Va. Code* §6B-2-5(b)(1).

42. The Respondent Eugene R. Thorne appeared before the West Virginia Ethics Commission on May 20, 2015, and presented his narrative response to the Complaint, which was duly recorded and submitted at the full hearing as Exhibit No. 12. This narrative was not made under oath and was not subject to cross-examination by the Commission or its counsel.
43. The hearing in this matter was conducted on July 18, 2016, in Charleston, West Virginia. The Commission appeared by and through its counsel, Kimberly Weber and Meridith Johnstone. The Respondent, Eugene Thorne, appeared in person and by and through his counsel, John H. Tinney, Jr. of Hendrickson & Long.
44. Sworn testimony was received from Ulrika Browning, Billie Jo Donovan, Robert Silvester and Sandra Thorn. The Respondent did not testify at the hearing, nor did he submit any sworn affidavit. The parties submitted Exhibits Nos. 1 through 13 which had been previously reviewed and stipulated as admissible with no objection. Exhibit No. 14 was admitted during the hearing without objection.
45. Both parties timely submitted their respective proposed findings of facts, conclusions of law and briefs on the matter.

DISCUSSION

Burden of Proof

The statute in effect as of the date of the present complaint provides that the Commission has the burden of proving that the Respondent violated the provisions of the West Virginia Governmental Ethics Act beyond a reasonable doubt. *W.Va. Code*

§6B-2-4 (r)(1). If the Commission finds that the facts alleged in the Complaint are true and constitute a material violation of the Ethics Act, the Commission may impose one or more sanctions upon the Respondent. *Id.*

As noted by the Respondent, the burden of proof in this matter is the highest standard under the law. “A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such convincing character that a reasonable person would not hesitate to rely and act upon it.” *State v. Berry*, 176 W.Va. 291, 296, 342 S.E.2d 259, 263 (1986). As noted by the Commission, reasonable doubt does not necessarily mean proof without contradiction or conflict. *State v. Conrad*, 167 W.Va. 906, 908, 280 S.E.2d 728 (1981). The present matter not only presents contradictions and conflict, it often challenges the notions of reason and common sense.

Public Employee

The Commission asserts that the Respondent is a public employee and has violated various provisions of the *West Virginia Governmental Ethics Act*, *W.Va. Code* §6B-1-1, *et seq.* The *Ethics Act* defines a “public employee” as “any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.” *W.Va. Code* § 6B-1-3(i).

There is no dispute that the Respondent was a Wildlife Biologist at the West Virginia State Wildlife Center operated by the West Virginia Department of Natural Resources Wildlife Resources Section. The undersigned finds that the Respondent is

indeed a “public employee” as defined by *W.Va. Code § 6B-1-3(j)* and, as such, is subject to the requirements and restrictions of the *Ethics Act*.

The Commission asserts violations of *W.Va. Code §6B-2-5(b)(1)*, which provides, in part, that a 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.” The Commission further asserts a violation of the provisions of *W.Va. Code §6B-2-5(d)(1)*, which state that no “public employee or member of his or her immediate family . . . may be a party to or have an interest in the profits or benefits of a contract which the . . . employee may have direct authority to enter into, or over which he or she may have control.”

The Respondent argues that he did not have the authority or control over the vendor’s contract sufficient to make him subject to the provisions of the *Ethics Act*; that he had no knowledge of the financial transactions between Ms. Browning and his wife; and that the alleged compensation paid to Sandra Thorn and the interest and costs earned from the loan were *de minimis* amounts permitted by law, and therefore all charges should be dismissed.

Both parties rely heavily on the credibility of the witnesses. The fact that the Respondent did not testify under oath and did not submit any sworn statements or affidavits is duly noted. The testimony of Ulrika Browning is consistent with documented evidence of meetings and transactions at issue in the matter, and is supported by independent testimony from at least two other witnesses. The only testimony offered in support of the Respondent’s position was that of his wife, Sandra Thorn.

COUNT ONE

Count One of the Probable Cause Order states that the Respondent Eugene Thorne, directly or indirectly through his wife, had a prohibited interest in the profits or benefits of a contract over which his public position gave him control. Those profits or benefits arose out of the working relationship between the vendor of the contract, Ulrika M. Browning, and Sandra Thorn, the wife of the Respondent. Under that purported relationship, Ms. Browning and Ms. Thorn were equal partners in the venture, and agreed to share the net profits from the operation of the gift shop in exchange for Sandra Thorn working at the gift shop. Ms. Browning testified that she paid Mrs. Thorn \$100 per day for her services off the top of all revenues received each day. The Commission asserts that this relationship and the profits derived from the same constitute a violation of *W.Va. Code §6B-2-5(d)(1)*.

The Respondent asserts that he did nothing improper; that he and his wife acted solely out of compassion for Ms. Browning; and that Mrs. Thorn did not receive any compensation for volunteering at the gift shop. Whether Mrs. Thorn received any form of monetary payment from Ulrika Browning is an issue that depends solely on the weight of the evidence and the credibility of the witnesses and supporting documents.

The *Ethics Act* prohibits a public employee or any member of his immediate family from being a party to a contract, or having an interest in the profits or benefits of a contract, where the public employee may have direct authority or control over that contract. The testimony of Ulrika Browning and the report of Robert Silvester both reflect that Sandra Thorn worked in the gift shop and was considered at least an employee, if not a partner. The testimony and exhibits support the Commission's contention that Mrs. Thorn was paid to work in the gift shop.

In addition to the testimony of Ms. Browning, another employee, Billie Jo Donovan, testified that she overheard a conversation where Mrs. Thorn “asked to get her money early because she was going away.” (Hearing Exhibits No. 2, No. 9; Hearing Transcript p. 60.) This implies that Mrs. Thorn regularly received money from Ms. Browning, and is consistent with Ms. Browning’s testimony that Mrs. Thorn requested payment prior to going on vacation.

The report of Robert Silvester is also persuasive in establishing not only that Sandra Thorn was an employee/partner, but also that Eugene Thorn asserted control over the gift shop and the employees who worked there. It is significant that early on Ulrika Browning asserted that Sandra Thorn was an employee whom she wanted to fire; but she was afraid to do so because of the supervision and control of Eugene Thorn. The fact that Ms. Browning requested a meeting with Mr. Silvester present reflects that fear. The fact that Sandra Thorn left the meeting and allowed Eugene Thorn to discuss the issue, including the termination of her services at the gift shop, demonstrates that the Respondent not only knew of the situation, he also exerted authority and control over the matter. There is no other logical reason for Mr. Thorn to have attended a meeting in which Ms. Browning wanted to fire his wife. Mr. Silvester’s report, as well as his testimony that Mr. Thorn could have recommended that the vendor’s contract be pulled, is significant.

As noted by the Commission, for someone who professed ignorance as to the operation of the gift shop, the Respondent knew a great many details. His written response to the Complaint, Exhibit No. 2, specifically noted the income, the tax obligations and the operations of the business. He described the activities of both Ms. Browning and

his wife, and gave specific orders regarding gate fees and tickets. This evidence demonstrates that the Respondent was very much involved in the structure and operation of the gift shop.

The testimony and the evidence support the Commission's allegations beyond a reasonable doubt. The Respondent and his wife had an interest in the contract that Ms. Browning held with a state agency and gained benefits and profits from the same. The actions of Mr. Thorn and the testimony and reports of Mr. Silvester demonstrate that the Respondent had some authority and control over the contract and the vendor, all in violation of the provisions of *W.Va. Code §6B-2-5(d)(1)*.

COUNT TWO

Count Two of the Probable Cause Order asserts that the Respondent, through his wife, Sandra Thorn, had a financial interest in the vendor's contract held by Ulrika Browning at the Wildlife Center's gift shop. There is no question that Mrs. Thorn gave \$5,000 to Ms. Browning to be used as the security deposit required by the contract to operate the gift shop. The Commission asserts that because of the Respondent's financial interest in the contract and participation in the contract on behalf of the Division of Natural Resources, Mr. Thorn was in violation of the provisions of *W.Va. Code § 6B-2-5(d)*. The Respondent argues that he knew absolutely nothing of this transaction; that it was simply a goodwill gesture on the part of his wife, and that neither he nor his wife ever asked that the money be repaid. In the alternative, the Respondent asserts that even if he and his wife could be deemed creditors of Ms. Browning, the loan should be considered a "limited interest" under the provisions of *W.Va. Code § 6B-2-5(d)* and not actionable.

There is no question whatsoever that the Respondent and/or his wife loaned Ulrika Browning the sum of \$5,000, at 18% interest, and charged her additional costs and fees. The repayment schedule submitted as an exhibit in this matter, without objection, establishes the transaction and reflects that Ms. Browning ultimately repaid \$5,630. The testimony of Ms. Browning and Mrs. Thorn reflect that these funds were indeed obtained from the Thorn joint account and, ultimately, repaid back to them.

The Respondent's assertions that Eugene Thorn had no idea the \$5,000 loan was made by his wife is not credible. First, the evidence is clear that Eugene Thorn specifically solicited Ulrika Browning and asked her to submit a bid for the DNR vendor's contract. He actively worked with her before and after the contract was awarded, including going with her to offices of insurance agents to discuss the performance bond. (Hearing Exhibit No. 2.) The testimony from both sides reflects that they met often and discussed the business plan and proposed operations. It is inconceivable that the Respondent would not know that Ms. Browning could not get the security bond; would not have discussed the matter with his wife; and would not have noticed that \$5,000 was withdrawn from their joint account.

The manner in which the funds were obtained and paid is not clearly established. Ms. Browning testified that she believed the funds were withdrawn from Mr. Thorn's retirement account. The Respondent asserts that the funds were drawn from Mrs. Thorn's credit card. The Commission did not submit any evidence reflecting a withdrawal from the Respondent's retirement account; and the Respondent did not submit any evidence reflecting an advance on a credit card. The repayment schedule, however, includes a notation at the top: "\$5,000 CC Loan." That suggests that the loan made to

Ms. Browning by the Respondent and/or his wife came from an advance on a credit card, a statement that was included in the Briefing Report from Gary Foster.

Regardless of the source, all parties agree that Sandra Thorn wrote a check from the Thorn's joint account; purchased a cashier's check payable to the DNR, and gave it to Ulrika Browning. The testimony that she wrapped it in a newspaper and handed it to her at a convenience store is reflective of concerns of impropriety and possibly illegality. Mrs. Thorn obviously did not want to mail the check; she wished to hand deliver it in a rather secretive manner.

The question thus arises as to whether that \$5,000 loan and the interest and fees generated on the same constitutes a prohibited financial interest in a vendor's contract, or if it is a permitted transaction.

Limited Interest

The Respondent argues that he should be entitled to the "limited interest" exceptions provided by *W.Va. Code* § 6B-2-5(d):

- (2) In the absence of bribery or a purpose to defraud, [a] . . . public employee or a member of his . . . immediate family . . . shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:
 - (A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;
 - (B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.
- (3) If a public official has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any

way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest

W.Va. Code § 6B-2-5(d)(2).

Under the first exemption, the Respondent, through his wife, would not have a prohibited financial interest in a public contract if, as an owner, shareholder or creditor of the business, he did not realize more than \$1,000 in the profits or benefits of the public contract in a calendar year.

The evidence is not clear how much, if anything, Sandra Thorn received as a purported owner of the gift shop. Ms. Browning testified that she paid her \$100 per day for several months, but there is absolutely no documentation to prove that. Mrs. Thorn, of course, denies receiving any monies. As noted previously, the evidence does support the allegation that Mrs. Thorn was a paid employee or partner, but the amount she received cannot be quantified. The absence of such evidence cannot support the allegation that the Respondent, through his wife, realized more than \$1,000 in profits or benefits as an owner.

The Respondent did, however, realize more than \$1,000 as a creditor. Through the repayment of the loan to his wife, the Respondent not only recovered the original \$5,000 loan, he also realized an additional profit through the 18% interest and fees. In addition, he exercised control over the contract by virtue of being on the recruitment and interview committee, his involvement and control over the business, and the authority – and fear – that he held over Ms. Browning and her business.

The Respondent asserts that even if there is a violation of the maximum statutory prohibition, the loan should be considered a limited interest under *W.Va. Code* 6B-2-5(d) because it is just one cent over the prohibited amount of \$4,999.99. This position fails to

take into consideration the additional interest, fees and costs collected by the Respondent and his wife. Altogether, Ms. Browning paid \$5,630 to the Thorns, an amount in excess of the statutory prohibition. As noted by the Commission, the West Virginia Ethics Commission strictly construes the financial limits in similar matters. While Advisory Opinion 2012-37 found that \$100 in compensation was indeed *de minimis*, other opinions focused on the total amount of revenues received, including those from potential sales and actual monies paid.

Authority and Control

A further consideration under the limited exception portion of the *Ethics Act* focuses on what control, if any, the public employee under scrutiny had over the state contract. The Commission asserts that the Respondent had sufficient control over the gift shop contract to place him outside the scope of the statutory exception. The Respondent denies that he had anything to do with the acquisition or approval of the contract and further denies any supervisory role over the operation of the gift shop.

The West Virginia Ethics Commission pointed to two prior Advisory Opinions that establish the categories of public employees or public officials who exercise control over state contracts. In Advisory Opinion 99-02, the Commission noted the considerable control that vocational school instructors have over the construction of a modular home by the students of the school, and prohibited the instructor from bidding on the subsequent sale of the home. The Commission thus recognized that public employees may have direct authority to enter into a state contract OR control over the contract.

In a prior opinion, the Commission stated its position on a controlling public employee quite clearly: “[A]n individual has control over a contract as contemplated by

W.Va. Code 6B-2-5(d)(1) if he oversees the administration of the contract or if he monitors or supervises the services provided under the contract.” Advisory Opinion 95-02.

The evidence has established that the Respondent was a public employee with control over the awarding of the contract and control over the operation of the gift shop. As noted by Mr. Silvester, the Respondent sat on the interview committee, which was expected to render a unanimous recommendation to the Director, who ultimately awarded the contract. The Respondent’s potential “nay” in this regard indirectly controlled the awarding of the contract, and is very similar to the prohibited actions noted in Advisory Opinion 2012-29, where a public employee sought to provide services under a federal grant that he helped secure. Moreover, the later actions of the Respondent in suggesting to other potential vendors that the contract would be put out for bid again clearly established his efforts to control the awarding of the agreement.

The evidence also establishes that the Respondent was the sole voice of the DNR in controlling the operation of the gift shop under the contract. Ms. Browning considered him her supervisor and consulted with him on day-to-day operations, including inventory and ticket sales. The Respondent’s supervisor, Robert Silvester, testified that Ms. Browning looked to Mr. Thorn for direction, even to the point of firing the wife of the Respondent. The reports and findings submitted by the DNR and the answer submitted by Mr. Thorn himself reflect a significant involvement by the Respondent in the operation of the gift shop pursuant to the state contract with Ms. Browning.

The loan from the Thorn’s joint account was a prohibited interest under *W.Va. Code § 6B-2-5(d)*. The Respondent stood to profit from the loan – and did. He became a creditor of a vendor to an agency of the State of West Virginia in the amount of \$5,630

after repayment of the loan, interest, costs and fees, an amount clearly in excess of the limits established under the *Ethics Act*. He also stood in a position of authority and control over Ms. Browning and her contract with the DNR. The Commission has satisfactorily established Count Two of its Complaint.

COUNT THREE

Count Three of the Probable Cause Order asserts that the Respondent used his public position for his and his wife's private gain to influence Ulrika M. Browning to immediately repay the \$5,000 loan, plus 18% interest and costs, in violation of the provisions of *W.Va. Code* § 6B-2-5(b)(1). The Commission argues that the Respondent used his position with the DNR to control and intimidate Ulrika Browning regarding the operation of the gift shop and the repayment of the loan made to her. The Respondent argues that he knew nothing about the loan or the repayment plan; that everything involving the transaction was at the insistence of Ms. Browning, and that he essentially had a hands-off approach to everything related to the gift shop.

The testimony of Ms. Browning, the testimony of Sandra Thorn and the written reports and responses establish that Eugene Thorn had greater control over the gift shop than he probably should have. As noted previously, he sat on the interview committee and was crucial in awarding the contract to Ms. Browning. He and his wife met with her numerous times to discuss business plans, inventory and operation. The Respondent admitted to going to see insurance agents with Ms. Browning when she was attempting to obtain the security bond. Ms. Browning considered him her supervisor and the sole voice of the DNR with regard to operating the gift shop. When the issue of firing Sandra Thorn arose, Ms. Browning sought the guidance of the Respondent's supervisors, who

believed that Mrs. Thorn was an employee of Ms. Browning and acknowledged that Mr. Thorn was significantly involved in the operation of the gift shop.

As noted by Robert Silvester, Eugene Thorn could have caused the termination of the DNR contract with Ms. Browning by merely saying the word to his supervisors. At any indication of problems or trouble with the vendor, the DNR could have re-bid the contract. It appears that Mr. Thorn actually contemplated doing just that, given the inquiry from the realtor just days after the July 29 meeting with Ms. Browning, Mr. Silvester and the Respondent.

The evidence further establishes that the Respondent prepared the repayment plan and presented it to Ms. Browning immediately after she terminated his wife from her position at the gift shop – partner, employee or volunteer. Both parties deny ever preparing the document, but the evidence leans heavily in favor of Ms. Browning. It is inconceivable that she would have drafted a document that included such onerous terms – 18% interest, fees and charges of which she had no knowledge and a monthly payment in an amount that presented a financial burden to her.

A significant clue as to who prepared the document is on the very first line: “\$5,000 CC Loan.” Ms. Browning has always stated that she thought Mr. Thorn withdrew the funds from his retirement. She testified that the Respondent handed her the repayment plan on August 1, 2013, just a few days after she terminated Mrs. Thorn from her position at the gift shop. The phrase “CC Loan” could very well be construed as a “credit card loan.” However, the only mention of the \$5,000 loan being an advance on a credit card is in the Briefing Report submitted by Gary Foster on September 3, 2013 – a full month

after the repayment plan was tendered to Ms. Browning. Prior to that date, there had been no mention of a credit card advance made to Ms. Browning.

The notation at the top of the repayment plan supports the Respondent's contention that the funds came from a credit card advance, and supports the Commission's allegations that the Respondent drafted the repayment plan and presented it to Ms. Browning. No one else other than the Respondent and his wife knew that the loan was made from a credit card advance.

The evidence supports the Commission's allegations that the Respondent used his public position for his and his wife's private gain to influence Ulrika M. Browning to immediately repay the \$5,000 loan, which said actions constitute a violation of the provisions of *W.Va. Code* § 6B-2-5(b)(1).

CONCLUSIONS OF LAW

1. The West Virginia Ethics Commission ("the Commission") has jurisdiction over alleged violations of the *West Virginia Governmental Ethics Act* committed by West Virginia public employees. The Commission is charged with proving all alleged violations beyond a reasonable doubt. *W. Va. Code* §§ 6B-1-1 through 6B-2B-6.
2. The Respondent, Eugene Thorne, was a "public employee" as defined by the provisions of the *West Virginia Governmental Ethics Act*, *W.Va. Code* §6B-1-3(j).
3. The Respondent was employed by the West Virginia Division of Natural Resources as a Biologist One at the Wildlife Center in French Creek.

4. The West Virginia Division of Natural Resources offered for bid a contract to operate the gift shop at the Wildlife Center. Ulrika Browning was the sole bid on said contract.
5. The Respondent had authority over the contract as contemplated by *W.Va. Code* §6B-2-5(d) and Advisory Opinions 2012-29 and 2015-01 because he was a member of the interview committee that recommended that Ms. Browning be awarded the contract.
6. The Respondent had control over the contract because he oversaw the administration of the contract and monitored and supervised the services provided under the contract. *W.Va. Code* § 6B-2-5 (d); Advisory Opinion 95-02.

Count One

7. The Respondent had a prohibited interest in the contract between Ulrika M. Browning and the Division of Natural Resources for the operation of the Wildlife Center gift shop because the Respondent's wife, Sandra Thorn, and Ms. Browning agreed to share the net profits from the contract in exchange for Sandra Thorn working at the gift shop and the Respondent had authority to enter into the contract and control over the contract. *W.Va. Code* § 6B-2-5(d).
8. The Commission proved beyond a reasonable doubt the Respondent violated the Ethics Act as charged in Count One.

Count Two

9. The Respondent had a prohibited financial interest in the contract with Ulrika Browning as defined by *W.Va. Code* § 6B-2-5 (d) because the Respondent and his wife loaned Ulrika Browning the sum of \$5,000 at 18% interest plus costs and

fees so that she could pay for the security deposit required by the DNR's gift shop contract. The Respondent and his wife realized a total benefit of \$5,630 from the transaction.

10. The Commission proved beyond a reasonable doubt that the Respondent violated the Ethics Act as charged in Count Two.

Count Three

11. The Respondent used his public position for his private gain to cause Ulrika M. Browning to immediately repay the \$5,000 loan with 18 percent interest in violation of the provisions of *W.Va. Code* § 6B-2-5(b)(1).
12. The Commission proved beyond a reasonable doubt the Respondent violated the Ethics Act as charged in Count Three.
13. The Respondent's Motion to Dismiss based upon the *de minimis* defense is denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, and on the basis of the evidence, the undersigned Hearing Examiner recommends that pursuant to the authority reflected in *W.Va. Code* § 6B-2-4(4), the West Virginia Ethics Commission find that the evidence, beyond a reasonable doubt, proves that the facts alleged in the Complaint are true and constitute a material violation of the West Virginia Governmental Ethics Act.

The undersigned further recommends that the relief sought by the Commission be GRANTED, and that the Commission ORDER as follows:

1. A public reprimand shall be issued against the Respondent Eugene Thorn;

2. The Respondent shall pay a fine of \$15,000 to the West Virginia Ethics Commission;
3. The Respondent shall reimburse the West Virginia Ethics Commission for the following actual costs of investigating and prosecuting this matter:
 - (a) Realtime Court Reporting in the amount of \$480.60;
 - (b) The expenses and fees charged by the hearing examiner; and
 - (c) Travel expenses for Ulrika M. Browning related to her appearance as a witness at the public hearing on July 18, 2013 in the amount of \$112.32.
5. The Respondent shall pay restitution to Ulrika M. Browning in the amount of \$630, the amount of interest and costs charged by the Respondent.
6. The Respondent shall complete training regarding the West Virginia Ethics Act either in person or by viewing the video on the Ethics Commission's website, at www.ethics.wv.gov, within 30 days of holding public office or employment and that the Respondent shall notify the Commission in writing upon completion of this training.

Respectfully submitted this 8th day of September 2016.

s/s *Jennifer N. Taylor*

Jennifer Narog Taylor, WVSB 4612
Hearing Examiner
West Virginia Commission of Osteopathic Medicine
1118 Kanawha Boulevard, East
Charleston, WV 25301
(304) 342 - 1887

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:

EUGENE R. THORN

COMPLAINT NO. CIC 2014-14

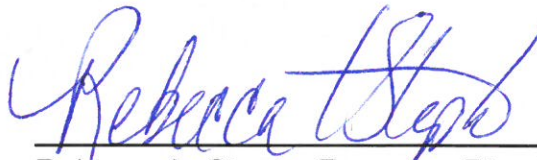
CERTIFICATE OF SERVICE

I, Rebecca L. Stepto, Executive Director of the West Virginia Ethics Commission, certify that I mailed a true and complete copy of the foregoing **FINAL DECISION AND ORDER** via email and certified, United States Mail, postage prepaid, on November 3, 2016, to:

John H. Tinney, Jr.
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214 Capitol Street
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jtinney@handl.com
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and via email and hand delivery to:

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