

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:

COMPLAINT NO. VCRB 2022-04

JAMES E. MARINO,
FORMER Mayor, City of Clarksburg,
Respondent

FINAL DECISION AND ORDER

This matter came for consideration before the West Virginia Ethics Commission during its regularly scheduled meeting on November 7, 2024, following a public hearing conducted on April 9, 2024, before the Commission's duly appointed Hearing Examiner.

This proceeding arises under the West Virginia Governmental Ethics Act, W. Va. Code §§ 6B-2-1 through 6B-3-11 ("Ethics Act").

The Ethics Commission's Probable Cause Review Board, following an investigation, entered an Order on June 21, 2023, finding probable cause to believe that Respondent violated W. Va. Code §§ 6B-2-5(b)(1); (j)(1), and (j)(3) and ordering that a Statement of Charges be prepared and that a public hearing be scheduled.

A Statement of Charges and Notice of Hearing was issued on June 23, 2023. The Statement of Charges contains seven counts against Respondent Marino:

Count One: On January 21, 2021, Marino violated the voting provisions in the Ethics Act, W. Va. Code § 6B-2-5(j)(1) and W. Va. Code 6B-2-5(j)(3), by participating in the vote on the Direct Election of Mayor and Extension of Terms Ordinance's first reading to extend his term of office. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself even though he voted against his own financial interest.

Count Two: On April 1, 2021, Marino violated the voting provisions in the Ethics Act, W. Va. Code § 6B-2-5(j)(1) and W. Va. Code 6B-2-5(j)(3), by participating in the vote to put the Direct Election of Mayor and Extension of Terms Ordinance, which would extend his term of office, on the June 1, 2021, General Election ballot. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself.

Count Three: On February 2, 2023, Marino violated the voting provisions in the Ethics Act, W. Va. Code § 6B-2-5(j)(1) and W. Va. Code 6B-2-5(j)(3),

by participating in the vote on Charter Amendment No. 23-4's first reading which affected the length of his term of office. Marino's vote constituted a vote in favor of maintaining his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself.

Count Four: On February 16, 2023, Marino violated the voting provisions in the Ethics Act, W. Va. Code § 6B-2-5(j)(1) and W. Va. Code 6B-2-5(j)(3), by participating in the vote on Charter Amendment No. 23-4 second and final reading which affected the length of his term of office. Marino's vote constituted a vote in favor of maintaining his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself.

Count Five: On February 2, 2023, Marino violated the voting provisions in the Ethics Act, W. Va. Code § 6B-2-5(j)(1) and W. Va. Code 6B-2-5(j)(3), by participating in the vote on the Ordinance Placing Three Council Seats on Upcoming Ballot's first reading which affected the length of his term of office. Marino's vote constituted a vote in favor of maintaining his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself.

Count Six: On February 16, 2023, Marino violated the voting provisions in the Ethics Act, W. Va. Code § 6B-2-5(j)(1) and W. Va. Code 6B-2-5(j)(3), by participating in the vote on the Ordinance Placing Three Council Seats on Upcoming Ballot's second and final reading which affected the length of his term of office. Marino's vote constituted a vote in favor of maintaining his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023. He had a financial interest in his term of office because he receives compensation and

benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself.

Count Seven: Marino used his office for private gain in violation of the Ethics Act, at W. Va. Code § 6B-2-5(b)(1) by knowingly and intentionally participating in votes in which he had a financial interest.

The hearing on the Complaint was held in Charleston, West Virginia, on April 9, 2024, with Jeffrey G. Blaydes presiding as the independent Hearing Examiner. At the hearing, the Commission was represented by its General Counsel Theresa M. Kirk and Staff Attorney Andrew R. Herrick. Respondent appeared at the hearing pro se. The Respondent did not testify. The Commission presented as witnesses Annette Wright, Edward Ryan Kennedy, and Richard Marsh. A certified court reporter created a stenographic record of the hearing and a transcript of the proceedings.

By letter dated September 17, 2024, both parties agreed that oral arguments would occur at the November 7, 2024, meeting of the Ethics Commission and that in conjunction with the request for continuance, to waive the time requirements in the Ethics Act at W. Va. Code § 6B-2-4(m) governing the period in which the Commission must rule on a complaint following receipt of the record.

The Commission, with two-thirds of the Commission members present and voting, and with Commissioner Jordan Herrick recusing, considered the hearing record, which includes the Probable Cause Order, Statement of Charges and Notice of Hearing; the Hearing Examiner's Recommended Decision; the Ethics Commission's Proposed Findings of Fact and Conclusions of Law; the Respondent's Proposed Findings of Fact and Conclusions of Law; the Ethics Commission's Written Arguments, and the hearing transcript with exhibits. Respondent, through counsel, understands that Commissioner Cottle was absent during a portion of Respondent's oral argument. Respondent, through counsel, agreed for the Commission, including Commissioner Cottle, to proceed in reaching a final decision and order in this matter, and waived any potential procedural defects.

The Commission adopts the Hearing Examiner's "Findings of Fact and Conclusions of Law," in his Recommended Decision, which is attached hereto and incorporated herein by reference.

ORDER

Based on the foregoing, the West Virginia Ethics Commission finds that there was clear and convincing evidence presented in this matter that James Marino materially violated W. Va. Code §§ 6B-2-5(b)(1); (j)(1), and (j)(3) and ORDERS the following sanctions against him:

1. A Public Reprimand;

2. Respondent shall pay a fine in the amount of \$200 to the West Virginia Ethics Commission for his violations of the Ethics Act by November 30, 2024;
3. Respondent shall reimburse the West Virginia Ethics Commission for half of the total actual costs of investigating and prosecuting the violations, which half is as follows, by November 30, 2024, and

Court Reporter (hearing transcript)	\$ 371.12
Hearing Examiner	<u>1,825.00</u>
TOTAL	\$2,196.12

4. Respondent shall undergo training on the West Virginia Governmental Ethics Act by attending either an in-person or virtual training presented by the Ethics Commission staff or by viewing the training provided on the Ethics Commission's website at ethics.wv.gov by November 30, 2024, and shall provide written confirmation of the completion of this training to the Ethics Commission within five business days of completing it.

This Order was entered on the 7th day of November 2024.



Roger J. Wolfe, Chairperson
West Virginia Ethics Commission

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:
JAMES E. MARINO,
Mayor, City of Clarksburg,
Respondent.

COMPLAINT NO. VCRB 2022-04

DECISION

This matter came on for hearing on April 9, 2024, at the West Virginia Ethics Commission (“Commission”) located at 210 Brooks Street, Charleston, Kanawha County, pursuant to a Notice of Hearing issued by the Commission. The Commission was represented by Staff Attorney Andrew R. Herrick and General Counsel Theresa M. Kirk.¹ Respondent James E. Marino (“Respondent Marino”) appeared in person. This matter became ripe for decision following the parties’ submissions of Proposed Findings of Fact and Conclusions of Law. Having thoroughly considered the evidence and argument presented at the hearing and the written submissions of the parties, the hearing examiner now issues the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Respondent Marino served as the Mayor for the City of Clarksburg at all times relevant herein. As Mayor, Respondent Marino is a “public official” as defined in the West Virginia Governmental Ethics Act (“Ethics Act” or “Act”), See W. Va. Code § 6B-1-3(k).

2. During the relevant time period, the City of Clarksburg was governed by:
- Seven elected City Council members serving four-year staggered terms.

¹ John E. Roush, Staff Attorney, appeared on the post-hearing submissions for the Commission as well.

- 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.²

3. On June 4, 2019, there was a City election, and three of the seven City Council seats were on the ballot. The three new City Council members elected to four-year terms, commencing on July 1, 2019, and ending on June 30, 2023, were Lillie Junkins (“Junkins”), Gary Keith, II (“Keith”), and Respondent Marino.³ The four other City Council positions were not up for election in June 2019 as their terms of office did not expire until June 30, 2021.⁴

4. As the City of Clarksburg Council member serving as mayor, Respondent Marino received \$3,000 per year.⁵ City Council members also have the option to receive health insurance benefits and dental and vision benefits through the City and its Public Employees Insurance Agency (“PEIA”) plan or to opt out of PEIA and receive a monthly reimbursement to cover their health insurance premiums with another health insurance provider. Respondent Marino received the health insurance and dental and vision benefits “opt out reimbursement” valued at \$6,849 per year.⁶

5. The City of Clarksburg’s Charter establishes the terms of office for its elected officials and the City’s election procedures, including the election day. The City of Clarksburg elections were, historically, held every two years on the first Tuesday in June in odd-numbered

² April 9, 2024, Public Hearing Transcript, pp. 57 – 58

³ Junkins, Keith and Respondent Marino were all the subject of complaint investigated by the Commission. Keith previously resolved his complaint with the Commission. Junkins and Respondent Marino contested the complaint and participated in a consolidated hearing before the undersigned on April 9, 2024. The complaint regarding Respondent Junkins is addressed by separate Decision.

⁴ April 9, 2024, Public Hearing Transcript, pp. 59 – 60

⁵ April 9, 2024, Public Hearing transcript, pp. 57 – 58

⁶ Ethics Exhibit #21, April 9, 2024, Public Hearing; April 9, 2024, Public Hearing Transcript, pp. 57, 60 – 62

years. In or around 2019, the City leaders sought to improve voter turnout by holding 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

6. To change its election day and year, the City had to amend Section 37 of the City Charter. A City Charter amendment requires City Council 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.

7. 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 dates.⁸ The ordinance (“New Election Date Ordinance”) changed the Charter so that City elections would be held on the same day and year as West Virginia’s primary election day. The proposed election day change did not financially benefit any Council member.

8. 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 No City Council members were prohibited from voting on the ordinance because it did not financially impact them.

9. The New Election Date Ordinance was flawed because it failed to reconcile the current City Council members’ terms of office with the proposal to hold the first even-numbered year election in 2022 and the next one in 2024. The terms of offices of the City Council members elected in 2019 for four-year terms would expire on June 30, 2023, but the next City election would

⁷ April 9, 2024, Public Hearing transcript, pp. 62 – 64

⁸ Ethics Exhibit #9, April 9, 2024, Transcript of Public Hearing; Ethics Exhibit #14, April 9, 2024, Transcript of Public Hearing; April 9, 2024, Public Hearing Transcript, pp. 64 – 66

⁹ Ethics Exhibit #15; April 9, 2024, Transcript of Public Hearing

not occur until June 2024.¹⁰ Hence, the timing of events under the New Election Date Ordinance would have left three vacancies on the City Council for a twelve-month period, July 1, 2023, until June 30, 2024. Further, the four new members that would be elected in the 2021 election for four-year terms would have their terms of office end on June 30, 2025. However, the next City election would not occur until June 2026. Thus, there would be four vacancies on City Council for a twelve-month period – ie., July 1, 2025, until June 30, 2026.

10. In January 2021, City Council addressed the possibility of citizens directly electing the mayor. At the same time, the New Election Date Ordinance needed to reconcile the City Council members' terms of office with the change from odd to even year elections so that there would not be vacancies.

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

- Those City Council members who were first elected in June 2019 would have their terms extended by one year, ending on June 30, 2024, instead of June 30, 2023.
- The four City Council members to be elected in the upcoming June 2021 election would serve five-year terms, that would end on June 30, 2026. Then, in May 2026, one City Council position would be eliminated and the voters would directly elect the mayor at the 2026 election. Hence,

¹⁰ April 9, 2024, Public Hearing Transcript, pp. 67 – 68

there would be six City Council members and an elected mayor starting July 1, 2026.

12. The Direct Election of Mayor and Extension of Terms Ordinance uniquely affected Respondent Marino and the two other City Council members elected in June 2019 by extending their terms of office by one year and providing an additional year's pay and benefits.¹¹

13. On January 21, 2021, the first reading of the Direct Election of Mayor and Extension of Terms Ordinance was on the City Council meeting agenda and considered at that meeting.¹² The agenda item was listed as "Consideration of First Reading of an Ordinance of the City of Clarksburg Amending Section 5 of the City Charter to Provide for Direct Election of the Mayor." The City Council voted in favor of adopting the Direct Election of Mayor and Extension of Terms Ordinance on the first reading by a vote of four to three. Respondent Marino did not recuse himself from the discussion and vote. Respondent Marino voted in opposition to the Ordinance.¹³

14. On February 4, 2021, the City Council had a second and final reading of the Direct Election of Mayor and Extension of Terms Ordinance.¹⁴ The second and final reading of the Direct Election of Mayor and Extension of Terms Ordinance passed by a vote of four to two. Respondent Marino was absent from the meeting and did not vote.¹⁵

¹¹ April 9, 2024, Public Hearing Transcript, pp. 69 – 70

¹² Ethics Exhibit #16; April 9, 2024, Transcript of Public Hearing

¹³ *Count One - Junkins and Marino*

¹⁴ Ethics Exhibit #17, April 9, 2024, Transcript of Public Hearing

¹⁵ *Count Two - Junkins*

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.¹⁶ The vote to place the Direct Election of Mayor and Extension of Terms Ordinance on the ballot passed unanimously. Respondent Marino did not recuse himself from the discussion and vote. Respondent Marino voted in favor of placing the Ordinance on the ballot.¹⁷

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.¹⁸ The title of the Direct Election of Mayor and Extension of Terms Ordinance ballot amendment was listed on the ballot as: “Amendment No. 5: To change from a 7-member Council from which council members elect a mayor to a 6-member Council plus a mayor elected by the public; imposition of term limits; and procedures for vacancies.” The ballot also contained a summary of Amendment No. 5 and the other proposed City Charter Amendments. The title and description on the ballot did not reference the one-year term extension for Council members Junkins, Keith, and Respondent Marino, but the summary did.

17. On June 1, 2021, there was a City of Clarksburg municipal election, and the ballot contained proposed City Charter Amendments.¹⁹ One Charter Amendment, which was subsequently passed by the voters, changed the City’s form of government and its election day.

¹⁶ Ethics Exhibit #18, April 9, 2024, Transcript of Public Hearing

¹⁷ *Count Two – Marino*

¹⁸ Ethics Exhibit #6, April 9, 2024, Transcript of Public Hearing

¹⁹ Ethics Exhibit #6; April 9, 2024, Transcript of Public Hearing

18. The adoption of the Charter Amendment by the voters extended the term of office by one year for Respondent Marino and two other City Council members. But for the City Council passing the Direct Election of Mayor and Extension of Terms Ordinance, this matter would not have been on the ballot, and the term of office of Respondent Marino would not have been extended.

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.²⁰ 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”²¹ (hereinafter “Charter Amendment 23-4”) and Ordinance No. 23-5 “An Ordinance Regarding Charter Amendments and Elections”²² (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 Respondent 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 City 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.

²⁰ April 9, 2024, Public Hearing Transcript, pp. 71 – 75

²¹ Ethics Exhibit #11, April 9, 2024, Transcript of Public Hearing

²² Ethics Exhibit #12, April 9, 2024, Transcript of Public Hearing

21. On February 2, 2023, the City Council had a first reading of Charter Amendment No. 23-4. The first reading of Charter Amendment No. 23-4 passed five to two.²³ Respondent Marino did not recuse himself from the discussion and vote and voted in opposition to the Ordinance. Respondent Marino's vote constituted a vote in favor of maintaining his extended terms, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023.²⁴

22. Also on February 2, 2023, the City Council had a first reading of the Ordinance Placing Three Council Seats on Upcoming Ballot.²⁵ The first reading of the Ordinance Placing Three Council Seats on Upcoming Ballot passed five to two. Respondent Marino did not recuse himself from the discussion and vote and voted in opposition to the Ordinance. Respondent Marino's vote constituted a vote in favor of maintaining his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023.²⁶

23. On February 16, 2023, the City Council had a second and final reading of the Charter Amendment No. 23-4.²⁷ The second and final reading of Charter Amendment No. 23-4 passed five to two. Respondent Marino did not recuse himself from the discussion and vote and voted in opposition to the Ordinance. Respondent Marino's vote constituted a vote in favor of

²³ Ethics Exhibit #19, April 9, 2024, Transcript of Public Hearing

²⁴ *Count Three - Junkins and Marino*

²⁵ Ethics Exhibit #19, April 9, 2024, Transcript of Public Hearing

²⁶ *Count Five - Junkins and Marino*

²⁷ Ethics Exhibit #20, April 9, 2024, Transcript of Public Hearing

maintaining his extended terms of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023.²⁸

24. Also on February 16, 2023, the City Council had a second and final reading of the Ordinance Placing Three Council Seats on Upcoming Ballot.²⁹ The second and final reading of the Ordinance Placing Three Council Seats on Upcoming Ballot passed five to two. Respondent Marino did not recuse himself from the discussion and vote and voted in opposition to the Ordinance. Respondent Marino's vote constituted a vote in favor of maintaining his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year.³⁰

25. Charter Amendment No. 23-4 was placed on the June 6, 2023, election ballot for approval by the voters pursuant to West Virginia Code § 8-4-7.³¹ 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.

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

²⁸ *Count Four - Junkins and Marino*

²⁹ Ethics Exhibit #20, April 9, 2024, Transcript of Public Hearing

³⁰ *Count Six - Junkins and Marino*

³¹ Ethics Exhibit #5, April 9, 2024, Transcript of Public Hearing

27. The Ordinance Placing Three Council Seats on Upcoming Ballot stated as grounds for its enactment, in part, that “objections have been made as to such Charter amendments, specifically as to the extension of certain terms of office.” Ordinance No. 23-5 at para. 6.³²

28. Respondent Marino had a personal financial interest in the extension of his term as he received compensation and benefits as the mayor and as a member of the City Council.³³

29. Respondent Marino asserts that he did not violate the Ethics Act because he relied upon the advice of legal counsel when he voted on matters affecting his term of office in 2021 and 2023. In the alternative, Respondent Marino implicitly asserts that even if he did violate the Ethics Act, he should not be subject to sanctions because he acted on the advice of counsel.

30. The witnesses testified at the public hearing that the City Attorney, Richard Marsh, and former Mayor, Ryan Kennedy, initially drafted and proposed the City Charter and ordinance changes that the City Council considered and passed in 2021.³⁴ Respondent Marino did not request advice from the City Attorney in 2021 regarding whether he may vote on matters that would extend his term of office for one year, entitling him to an additional year of compensation and benefits from the City, in lieu of requiring him or other qualified candidates to run for that term.³⁵

31. As it relates to alleged violations occurring in 2023, it is clear that Respondent Marino and the remainder of City Council discussed potential violations under the Act. Mr. Marsh testified that by 2023, he and City Council were aware of a complaint to or investigation by the Commission regarding the participation of Respondent Marino and two other City Council

³² Ethics Exhibit #12, April 9, 2024, Transcript of Public Hearing

³³ *Count Seven - Jenkins and Marino*; April 9, 2024, Public Hearing transcript, pp. 57 - 58 & 60 - 62; Ethics Exhibit #21, April 9, 2024, Public Hearing

³⁴ April 9, 2024, Public Hearing Transcript, pp. 102

³⁵ April 9, 2024, Public hearing Transcript p. 120

members in the votes relating to the extension of their terms. Mr. Marsh indicated that he disagreed with the allegation that by voting on the Ordinances, Respondent Marino and others had violated the Act. He asserted that Respondent Marino did not experience a “gain” until the public voted on the issue. He testified that he advised Respondent Marino and others to vote on the Ordinance in 2023 – despite the pending complaint or investigation pursuant to the Act. He further acknowledged that he understood the nature of the complaint and still told Respondent Marino and others to pass the Ordinance. Indeed, at that time, Mr. Marsh was defending the ethics complaint against Respondent Marino.³⁶

32. Mr. Marsh candidly stated that in 2021, he did not know that there could be a violation arising from the Act if Respondent Marino voted on the Ordinance. However, with charges filed in 2022, he urged Respondent Marino and others to move forward with the vote. He suggested that this advice was based, at least in part, on the desire to ensure that a sufficient number of City Council members were available to vote to support the Ordinance. In other words, there were political concerns that the Ordinance might not pass without the votes of Respondent Marino and others. Thus, Mr. Marsh advised Respondent Marino and others to move forward, and vote on the Ordinance and then to defend charges under the Act.³⁷

33. Mr. Marsh noted that between the First and Second Reading of the Ordinance in 2023, he discussed this matter with an attorney for the Ethics Commission. At that time, the issue of recusal by Respondent Marino was discussed. At or about that time, Mr. Marsh discussed the

³⁶ April 9, 2024 Public Hearing Transcript, pp. 119-123

³⁷ April 9, 2024, Public Hearing Transcript, pp. 141-144

possibility of recusal with Respondent Marino (who was also meeting with Mr. Marsh, ostensibly, on behalf of Respondent Junkins). Mr. Marsh indicated that voting on the Ordinance might create additional issues under the Ethics Act for Respondent Marino and Respondent Junkins. Mr. Marsh continued to believe that the charges under the Act were defensible. He further advised them to vote “yes” on the 2023 Amendments and that they would move forward to defend the charges under the Act. Thereafter, Respondent Marino and Respondent Junkins voted “yes” on the issue.³⁸

34. At no time did Mr. Marsh advise Respondent Marino not to vote on the matters at issue herein.³⁹

35. Mr. Marsh, in the capacity of City Attorney or any other capacity, did not defend Respondents Marino and Junkins at the hearing in this case. Respondent Marino did not testify in this matter.

36. Ultimately, the City of Clarksburg abandoned the idea of extending the terms of any of the three City Council members elected to four-year terms in 2019 by passing measures to allow the citizens to vote on who should fill the one-year slots at the June 2023 election. Respondent Marino was a candidate for the one-year slot in 2023, but he lost the election. Hence, he left office on June 30, 2023, the original end date for his four-year term.⁴⁰

ANALYSIS

The purpose and intent of the West Virginia Ethics Act is set forth in West Virginia Code § 6B-1-2(a), as follows:

The Legislature hereby finds that the holding of a public office or public employment is a *public trust*. Independence and impartiality of public officials and

³⁸ April 9, 2024, Public Hearing Transcript, pp. 125-126; 142-144

³⁹ April 9, 2024, Public Hearing Transcript, pp. 137-138

⁴⁰ April 9, 2024, Public Hearing Transcript, pp. 79 – 80

public employees are essential for the maintenance of the confidence of our citizens in the operation of democratic government. The decisions and actions of public officials and public employees must be made free from undue influence, favoritism or threat, at every level of government. *Public officials and public employees who exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position or who see to benefit narrow economic or political interests at the expense of the public at large undermine public confidence in the integrity of democratic government.*

(Emphasis added)

A central tenet of the Act is that the public fisc must be protected and used only for the benefit of the public. To this end, the Legislature has prohibited the use of a public office for private gain. West Virginia Code § 6B-2-5(b) states:

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

In the same vein, West Virginia Code §§ 6B-2-5(j)(1) and (3) prohibits a public official from voting upon a matter in which he or she has a financial interest and requires recusal by the public official.

Respondent Marino was charged with violating the Act as follows:

Count 1: January 21, 2021 - - Respondent Marino is charged with violating West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3) by participating in the vote on the Direct Election of Mayor and Extension of Terms Ordinance's first reading to extend his term of office.

Count 2: April 1, 2021 - - Respondent Marino is charged with violating West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3) by participating in the vote to put the Direct Election of Mayor and Extension of Terms Ordinance, which would extend his term of office, on the June 1, 2021, General Election ballot.

Count 3: February 2, 2023 - - Respondent Marino is charged with violating West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3) by participating in the vote on Charter Amendment No. 23-4's first reading which affected the length of his term of office.

Count 4: February 16, 2023 - - Respondent Marino is charged with violating West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3) by participating in the vote on Charter Amendment No. 23-4 second and final reading which affected the length of his term of office.

Count 5: February 2, 2023 - - Respondent Marino is charged with violating West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3) by participating in the vote on the Ordinance Placing Three Council Seats on Upcoming Ballot's first reading which affected the length of his term of office.

Count 6: February 16, 2023 - - Respondent Marino is charged with violating West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3), by participating in the vote on the Ordinance Placing Three Council Seats on Upcoming Ballot's second and final reading which affected the length of his term of office.

Count 7 - - Respondent Marino is charged with violating West Virginia Code § 6B-2-5(b)(1) by knowingly and intentionally participating in votes in which he had a financial interest.

Respondent Marino raises several arguments to contest these charges. Generally, his arguments are as follows: (1) Respondent Marino, on one occurrence on January 1, 2021, voted *against* a matter that would or could have benefitted him financially; (2) the Ordinance at issue did not, in and of itself, potentially extend his term in office (rather, it resulted in the placement of the proposal on a ballot for public vote to, *inter alia*, extend his term); (3) West Virginia Code §§ 6B-2-5(j)(1) and (3) do not apply to the facts in this matter; and (4) Respondent Marino either was

not advised that his participation in the votes at issue violated the Act or relied upon advice of counsel when he participated in those votes. The undersigned will now address those issues herein.

It is uncontraverted that Respondent Marino voted against the issues giving rise to Count 1 in this case. That is, Respondent Marino voted against the January 21, 2021, vote regarding the Direct Election of Mayor and Extension of Terms Ordinance, First Reading. In contrast, Respondent Marino voted in favor of maintaining his extended term of office the issues giving rise to Counts 2 through 6 in this case. These charges arose in 2023.

As it relates to Count 1, the Commission contends that by participating in the vote, Respondent Marino violated the Act. In contrast, Respondent Marino asserts that he did not violate the Act because he voted against a proposed ordinance that would have benefitted him.

In order to address these arguments, it is necessary to review West Virginia Code §§ 6B-2-5(j)(1) and (3) provides, in pertinent part, as follows:

(j) Limitations on voting. — (1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

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

(3) 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.

At the outset, as the Commission asserts, it is self-evident that Respondent Marino (and Respondent Junkins) have

a personal financial interest in extending their terms in office by an extra year. Members of the city council in Clarksburg receive \$200 per month (\$2,400 per year) in salary and health insurance worth approximately \$354.48 per month (\$4,253.76 per year).

The Commission states,

This financial interest required both [Marino and Junkins] to recuse themselves from any discussion or vote on any of the three measures that resulted in the extension of their term of office. It is not sufficient nor even particularly relevant that they voted against those interests. Their mere presence during the discussion may well have influenced the other members of the council. Eliminating such influence is the principle behind the requirement of recusal rather than simple abstention from voting.

Written Arguments Filed on Behalf of the West Virginia Ethics Commission, p. 17.

Respondent Marino counters that West Virginia Code § 6B-2-5(j)(1) “deals with the unethical appropriation of business contracts, which is not at issue herein.”⁴¹ Respondent Marino’s interpretation of the statute is too narrow.

While West Virginia Code § 6B-2-5(j)(1) certainly addresses business interests that a public official may have, it clearly prohibits a public official – like Respondent Marino – from voting on a matter in which he has “a financial interest.” Specifically, this section states that a public official “may not vote on a matter” in “which they . . . have a financial interest.” The Act clearly prohibits Respondent Marino from voting on an issue in which he had a financial interest.

⁴¹ Respondent Marino’s Proposed Findings of Fact and Conclusions of Law,” pp. 4-5

It is beyond cavil that Respondent Marino had a financial interest in the matters upon which he voted as he stood to gain an extra year's pay and health insurance benefits (or the cash equivalent thereof). Importantly, the statute at issue does not distinguish between instances where a public official votes *against* his interests as opposed to voting in favor of his interests; rather, it clearly prohibits the public official from voting at all. Respondent Marino violated West Virginia Code § 6B-2-5(j)(1). The Commission's reasoning in this regard is persuasive. It asserts that the "mere presence" of the public official with a financial interest may influence others and such influence must be eliminated. The undersigned agrees.

Given the foregoing, the Commission's conclusions regarding West Virginia Code § 6B-2-5(j)(3) are supported by law. This provision states:

(3) 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.

Respondent Marino was not excused from the requirement that he recuse himself because he held a financial interest in the matters upon which he voted. This provision clearly states that a public official holding a financial interest in a matter must: (1) excuse him or herself from the discussion and decision-making process; (2) physically remove him or herself from the room when the discussion occurs; (3) disclose his or her interests; and (4) recuse him or herself from the vote. It is clear that the Act requires complete separation from the process and vote when the person has a financial interest. Respondent Marino failed to do so.

Moreover, Respondent Marino was not relieved from the requirements of West Virginia Code §§ 6B-2-5(j)(1) and (3) because, as he asserts, the Ordinance did not "extend anyone's term

in office.” He contends, the Ordinance merely placed a Charter Amendment on the ballot “for the residents of the City of Clarksburg to vote” on an amendment that would, *inter alia*, extend Respondent Marino’s term resulting in additional pay and/or benefits.

It is clear that the votes taken by City Council potentially resulting in the extension of Respondent Marino’s term in office (and financial interest in the vote) were the catalyst for his term to be extended. In other words, *but for* the vote of City Council on this issue, the amendment would not have appeared on the ballot for consideration by the public. Indeed, Respondent Marino’s argument is contrary to law and runs the risk of rendering West Virginia Code §§ 6B-2-5(j)(1) and (3) a nullity.

Advisory Opinion No. 2010-08 is on point. Advisory Opinion 2010-08 dealt with the following inquiry:

A City currently holds its elections every four years on odd numbered years. The City Council and Mayor (“City Officials”) propose that the charter be amended to change the election cycle to even numbered years in order to coincide with the primary election in which the offices of the President of the United States and Governor of West Virginia are on the ballot

In addition to changing the election year, the City Officials propose holding the non-partisan elections to eliminate the need for a primary and general election every four years. The result would be a single election for all City Officials.

The current terms of the elected City Officials expires in 2011. At present, based upon the existing charter, the next primary is scheduled for March 2011, and the next general election in May 2011.

In order to amend the municipal election calendar, the City Officials propose having City Council vote to approve a change to the City Charter. The proposed charter change would then be presented to the City Charter. The proposed charter change would then be presented to the City voters at a Special Election to be held in the

Fall of 2010. The proposed charter to be considered by the citizens would contain the following:

- (1) That one non-partisan election be held on even-numbered years and that the first election under the new charter be held in May 2012; and,
- (2) That the terms of the existing City officials be extended from a four year term ending in 2011, to a five year term to end in 2012. Thereafter, all elected City Officials would continue to have a four year term.

The Requester seeks guidance in regard to whether the City Officials may, under the circumstances presented, vote to extend their term by one year; provided, that, the City voters ratify this charter change and term extension at a special election to be held this year.

In addressing this issue, the Advisory Opinion succinctly finds:

Here, instead of amending the charter to apply to future elected officials (e.g. Option Two), 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.

Accordingly, the Commission hereby finds that a public official's vote to extend her or his own current term beyond the statutorily or constitutionally prescribed, and thereby obtain extra compensation, constitutes use of public office for private gain in violation of W.Va. Code § 6B-2-5(b).

This holding applies herein. Respondent Marino's actions violated the Act as it relates to prohibitions against private gain for a public official and voting on matters in which the official has a financial interest.

Finally, Respondent Marino asserts that, assuming that his vote did violate the Act, his reliance on the advice of counsel is an affirmative defense to any such violation. In *Powers v. Goodwin*, 324 S.E.2d 701 (1984), the West Virginia Supreme Court of Appeals addressed the

application of advice of counsel as a potential defense in an instance where two county commissioners voted to reimburse legal expenses incurred by the third county commissioner.

In *Powers*, the Court stated as follows:

Reliance on advice of counsel as a defense is a subject that does not appear to have been extensively discussed by the courts.⁷ 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.⁸ *SEC v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n. 28 (D.C.Cir.1981); see *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101-02 (2d Cir.1972); *United States v. Custer Channel Wing Corp.*, 376 F.2d 675, 683 (4th Cir.), cert. denied, 389 U.S. 850, 88 S.Ct. 38, 19 L.Ed.2d 119 (1967); *Hawes & Sherrard, Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases*, 62 Va.L.Rev. 1 (1976); Note, *Advice of Counsel as a Defense*, 28 Va.L.Rev. 26 (1941).

Id. at 705 (footnote omitted).

Although the Court acknowledged that advice of counsel may be an absolute defense in suits involving malicious prosecution, advice of counsel is not an absolute defense in other instances. Instead, if the *Powers* factors are met, acting under the advice of counsel may be considered in mitigation. The Court indicated:

We have recognized much this same law in cases involving suits for malicious prosecution where acting on advice of counsel can be an absolute defense. In Syllabus Point 8 of *Truman v. Fidelity & Casualty Company of New York*, 146 W.Va. 707, 123 S.E.2d 59 (1961), we said:

" 'A suit, action or proceeding, prosecuted in good faith, and on advice of reputable counsel obtained after a fair and accurate disclosure to counsel of the facts on which advice is sought, may not serve as the basis of an action for malicious prosecution.' *Hunter v. Beckley Newspapers Corp.*, 129 W.Va. 302, Pt. 5 Syl. [40 S.E.2d 332 (1946)]; *Wright v. Lantz*, 133 W.Va. 786, Pt. 2 Syl. [58 S.E.2d 123 (1950)]."

See also *Hogan v. Robert H. Irwin Motors, Inc.*, 121 N.H. 737, 433 A.2d 1322 (1981); [174 W.Va. 292] *Pallas v. Zaharopoulos*, 219

Va. 751, 250 S.E.2d 357 (1979); Restatement (Second) of Torts § 666 (1977).

However, acting under advice of counsel is not an absolute defense in other situations. In the contempt field, we have stated that it is not a defense, but may go to the mitigation issue. *State ex rel. Walker v. Giardina*, W.Va., 294 S.E.2d 900, 903 (1982); *Bailey v. Bailey*, 127 W.Va. 826, 829, 35 S.E.2d 81, 82-83 (1945).

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.⁹ 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).

Id. at 705-706 (footnote omitted).

Powers is controlling.⁴² As it relates to the violations alleged to have occurred in 2021, there is no evidence of record with regard to the four factors set forth in *Powers*. That is, there is no evidence that Respondent Marino made a full disclosure of facts to his attorney; that he requested advice as to the legality of the contemplated action; that he received advice that his contemplated actions were legal; or that he relied upon any advice of counsel. In fact, the record shows that these factors would not come into play with regard to the violations occurring in 2021 because Respondent Marino was not made aware that he violated the Act until 2022.

Thus, up until that point, there is no evidence of record that he received advice of counsel as contemplated in *Powers*. As such, any potential defense (or mitigation) arising from advice of

⁴² For his part, Respondent Marino relies upon cases from other jurisdictions that generally state that a public official acting in good faith upon the advice of counsel is not considered to be a willful violation of a particular statute.

counsel for alleged violations occurring in 2021 is not supported by the record and fails under the *Powers* analysis.

As it relates to alleged violations occurring in 2023, the record clearly establishes that Respondent Marino and the remainder of City Council discussed potential violations of the Act. City Attorney Marsh testified that by 2023, he and City Council were aware of a complaint to the Commission regarding the participation of Respondent Marino and two others in the votes relating to the extension of their terms. Mr. Marsh testified that he disagreed with the allegation that by voting on the Ordinances Respondent Marino and others had violated the Act, asserting that Respondent Marino did not experience a “gain” until the public voted on the issue. He further testified that he advised Respondent Marino and others to vote on the Ordinance in 2023 – despite the pending complaint under the Act. Indeed, at that time, Mr. Marsh was defending the ethics complaint.⁴³

Mr. Marsh candidly stated that in 2021, he did not know that there could be a violation arising from the Act if Respondent Marino voted on the Ordinance. However, even with charges filed in 2022, he urged Respondent Marino and others to move forward with the vote. He suggested that this advice was based, at least in part, upon the desire to ensure that a sufficient number of City Council members were available to vote to support the Ordinance. In other words, there were political concerns that the Ordinance might not pass without Respondent Marino and others voting. Thus, Mr. Marsh advised Respondent Marino and others to move forward and to vote on the Ordinance and then defend charges under the Act.⁴⁴

Mr. Marsh noted that between the First and Second Reading of the Ordinance in 2023, he discussed this matter with an attorney for the Ethics Commission. At that time, the issue of recusal

⁴³ April 9, 2024, Public Hearing Transcript, pp. 119-123

⁴⁴ April 9, 2024, Public Hearing Transcript, pp. 141-144

by Respondent Marino and others was discussed. At or about that time, Mr. Marsh also discussed the possibility of recusal with Respondent Marino (who was also meeting with Mr. Marsh, ostensibly, on behalf of Respondent Junkins). Mr. Marsh indicated that voting on the Ordinance might create additional issues under the Act for Respondents Marino and Junkins, but he continued to believe that the charges under the Act were defensible. He further advised them to vote “yes” on the 2023 Amendments and that they would move forward to defend the charges under the Act. Thereafter, Respondent Marino and Respondent Junkins voted “yes” on the issue.⁴⁵

Mr. Marsh, in the capacity of City Attorney or any other capacity, did not defend Respondents Marino and Junkins at the hearing in this case. Respondent Marino did not testify.

Finally, although the Commission observes that Mr. Marsh did provide advice to Respondent Marino on whether the actions at issue constituted private gain, it contends that Marsh failed to address with Respondent Marino the issue of the Act’s rules relating to voting. The discrete, unique and reliable record in this case indicates otherwise. Mr. Marsh testified, without contradiction, that he discussed the issue of recusal with Respondent Marino (with his understanding that this information would be shared with Respondent Junkins). Clearly this discussion implicates the Act’s provision relating to voting. Moreover, the issue of private gain is inextricably intertwined with the potential financial interest of Respondent Marino in the matters upon which he voted. As such, the undersigned finds that Respondent Marino did rely on the advice of counsel as it relates to the charges arising in 2023. As noted, however, *Powers* does not provide an absolute defense in this regard. Rather, it is a mitigating factor for proposed sanctions. See *infra*.

⁴⁵ April 9, 2024, Public Hearing Transcript, pp. 125-126; 142-144

Based upon the foregoing, the Commission has established Counts 1 through 7 by clear and convincing evidence as more fully set forth in the Conclusions of Law. Moreover, the record establishes that mitigating factors exist with respect to Counts 3 through 7, based upon advice of counsel. However, that Respondent Marino acted upon the advice of counsel does not absolve him of responsibility in this matter. He was, after all, a public official who was the subject of charges under the Act in 2022, but, nonetheless, elected to continue to participate in proceedings in which he would undoubtedly benefit financially. It is clear that those who administer government (and public resources) must conduct themselves for the benefit of the public, not for themselves. Here, Respondent Marino either participated or voted upon matters that involved and/or benefitted his financial interest. While the advice of counsel defense will be considered herein, a public official cannot, based upon the unique facts of this case, be relieved of all responsibility. As such, the undersigned recommends financial sanctions (with mitigation considered and applied to Counts 3 through 7, as set forth, *inter alia*) for all 7 counts which the Commission has established by clear and convincing evidence.

CONCLUSIONS OF LAW

1. West Virginia Code § 6B-2-4(k) provides in pertinent part:

With respect to allegations of a violation under this chapter, the complainant has the burden of proof.

2. West Virginia Code § 6B-2-4(s)(1) provides in pertinent part:

If the commission finds by clear and convincing evidence that the facts alleged in the complaint are true and constitute a material violation of this chapter (Emphasis added).

3. Clear and convincing evidence means that more than a mere scintilla of evidence has been presented to establish the veracity of the allegations of abuse and/or neglect, but it does not impose as exacting an evidentiary burden as criminal proceedings which generally require proof beyond a reasonable doubt. *See Cramer v. W. Va. Dep't of Highways*, 180 W. Va. 97, 99 n.1, 375 S.E.2d 568, 570 n.1 (1988)

(construing clear and convincing evidentiary standard of proof as "intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases"). See also *In re F.S.*, 233 W. Va. 538, 546, 759 S.E.2d 769, 777 (2014) (per curiam) ("It is imperative to note that the evidence in an abuse and neglect case does not have to satisfy the stringent standard of beyond a reasonable doubt; the evidence must establish abuse by clear and convincing evidence.").

In re A.M., 849 S.E.2d 371 (W. Va. 2020).

4. West Virginia Code § 6B-1-3(k) provides:

"Public official" means any person who is elected to, appointed to, or given the authority to act in any state, county, or municipal office or position, whether compensated or not, and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating, or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interest or

interests of any person. The term "public official" includes a public servant volunteer.

5. West Virginia Code § 6B-2-5(j)(1) states, in relevant part:

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

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

....

6. West Virginia 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.

7. West Virginia Code § 6B-2-5(b)(1) states, in relevant part:

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

8. In Advisory Opinion 2010-08, the West Virginia Ethics Commission addressed a situation in which a town wanted to change its election cycle for two reasons. First, the town sought to shift its elections to coincide with the four-year cycle utilized for the selection of the governor of the state and the president of the United States of America. Second, the town sought to convert the election of its public offices from partisan to non-partisan. The city's next election was scheduled for 2011, and the city asked if it would violate the West Virginia Ethics Act to extend the terms of its current officials by one year so that an election for new officials could be conducted in 2012 with a return to the four-year term. The Commission suggested that a preferable method of achieving the city's desired changes would be to conduct their elections in 2011 for five-year terms, with the gubernatorial and presidential elections to occur in 2016. The Commission held that the city's proposal, granting an extra year in office to its current public officials, would constitute the use of public office for private gain in violation of W. Va. Code § 6B-2-5(b)(1).

9. Reliance on Advice of Counsel

The West Virginia Supreme Court has held that reliance on advice of counsel is not, except for malicious prosecution suits, an absolute defense to charges that a person is acting unlawfully or negligently. *Powers v. Goodwin*, 174 W. Va. 287, 292, 324 S.E.2d 701, 706 (1984). In *Powers*, the West Virginia Supreme Court stated: "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.⁹ 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)."

The Court also held that "the party asserting this defense has the burden of showing that he: (1) made a complete disclosure of the facts to his attorney; (2) requested the attorney's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied upon the advice in good faith." *Id.* at 705.

Count One

The West Virginia Ethics Commission has proven by clear and convincing evidence that on **January 21, 2021**, Respondent Marino violated the voting provisions in the Ethics Act, West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3), by participating in the vote on the Direct Election of Mayor and Extension of Terms Ordinance's first reading to extend his term of office. Respondent Marino had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself.

Count Two

The West Virginia Ethics Commission has proven by clear and convincing evidence that on **April 1, 2021**, Respondent Marino violated the voting provisions in the Ethics Act, West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3), by participating in the vote to put the Direct Election of Mayor and Extension of Terms Ordinance, which would extend his term of office, on the June 1, 2021, General Election ballot. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself.

Count Three

The West Virginia Ethics Commission has proven by clear and convincing evidence that on **February 2, 2023**, Respondent Marino violated the voting provisions in the Ethics Act, West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3), by participating in the vote on Charter Amendment No. 23-4's first reading which affected the length of his term of office. Respondent Marino's vote constituted a vote in favor of maintaining his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1,

2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself. Respondent Marino's unlawful action, as well as the resulting sanctions, are mitigated by his reliance on the advice of counsel.

Count Four

The West Virginia Ethics Commission has proven by clear and convincing evidence that on **February 16, 2023**, Respondent Marino violated the voting provisions in the Ethics Act, West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3), by participating in the vote on Charter Amendment No. 23-4 second and final reading which affected the length of his term of office. Respondent Marino's vote constituted a vote in favor of maintaining his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself. Respondent Marino's unlawful action, as well as the resulting sanctions, are mitigated by his reliance on the advice of counsel.

Count Five

The West Virginia Ethics Commission has proven by clear and convincing evidence that on **February 2, 2023**, Respondent Marino violated the voting provisions in the Ethics Act, West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3), by participating in the vote on the Ordinance Placing Three Council Seats on Upcoming Ballot's first reading which affected the length of his term of office. Respondent Marino's vote constituted a vote in favor of maintaining

his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself. Respondent Marino's unlawful action, as well as the resulting sanctions are mitigated by his reliance on the advice of counsel.

Count Six

The West Virginia Ethics Commission has proven by clear and convincing evidence that on **February 16, 2023**, Respondent Marino violated the voting provisions in the Ethics Act, West Virginia Code § 6B-2-5(j)(1) and West Virginia Code 6B-2-5(j)(3), by participating in the vote on the Ordinance Placing Three Council Seats on Upcoming Ballot's second and final reading which affected the length of his term of office. Respondent Marino's vote constituted a vote in favor of maintaining his extended term of office, created by the Direct Election of Mayor and Extension of Term of Office Ordinance on June 1, 2021, thereby allowing him to serve an additional year beyond the original four-year term that otherwise would have expired on June 30, 2023. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council and, therefore, violated the Ethics Act by not recusing himself. Respondent Marino's unlawful action, as well as the resulting sanctions, are mitigated by his reliance on the advice of counsel.

Count Seven

The West Virginia Ethics Commission has proven by clear and convincing evidence that Respondent Marino used his office for private gain in violation of the Ethics Act, West Virginia

Code § 6B-2-5(b)(1), by knowingly and intentionally participating in votes in which he had a financial interest. He had a financial interest in his term of office because he receives compensation and benefits for serving on City Council.

PROPOSED SANCTIONS

1. Respondent Marino shall pay a fine in the amount of \$2,300 to the West Virginia Ethics Commission for his violations of the Ethics Act, representing \$1,000 for Counts One and Two relating to his failure to recuse himself from votes on matters affecting his term of office in 2021; \$1,100 for Counts Three, Four, Five, and Six relating to his failure to recuse himself from votes on matters affecting his term of office in 2023, and as a result of his reliance on the advice of counsel; and \$200 for Count Seven, Use of Office for Private Gain;

2. Respondent Marino shall reimburse the West Virginia Ethics Commission for the actual costs of investigating and prosecuting the violations with the costs being split between Respondent Marino and Junkins, VCRB 2022-02; and

3. Respondent Marino shall undergo training on the West Virginia Governmental Ethics Act by attending either an in-person or virtual training presented by the Ethics Commission staff or by viewing the training provided on the Ethics Commission's website at ethics.wv.gov.

Entered this 8th day of July, 2024.



JEFFREY G. BLAYDES
HEARING EXAMINER

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:
JAMES E. MARINO,
Mayor, City of Clarksburg,
Respondent.

COMPLAINT NO. VCRB 2022-04

CERTIFICATE OF SERVICE

I, Jeffrey G. Blaydes, do hereby certify that I have served a copy of the foregoing “Decision”, by placing a true copy, postage prepaid, in the United States mail, on this 8th day of July, 2024, upon the following:

James E. Marino
700 Milford Street
Clarksburg, WV 26301

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Charleston, WV 25301

Theresa M. Kirk, General Counsel
WV Ethics Commission
210 Brooks Street, Suite 300
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WV Ethics Commission
210 Brooks Street, Suite 300
Charleston, WV 25301



Jeffrey G. Blaydes
Hearing Examiner

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:
JAMES MARINO,
Former Mayor, City of Clarksburg,
Respondent

COMPLAINT NO. VCRB 2022-04

CERTIFICATE OF SERVICE

I, Kimberly B. Weber, Executive Director of the West Virginia Ethics Commission, do hereby certify that I mailed a true and complete copy of the foregoing **FINAL DECISION AND ORDER** on November 7, 2024, to:

Via Electronic Mail, U.S. Mail and Certified Mail, Return Receipt Requested:

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