

**BEFORE THE STATE OF WEST VIRGINIA
ETHICS COMMISSION**

JAMES JONES,

Complainant,

v.

Complaint No. VCRB 2007-25

WILLIAM PERRY,

Respondent.

FINAL DECISION AND ORDER

On December 26, 2007, Morgantown resident James Jones filed a verified Complaint alleging that Monongalia County Chief Deputy Assessor William Perry violated the West Virginia Ethics Act. In accordance with W.Va. Code § 6B-2-4, the Complaint was forwarded to the Commission's Probable Cause Review Board for consideration.

Following a lengthy investigation and a personal appearance by the Respondent, the Probable Cause Review Board unanimously entered an Order on December 5, 2008, finding probable cause to believe that Respondent Perry had violated W.Va. Code § 6B-2-5(b) and W.Va. Code § 6B-2-5(h). Thereafter, a Public Hearing was duly noticed and conducted on August 11, 2009, at the WVU College of Law Lugar Courtroom in Morgantown, West Virginia before Hearing Examiner Michael J. Aloï. On March 29, 2011, Hearing Examiner Aloï submitted his Recommended Decision.

Having reviewed the Recommended Decision, and the record in this matter, the Commission hereby finds that the Complainant has failed to prove beyond a reasonable doubt that Respondent William Perry violated W.Va. Code § 6B-2-5(b) or (h). In support

of this conclusion, the Commission hereby expressly adopts and incorporates the Hearing Examiner's Recommended Decision, with the following modifications:


1. While the Commission does not necessarily agree with the Hearing Examiner's Credibility Findings, the Commission finds that the record does not support proof beyond a reasonable doubt that Respondent made the phone call to Mr. Jones as alleged in the Complaint; and
2. Since the Commission finds and concludes that the Complainant failed to prove beyond a reasonable doubt that Respondent made the alleged phone call, the Commission does not need to address, and hereby expressly rejects, conclusions of law # # 5 - 8 in the Hearing Examiner's Recommended Decision.

A copy of the Recommended Decision is attached hereto and made part of this Final Decision and Order.

WHEREFORE, having found that the Complainant failed to prove a material violation of the Ethics Act beyond a reasonable doubt, Complaint No. VCRB 2007-25 is hereby **DISMISSED**.

It is so **ORDERED**.

Entered this 5th day of May, 2011.



R. Kemp Morton, Chairperson

BEFORE THE STATE OF WEST VIRGINIA
ETHICS COMMISSION

IN RE: Complaint of James Jones
Against William Perry

I.D. No. VCRB 2007-25

HEARING EXAMINER'S RECOMMENDED DECISION

INTRODUCTION

A public evidentiary hearing was held on August 11, 2009, at the West Virginia University College of Law, Lugar Court Room, in Morgantown, West Virginia, regarding an Amended Statement of Charges issued February 9, 2009, by the Probable Cause Review Board of the West Virginia Ethics Commission against William Perry. Present were the undersigned, Michael John Aloï, Hearing Examiner, Martin J. Wright, Deputy Counsel and C. Joan Parker, General Counsel, on behalf of the West Virginia Ethics Commission, Respondent William Perry and his counsel, Sherri D. Goodman.

The Commission called the following witnesses: Eva Hajian, James Jones, William Lotspeich, Joyce Clay, Robert Clay and John Laurita. The Commission submitted 17 exhibits as reflected on the attached list. Mr. Perry called the following witnesses: Elmer Criswell, Henry Maxwell, Richard Raspa and Rodney Pyles. He introduced five exhibits, also reflected on the attached list.

Respondents Proposed Recommended Decision was submitted on the 24th day of May 2010. The Respondents Corrected Proposed Recommendation was submitted on the 1st day of June, 2010.

PROCEDURAL BACKGROUND

On December 26, 2007, Morgantown resident James Jones filed a verified Complaint with the West Virginia Ethics Commission asserting unethical conduct by Monongalia County Chief Deputy Assessor William Perry. In accordance with W.Va. Code 6B-2-4, the Complaint was forwarded to the Commission's Probable Cause Review Board for consideration, and a Notice of Investigation was issued to Respondent William Perry on January 16, 2008.

Thereafter, the Probable Cause Review Board conducted a lengthy and extensive investigation into the allegations raised in the Complaint. As part of the investigation, Respondent William Perry personally appeared before the Probable Cause Review Board, with counsel, on November 19, 2008, and provided sworn testimony in response to the allegations.

Following Mr. Perry's personal appearance, and after due consideration of the evidence and facts gained during the course of the investigation, the Probable Cause Review Board unanimously entered an Order on December 5, 2008, finding probable cause to believe that Respondent Perry had violated W.Va. Code 6B-2-5(b) and W.Va. Code 6B-2-5(h). A Statement of Charges was prepared and served upon Respondent William Perry. On February 9, 2009, an Amended Statement of Charges was issued and subsequently served upon Respondent William Perry.

In accordance with W.Va. Code 6B-2-4, the Ethics Commission retained and appointed Michael John Aloj, a licensed practicing attorney, to serve as the Hearing

Examiner for the Public Hearing in this matter. The Respondent William Perry did not object to the appointment of Mr. Aloï as the Hearing Examiner.

Following the issuance of the Amended Statement of Charges, a Public Hearing was duly noticed and conducted on August 11, 2009, at the WVU College of Law Lugar Courtroom in Morgantown, West Virginia before Hearing Examiner Michael John Aloï. In accordance with W.Va. Code 6B-2-4 and 158 C.S.R. 17, the following Findings of Fact and Conclusions of Law are proposed in this matter on behalf of the Complainant.

NATURE OF THE CHARGES

The amended Statement of Charges alleges one act: William Perry, Chief Deputy Assessor of Monongalia County, called a Morgantown resident, James Jones, from his office during a work day to offer to purchase commercial property located at 1116 University Avenue owned by a limited liability company in which Mr. Jones was a member, for \$100,000.

The Amended Statement of Charges alleges that this act violated two sections of the Governmental Ethics Act: West Virginia Code § 6B-2-5(h)(A) & (B) and 6B-2-5(b).

The first section reads:

No full-time official or full-time public employee may seek . . .to purchase, sell or lease real or personal property to or from any person who:

(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or,

(B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.

The Amended Statement of Charges alleges that Respondent made the offer to purchase in the Spring of 2007 within 12 months of a deputy assessor raising the appraised value of

the 1116 University Avenue property, and hence the assessed value, on September 6, 2006. The Statement of Charges alleges that the deputy assessor was a subordinate of Mr. Perry within the meaning of the §§ 6B-2-5(h)(A), because Mr. Perry's title was Chief Deputy Assessor and therefore he was second-in-command. Thus, it is alleged, all employees in the office, except the elected Assessor, were subordinates of Mr. Perry.

The Amended Statement of Charges further alleges that the directive in West Virginia Code § 11-3-1 that "all property shall be assessed annually as of the first day of July at its true and accurate value" means that the annual assessment of the property at 1116 University Avenue, whether its value changed, constituted a current matter on which some subordinate was working when the alleged call was made within the language of W. Va. Code § 6B-2-5(h)(B), and that Mr. Perry knew it by virtue of W. Va. Code § 11-3-1.

The second statutory violation alleged is West Virginia Code § 6B-2-5(b), a public employee may not knowingly and intentionally use his office or the prestige of his office for his own private gain. The Amended Statement of Charges alleges that Mr. Perry used public resources—the telephone, public time, during the work day-- and his official job title to seek to purchase property in furtherance of his own private business interests.

FINDINGS OF FACT

Parties

1. The Respondent, William Perry, is the Chief Deputy Assessor of the Monongalia County Assessor's Office, and has been employed in this capacity for the past twenty (20) years. [Public Hearing Transcript ("Tr.") pg. 413] 2. As the Chief Deputy Assessor, Respondent Perry serves as the second-in-charge of the Assessor's office in Morgantown,

West Virginia, and is supervised by elected Monongalia County Assessor Rodney Pyles.

[Tr. pg. 25-26]

2. The original Statement of Charges was amended by the Probable Cause Review Board to include a violation of W.Va. Code 6B-2-5(b).

3. In addition to overseeing personnel matters in the office, Respondent Perry handles and addresses constituent issues in the office as needed, including assessment determinations on property in Monongalia County. [Tr. pg. 26; 38]

4. Respondent has his own direct phone number and private office space in the Assessor's office. [Tr. pg. 56-57]

5. In addition to his public employment with the Monongalia County Assessor's Office, Respondent Perry owns and derives income from real estate investment property in Monongalia County. Respondent owned real estate investment property prior to his employment with the

Assessor's office, and he has continued to purchase and invest in commercial real estate, throughout his employment with the Monongalia County Assessor's Office.

[Complainant's ("Comp") Exhibit 15]

6. The Complainant in this matter, Jim Jones, resides in Morgantown, West Virginia, and co-owns with two other individuals a business known as Morgantown Commercial, LLC. Mr. Jones' business partners in Morgantown Commercial, LLC are Larry Stem and Father Dotsky. [Tr. pg. 84-86]

7. At issue in this matter is property owned by Complainant Jones and Morgantown Commercial, LLC which is located at 1116 University Avenue near the Westover bridge in

Morgantown, West Virginia. This property is identified by the Monongalia County Assessor's Office as Map No. 28A, Parcel 33. (For clarity purposes, this property is hereinafter referred to as the "Jones Property"). [Tr. pg. 84-86; Comp! Exhibit #3]

Respondent Sought to Purchase Property

8. From 1992 to 2004, Mr. Perry owned, among other property in Monongalia County, two lots along University Avenue near the Westover bridge in Morgantown, West Virginia. Specifically, the two lots owned by Mr. Perry are identified by the Monongalia County Assessor's Office as Map No. 28A, Parcel 30 and Parcel 31. [Tr. pg. 442; Comp. Exhibit 15]

9. On March 12, 2004, Mr. Perry sold his two lots on University Avenue near the Westover bridge. [Tr. pg. 416]

10. In 2005, rumors began circulating in Morgantown about a proposed \$91 million student housing complex on University Avenue near the Westover bridge. Initially, the Riverview project proposal was for a 19-story apartment building. [Comp. Exhibits 5 & 12]

11. The proposed Riverview project would have included or abutted the two lots Mr. Perry sold one year prior. [Tr. pg. 94-96; Comp. Exhibit 5]

12. At the time of his sale in 2004, Respondent Perry was not aware of the Riverview student housing project. [Tr. pg. 454]

13. Jim Jones and his business partner's tax ticket was substantially increased from the prior year. Specifically, in tax year 2005, the half-year tax ticket was for \$294.47.

However, the tax ticket for tax year 2006, was for half-year payment of \$2,331.72 (full year tax total of \$4,768.37). [Comp. Exhibit 6 & 7; Tr. pg. 105-107]

14. Following receipt of the tax ticket, on July 18, 2007, Mr. Jones went to the Monongalia County Assessor's Office to speak with the elected County Assessor Rodney Pyles about the increased assessment. [Tr. pg. 107-108]

15. Assessor Pyles was not available to meet with Mr. Jones. Instead, the office personnel directed Mr. Jones to Respondent Perry to discuss the assessment. [Tr. pg. 108-109]

16. During the meeting, Mr. Jones ultimately received a partial exoneration of the increased assessment because the statutorily-required notice of increase had not been provided to him in accordance with W.Va. Code 11-3-2a. [Comp. Exhibit 8; Tr. pg. 112-117]

17. The partial exoneration was directed and approved by Respondent Perry. [Comp. Exhibit 8; Tr. pg. 112-117]

18. Following his meeting and partial exoneration, Mr. Jones attempted to contact, without success, Assessor Pyles to complain about Respondent's offer to purchase, as well as the perceived retaliatory increase in his tax assessments. On September 18, 2007, Jones sent a letter to Assessor Pyles detailing the telephone offer by Respondent and the perceived retaliatory increase in his tax assessments. [Tr. pgs. 118-119; Comp. Exhibit 9]

19. Thereafter, Mr. Jones filed the instant Complaint with the West Virginia Ethics Commission. [Comp. Exhibits 9 & 10]

Respondent Took Regulatory Action Against Jim Jones

20. The responsibility for determining the annual assessment for each property lies with an elected County Assessor and those in his/her employ. This assessment is the basis for the levy of a property tax upon the property owner. [Tr. pg. 26]
21. As part of their assessment duties, the employees of the Assessor's office travel to various locations of the county and make value determinations on the property. The employees then enter the value into a master index system. The system registers the date the value is entered along with the initials of the person entering the value. Once entered, the assessment is complete and a property tax ticket is issued on or about July 15. This process constitutes the "annual assessment" of the property. [Tr. pg. 26; 29; 33-35]
22. However, in lieu of traveling to the property location, the Assessor's office employees sometimes just utilize recent purchase prices of the property to make a value determination and "annual assessment". They then enter this value into the master index system. [Tr. pg. 27; 30; 33-35]
23. Henry Maxwell is a full-time employee of the Monongalia County Assessor's Office, and has been employed as such since 1991. As part of his job responsibilities, Mr. Maxwell reviews property sales and makes a value determination on the subject property. He then enters the amount into the master index system. [Tr. pgs. 345-346; 348-349; 354-355]
24. On September 6, 2006, Henry Maxwell entered and updated the value determination for 1116 University Avenue, Map 28A, Parcel 33, (the Jones Property) into the master index system used by the Monongalia County Assessor's Office. Mr. Maxwell based the value determination on the sales price of the property when Mr. Jones and his

business partners purchased the property in 2004. [Tr. pg. 60-61; 346-349; Comp. Exhibit 1)

25. In order to understand and resolve the issues before the undersigned, it is necessary to set forth the functions of the Monongalia County Assessor's Office.

26. Assessors are responsible for placing a monetary value on real property and personal property located in their respective counties for the purpose of taxation. The tax year is a fiscal year, running from July to July. Citizens are taxed on property they owned on July 1 of the previous year. For example, if a homeowner acquired his or her house in November of 2005, it was reported as real property owned by the new homeowner as of July 1 2006. The homeowner would first owe property taxes on the home in the 2007 tax year.

27. Levying bodies, such as a county commission, board of education, municipalities or the State Legislature, establish rates at which property is taxed. The State Auditor certifies the tax rates and distributes them back to the counties. [Transcript at 365-368].

28. Assessors input the values in a statewide database operated by the State Tax Department. In March of each year, the computer records are "frozen," comparable to the books being closed. The computer records for the 2007 tax year (reporting values as of July 1, 2006) were frozen as of March of 2007. [*Id.*]

29. The State Tax Department takes the values provided by the Assessors and applies the various tax rates to all property (which may vary depending on whether certain levies have passed in a particular county or city). It generates a tape made available to each county Sheriff, who uses the tape to generate tax bills to county residents. Tax tickets

reflecting tax owed for property possessed as of July 1, 2006 for the 2007 tax year were mailed to residents in July 2007.

30. Monongalia County Assessor Rodney Pyles testified that Assessors in general do not review each piece of real property in their database each year. [T. 369]. If the value previously assigned to a piece of real property was not changed that year, the information from the previous tax year is “rolled over” to this tax year. The designation “EOY ROLL” on a computer record for a particular piece of property stands for “end of year rollover,” meaning no change had been made in the value for that tax year. To continue the example from above, if the value in the database for a house as of July 1, 2005 remained unchanged as of July 1, 2006, that value was “rolled over,” and the same value was reported as of July 1 2006 for the 2007 tax year.

31. The Code directs Assessors to reappraise real property on a three year cycle. [T. 26, 369].

32. There are three ways Assessors value real property: market value, cost approach and income approach. [T. 27]. Whichever value is used is called the appraised amount. The “assessed” value of property is 60% of the appraised value. A home assigned an appraised value of \$100,000 will be assessed at \$60,000. It is the assessed value from which taxes are calculated.

33. In Monongalia County, one way in which the Assessor determines market value is to assign an appraised value of 90 to 110% of the sales price if the property changes hands in an arm length transaction. When the sale of a piece of property occurs and a deed is recorded, the individual recording the deed completes a sales listing form at the County

Clerk's Office. This form is sent to the Assessor's Office. If the sale appears to be an arm's length transaction, as opposed to a transfer between family members, then the assessor sends the new owner a sales questionnaire. [Tr. 27, 31].

34. A deputy assessor who performs data entry will determine the appraised value of the real property and will apportion the appraised amount between land and buildings, if there are any. [T. 353-54].

35. Another source of information to help value property are field deputies who visually inspect property and take measurements.

36. When a taxpayer disagrees with the value placed on property and, therefore, the amount of tax owed, he or she may appeal to the County Commission, sitting as the Board of Equalization, which meets in February of each year. W. Va. Code § 11-3-24. If the taxpayer is dissatisfied with the classification of the property or believes the property is exempt from taxation, he or she may file written objections with the Assessor. W. Va. Code § 11-3-24a.

37. In the case before the undersigned, the following facts are undisputed and most are established by documentation.

38. On August 1, 2005, James Jones, Larry Stern and Fathila Dosky entered into a contract to purchase a building at 1116 University Avenue in Morgantown, Monongalia County, West Virginia from Joyce Foor-Clay and William Lotspeich for \$300,000.

[Respondent's Exhibit 2]

39. These three individuals sought financing from Centra Bank. On September 2, 2005, the bank requested Day-Warash Appraisal Services to appraise 1116 University

Avenue. Day-Warash conducted an appraisal on September 22, 2005 and prepared its report on October 5, 2005, finding market value in the amount of \$300,000. [Ex. R1].

40. The bank noted that the purchasers were going to form an limited liability company. [Ex. R2]. They did form a limited liability company called Morgantown Commercial Property LLC.

41. Morgantown Commercial Property LLC purchased 1116 University Avenue for \$300,000 on October 31, 2005. It executed two deeds of trust, one in the amount of \$250,000 to Centra Bank, and \$60,000 to Joyce Clay and William Lotspeich. [Ex. R1; T. 138].

42. On September 6, 2006, Deputy Assessor Henry Maxwell changed the appraised value of the property at 1116 University Avenue from \$18,200 to \$300,000 and the assessed value from \$10,920 to \$180,000 in the database consistent with the Assessor's practice of using the purchase price as a form of determining market value. [T. 27, 34, Commission Exhibit 1].

43. On April 4, 2007, Morgantown Commercial Property LLC paid delinquent taxes owed by the prior owners on 1116 University Avenue in the amount of \$294.27. This represented ½ year taxes in the amount of \$142.95, plus interest of \$8.57, and the remaining ½ year due March 30, 2007 of \$142.95. [attachment to Ex. C10].

44. On July 1, 2007, Sheriff issued a tax ticket on the property to Morgantown Commercial Property LLC for tax year 2007 in the amount of \$4,546.86 if paid by September 1. [Ex. C7]

45. On July 18, 2007, James Jones visited the Monongalia County Assessor's Office to inquire about the increase in property taxes for the building. Morgantown Commercial Property LLC received a partial exoneration for the failure of the Assessor's Office to send a notice of an assessed value increase greater than 10% from the valuation assessed in the last tax year not later than 15 days from when the Board of Equalization first meets in February. W. Va. Code § 11-3-2a. This meant that for Tax Year 2007, Morgantown Commercial Property LLC paid the reduced tax amount assessed on the property for Tax Year 2006. The partial exoneration form was signed by John Laurita who is General Counsel for the Assessor and by William Perry, Chief Deputy Assessor. [Ex. C9].

46. On September 18, 2007, James Jones wrote a letter to Assessor Rodney Pyles complaining that William Perry had called him and offered to purchase 1116 University Avenue for \$100,000. He asked for an investigation into Mr. Perry's assessments and real property purchases over the last ten years. He also requested an internal audit be conducted to determine the fairness, consistency and uniformity in the administration and assessment of real estate taxes on commercial buildings and businesses in the city of Morgantown. [Ex. C9].

47. Mr. Jones faxed documents to the West Virginia Ethics Commission on November 21, 2007 and filed a formal complaint against Mr. Perry received on December 26, 2007. [Ex. C10].

48. Mr. Jones, on behalf of Morgantown Commercial Property LLC, appeared before the Board of Equalization seeking a reduction in the appraised value of the property at 1116 University Avenue on February 19, 2008. The Board denied the request by Order

dated February 25, 2008 on the grounds that the purchase price of \$300,000 established market value. [Ex. R6].

49. Apart from these basic facts, the testimony adduced at the hearing was in sharp dispute. The allegation that is the crux of the Amended Statement of Charges—Mr. Perry offered to purchase the 1116 University Avenue property during a telephone conversation with Mr. Jones from the former's office during a work day relies completely on the testimony of Mr. Jones.

50. Accordingly, it is the responsibility of the undersigned to make determinations of credibility. Decisions from the currently named Public Employees Grievance Board, which are issued following administrative hearings by administrative law judges, provide useful guidance on how to assess credibility:

When witnesses have given different versions of events, credibility determinations must be made. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information.

Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD-216 (Dec. 28, 1999).

51. Keeping these factors in mind, the undersigned has carefully reviewed the relevant testimony.¹

¹ Testimony that focused on whether the Monongalia County Assessor's Office is efficiently run or disorganized or whether market value should have been determined differently does not assist the trier in fact in determining whether the Commission has met its burden of proving the violations of the Governmental Ethics Act alleged in the Amended Statement of Charges.

52. Mr. Jones testified that he moved to Morgantown in June of 2004. He and his partner, Larry Stern, purchased a condominium located at 1117 University Avenue. In 2005, he saw plans for a 91 million dollar, 19 story building called the Riverview project on top of a copier in his condominium building. The building was to be located close to the condominium. [T. 82, 128].

53. He then became interested in purchasing the building located at 1116 University Avenue as an investment, because maybe three to five years down the road, the building could quadruple in value if the \$91 million project was built. The building had been listed with several realtors and was owned by Joyce Clay and William Lotspeich. [T. 88, 129-132].

54. After a realtor told him the building was no longer for sale, he visited the Clays and Mr. Lotspeich. He told them about Riverside project and advised them they were asking too little for the property, which he thought was in the range of \$125,000 to \$175,000. They offered to sell it to him for \$300,000. [T. 88, 129-131].

55. Mr. Jones characterized himself as a dabbler in investment property all of his life who is fairly familiar with real estate transactions and property taxes. In his words, "I'm not a dummy in real estate." His sister works in a different county assessor's office in West Virginia, so he has a little bit of familiarity about what an assessor's responsibilities are. [T. 87, 132, 140].

56. On the other hand, he did not understand how Deeds of Trust operate as liens upon the property. He believed that he was loaned \$240,000 by the bank because Joyce Clay and William Lotspeich financed the remaining \$60,000 of the purchase price, secured by a

second Deed of Trust. He expressed surprise and confusion that the Deed of Trust to Centra Bank was in the amount of \$250,000.² He never saw the bank's appraisal. He never thought about property taxes increasing when he purchased the building. [136, 140].

57. With respect to the alleged phone call, Mr. Jones testified as follows: He was at his condominium, either just finishing a shower or just getting back from running. He saw the voice mail notification light blinking around 11:30 am and listened to the message. The caller identified himself as Deputy William Perry of the Assessor's Office and left a return call number of 291-7225. He wrote the number down on a pad of paper by the telephone. He waited until 1:15 p.m. or 1:30 p.m. to call back because the caller had mentioned going to lunch. [T. 99]. The telephone number went directly to Mr. Perry's office, and Mr. Perry answered. Mr. Perry said, "I've done research on your property and found that you paid too much for your property, and I will write you a check today for \$100,000 and take it off your hands." Mr. Jones said "First of all you're calling on county time, you're using a county phone, that's very unethical. You're being paid by the taxpayers to conduct assessment business only—not to purchase property. You must think I'm a fool to take \$200,000 less than what I paid originally for the property. You know exactly what's going on with that property because it has been all over the news. It's a \$91 million building." Mr. Perry hung up as soon as Mr. Jones said "This is unethical". [T. 99-103]. On cross-examination, Mr. Jones stated that Mr. Perry "got very nervous and hung up." [T. 155]. Mr. Jones acknowledged that Mr. Perry did not mention anything about the property taxes having been increased; nor did he make any threats about property taxes

² Banks typically loan up to 80% of the purchase price, but may add transaction costs, such as points and other fees into the loan amount.

increasing. [T. 156]. Mr. Jones immediately telephoned one of his business associates, Fathlia Dosky, who has a 50% ownership interest in the LLC, to tell her about the telephone call. He also “let his partner [Larry Stern] know.” [T. 104]. In his sworn statement, Mr. Jones testified that he told Mr. Stern about the conversation when the latter came back from a walk. At the hearing, he amended his testimony to say that Mr. Stern was out of town on business. [T. 147].

58. On cross-examination, Mr. Jones was asked about testimony he gave in a sworn statement taken by the Ethics Commission on December 2, 2008 that he had told Mr. Perry in this conversation, “I would never sell because \$91 million [sic] which you would have first privileged information. I discovered it accidentally. But I know it’s been approved and getting ready to be approved through city council and city planning commission.” [T. 150, Ex. R. 3]. He agreed that he had said that in the telephone conversation. He assumed that Mr. Perry had privileged information because anyone that plans to do business in the City of Morgantown would “go to the assessor, look at the maps, et cetera, et cetera, et cetera.” [T. 151]. He believes that the conversation lasted five minutes, but could have lasted longer. [T. 152]. He told Mr. Perry in this conversation that “if I worked at the Library of Congress and did that and called on county time or federal time and conducted business out of my office the way [you’re]. . . doing. . . you’re using taxpayer money to do your own personal gain. . . .” [T. 151-152]. He added that he said, “It’s not about Jim Jones. . . it’s about all the taxpayers of Mon County.” [T. 152-153]. He expanded on what he told Mr. Perry regarding the Library of Congress reference: “If we had done those type of things at the Library of Congress, they would’ve

packed our boxes out of our desk, taken us, had the police there, escorted us out of the building and said you're fired." [T. 153-154]. Upon being reminded by Mr. Perry's counsel, he remembered that he said to Mr. Perry, "I'm going to bring this to your supervisor's attention." [T. 154].

59. Mr. Jones testified that the telephone conversation occurred in 2007 and that the weather was turning warm. Later in his testimony he narrowed it down to after he paid the delinquent taxes for tax year 2006 sometime in April and before he received the 2007 tax ticket in July. Following his sworn statement but before the Statement of Charges was issued, he told the Ethics Commission that the conversation occurred in the spring of 2006. At the hearing, he explained that he became confused by the tax tickets being a year behind. [T. 198]. In a February 17, 2008 newspaper article introduced by the Commission, Mr. Jones is reported to have said he received the call "shortly after" purchasing the property, which was October 31, 2005. [Ex. C12].

60. Mr. Jones was asked whether he took any steps to preserve the telephone number written on the pad or the voice mail. He did not. He testified that he called Verizon to ask if a record existed of a call being placed from Mr. Jones's number to Mr. Perry's, but Verizon told him "no."

61. He was extremely unclear about the date when he contacted Verizon. He initially testified that after Mr. Perry's telephone call, he tried to call Assessor Pyles, who did not call him back. Then he called Verizon before his July 18th visit to the Assessor. [T. 180]. However, in his letter to Mr. Pyles of September 18, 2007, he recounted telling Mr. Perry on July 18 that telephone records were available and he would be able to substantiate

those claims. Mr. Perry's counsel pointed out to Mr. Jones that if he already knew as of July 18, 2007 that Verizon did not keep those types of records, he would have been untruthful on July 18. Mr. Jones then stated the phone call could have been after the July 18 meeting but could have been before. [T. 180-182]. It is Mr. Jones's firm testimony that by the time he wrote the letter to Mr. Pyles on September 18, 2007, he knew there were no records available from Verizon. [T. 181].

62. Mr. Perry testified that he had been Chief Deputy Assessor for 20 years. He denied making the telephone call to Mr. Perry, ever offering to buy property from Mr. Jones, directing Mr. Maxwell to change the valuation on 1116 University Avenue or taking any retaliatory action against Mr. Jones. [T. 413, 420, 422-23]. The first time he met Mr. Jones was on July 18, 2007. [T. 421]. He recalled joining the conversation with Mr. Jones that had begun with Mr. Laurita, but was not sure whether they remained at the counter or continued in his office. [T. 418]. In his sworn statement, he had stated that he stayed at the counter with Mr. Jones and did not go into his office. [C17]. Mr. Jones never mentioned anything about a telephone call or his offering to purchase the property during that conversation. [T. 413-18].

63. Mr. Perry also offered certain testimony going towards the implausibility of Mr. Jones's information. Mr. Jones had testified Mr. Perry said in his telephone conversation "I have done my research on your property and found you paid too much for the property. . . ." He then, according to Mr. Jones, offered \$100,00 to "take it off [Jones's] hands." Mr. Perry testified that he was knowledgeable about real estate. Before offering to purchase any property, he would have looked in the record room to see how it was

encumbered. So if he had “done [his] research” on the 1116 University Avenue property, as Mr. Jones reported he said, he would have seen that there were secured liens in the form of deeds of trust encumbering the property for \$300,000. There would have been no point in offering to buy the property for \$100,000 even if Mr. Jones had been willing. He would not have obtained clear title. He testified that he was not interested in buying commercial property in downtown Morgantown for several reasons, including the presence of a men’s shelter called the Barlett House. In response to the Commission’s cross-examination questions, he testified that the owner of 1116 University Avenue prior to Joyce Clay and William Lotspeich had offered the property to him and he had declined.⁴

64. It is the Commission’s theory that Mr. Perry made the offer to purchase 1116 University Avenue as part of a plan to acquire property near the proposed Riverview Center project to profit from the appreciation of surrounding property such a project could cause. It is to this end, that the Amended Statement of Charges alleged that Mr. Perry offered to purchase from Joyce Clay and William Lotspeich their property located at 1150 University Avenue. In his questioning at the hearing, the Commission’s counsel sought to establish that Mr. Perry made the first offer to Ms. Clay and Mr. Lotspeich in 2006 when

⁴ The Commission sought to impeach this testimony with a print-out showing all property deeded to Mr. Perry in Monongalia County since 1997. [Ex. C15]. The prior owner’s offer to purchase 1116 would have been during or before 1997, when Mrs. Clay and Lotspeich purchased it. The print-out showed that Mr. Perry was a grantee of two parcels on University Avenue on February 6, 1997 for a consideration of \$0. This property was next door to the Bartlett House that he sold in 2004. The Commission tried to prove that Mr. Perry was untruthful about turning down an opportunity to buy 1116 University inasmuch as he had purchased property several doors down in 1997. However, Mr. Perry explained that if the sale price was listed as \$0 on the print out, it meant that he had not made an arms-length transaction; he inherited it from his parents who died in 1992 and 1993. He stated that he did not purchase those two parcels in 1997. [T. 441-446]. Mr. Perry was not asked about any other purchases on Exhibit C15.

the Riverview Center project was under consideration as a 19 story building, and made the second offer to Mr. Jones after the newspaper announced in April 2007 that a ten to 12 story building was now being proposed. [Ex. C4].

65. Mr. Lotspeich, Ms. Clay and Mr. Clay testified fairly consistently with each other to the following: They all three live in a house in Reedsville, Preston County. Mrs. Clay and Mr. Lotspeich own a building next door to their house. They were having a flea market sale in the building some time after they sold 1116 University Avenue, in the spring of 2006 [T. 212, 248]. Mr. Perry entered and came directly to where they gathered. [T. 212-214]. He introduced himself by name, although not by his job title. [T. 217]. They did not provide their names to him or mentioned that they owned property in Morgantown. [T. 242, 254, 256]. After some small talk, he told the three that they “probably paid too much” for the building Clay and Lotspeich still owned together at 1150 University Avenue and that he would “take it off our hands” for \$100,000. [T. 215-216, 251]. None of them responded. They were shocked at such a low price. [T. 217; 238]. The taxes on 1150 University Avenue went up after Mr. Perry made that offer “the next tax year.” [T. 218]. They didn’t know they could challenge this until some period of time later. [T. 219]. They had not received the 10% notice. [T. 218].

66. Assessor Pyles testified that he was responsible for the reassessment of 1150 University Avenue that caused its tax increase. He had stopped in the building when it was called the Rag Bag; Joyce Clay introduced herself to him as the daughter of Pete Foor, a staff member in Mr. Pyles’s office. Sometime later, he noticed that the building was for sale. He became concerned that he might be subject to the criticism of favoring

Mr. Foor's daughter if the appraised value was low. He assigned someone to reappraise it. [T. 376-77].

67. Mr. Perry testified that he did stop at the flea market while driving to his weekend home in Preston County to see what was being sold. He did not know who owned the flea market beforehand and simply engaged in conversation with those individuals. He testified he did not make an offer to purchase 1150 University Avenue for the same reasons he would not have wanted to purchase 1116 University Avenue. He also testified that he never thought the Riverview Center project would come to fruition as a 19 story building or a 12 story building because there was no practical provision for parking. [T. 416, 423-426].

68. The undersigned has set forth at great length the relevant evidence introduced at the hearing on the question of whether the telephone conversation between Mr. Jones and Mr. Perry occurred. Applying the credibility factors listed in paragraph 26 above⁵ to the primary witnesses who testified on behalf of the Commission, the undersigned first finds that James Jones lacks credibility. **Bias or motive:** Mr. Jones's animus towards Mr. Perry is clear, although perplexing. Even assuming the phone call occurred, the worst that happened is that Mr. Perry insulted his intelligence by making a low ball offer. The alleged offer had absolutely nothing to do with the fact that the Assessor's Office increased the property value months earlier to reflect not only the purchase price of

⁵ 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information.

\$300,000, but the value reached by an independent appraiser that made possible the bank loan. **Motive:** Mr. Jones freely acknowledged that he hoped the ethics commission complaint process would result in a finding that the \$300,000 value set by the Assessor was wrong. **Consistency in prior statements:** Mr. Jones testimony at the hearing was often inconsistent with itself as well as being inconsistent with his prior sworn statement. The best the Commission could wring from Mr. Jones through leading questions was that he had “no doubt” that the telephone conversation occurred. **Untruthfulness.** By the time Mr. Jones wrote his letter of September 18, 2007, he knew that he could not obtain records from Verizon. While not making the bald misrepresentation that such records existed, he carefully wrote in a disingenuous manner that he had told Mr. Perry on July 18, 2007 that such records existed that could substantiate his claim. **Plausibility of information:** Mr. Jones’s information is not plausible. A person experienced and knowledgeable in real estate, like Mr. Perry, who was supposedly desperate to acquire property on University Avenue, would not have made a half-hearted offer to purchase for \$100,000 without investigating not only the purchase price but what the owner owed on it. Mr. Jones did not seem to understand how deeds of trust work, so he would not have grasped that the deeds of trust would undermine the plausibility of his story. **Existence or nonexistence of a fact/plausibility of information:** Most significant to the undersigned is the fact that Mr. Jones’s conduct is inconsistent with the existence of the telephone call: Mr. Jones purported to be shocked and outraged to have gotten the call. (It is, in fact, suspicious that Mr. Jones seems to lack a rudimentary understanding about real estate transactions and how tax appraisals are made, but knew instantly that Mr. Perry’s offer

was unethical, that it constituted a use of public office for private gain and that assessors should not ever offer to purchase real estate.) Yet he did not complain to anyone in authority; nor did the Commission produce a witness who could testify that Mr. Jones told him or her about the call when it occurred. He went to the Assessor's Office supposedly convinced that Mr. Perry had raised his taxes in retaliation for not selling and had acted unethically by making the phone call, but when he was directed to speak with Mr. Perry, by either the secretary or Mr. Laurita, he did not voice any objection to speaking with him. He claimed to have accused Mr. Perry of making the phone call while in Mr. Perry's office in a manner in which the whole office could hear. The Commission could produce no witness who heard Mr. Jones make such an accusation. Nor did any witness hear that he demanded three times in Mr. Perry's office that the Sheriff be present. After leaving the meeting, Mr. Jones did not immediately see the Sheriff or complain to anyone else. To the contrary, Mr. Jones's actions are entirely consistent with his having fabricated the telephone call and the retaliatory motive behind the increased property value. The only reliable evidence is that Mr. Jones first made his allegations two months after the July 18, 2007 visit to the Assessor in a letter of September 18, 2006. This allowed him sufficient time to fabricate his story that Mr. Perry offered to purchase the property and then retaliated by raising its assessed value. He used this allegation in an unsuccessful attempt to have the Board of Equalization reduce the appraised value of 1116 University Avenue. [See newspaper article, Ex. C6]. He also used this allegation to file a complaint with the West Virginia Ethics Commission. When the Commission's evidence showed his

accusation of retaliation was impossible, he still hoped he could use the proceeding to challenge the Assessor's method of valuation.

69. For similar reasons, the undersigned does not find the testimony of Joyce Clay, William Lotspeich or Robert Clay credible. Their testimony concerning the words Mr. Perry used in the spring of 2006 is virtually identical to Mr. Jones's testimony about the words Mr. Perry used in the spring of 2007. The information is implausible. Mr. Perry approached them not at their building in Morgantown, but at a building located next to their house in Reedsville. There, he offered to buy the property at 1150 University Avenue without there being any discussion first that they even owned it. Like Mr. Jones, they too attributed the fact that their next tax ticket on 1150 University Avenue increased to Mr. Perry's retaliation. (This would have been July 2006). Yet, they did not complain to anyone for more than a year, until Mr. Jones filed his ethics complaint in December 2007. They, too, sought to appeal the Assessor's appraisal before the Board of Equalization. These three individuals were not disinterested strangers to Mr. Jones who independently came forward with corroborating evidence. Mr. Jones brought them to the attention of the Ethics Commission in his complaint. [Ex. C10]. Finally, like Mr. Jones, these three individuals still somehow believe that Mr. Perry retaliated against them when, in fact, the Assessor's Office initiated the reassessment months before Mr. Perry spoke with them.⁶

⁶If they did not get the 10% notice and first learned of the increase when they received their tax ticket in July 2006, the increase had to have occurred no later than January 2006 under W. Va. Code § 11-3-2a (requiring owners to receive notice of any increase greater than 10% at least 15 days before the Board of Equalization meets in February).

70. Applying the same factors to Mr. Perry's testimony, the undersigned finds him more credible, although the analysis is more difficult, because much of his testimony by necessity consists of denials that certain acts occurred. The Commission pointed to inconsistencies in Mr. Perry's testimony at the hearing and at his sworn statement or answer to interrogatories. However, these were on minor issues—such as whether any part of the conversation with Mr. Jones occurred in his office or exclusively at the counter or whether the subject of real estate came up at all with the Clays and Mr. Lotspeich in 2006. The Commission sought to impeach Mr. Perry's testimony that he wasn't interested in purchasing property in the downtown University Avenue area and 1116 University Avenue in particular by attempting to show he purchased the property next to the Bartlett House in 1997. However, the undersigned finds Mr. Perry's explanation of the print-out, which showed a transaction without consideration based upon inheritance, to be more likely. In no instance, did Mr. Perry act inconsistently with his testimony that he first encountered Mr. Jones on July 18, 2007 as the individual in the office who handles complaints by the public [T. 375 *infra*], that he simply followed the law when he authorized a partial exoneration of the tax increase for the Assessor Office's failure to send notice and that he had no role in the increase of the Assessor's valuation of 1116 University Avenue.

71. The credibility of the Commission's primary witnesses is not sufficient enough to overcome the complete lack of hard evidence showing that a phone call from Mr. Perry to Mr. Jones was made, and leads to the conclusion that the Commission has not met its burden of proving the allegations of the Amended Statement of Charges beyond a

reasonable doubt. But the undersigned must still make additional findings of fact relating to the application of W. Va. Code §§ 6B-2-5(h)(A) or (B) in the event that the Ethics Commission does not accept his credibility findings.

72. The Commission introduced evidence that, as Chief Deputy Assessor, Mr. Perry was the second-in-command and everyone else in the office was subordinate to him, except for the Assessor himself. [T. 26, 259, 262, 351-352].

73. Upon closer questioning, these witnesses clarified that they were not directly supervised by Mr. Perry or assigned daily tasks by him. He was the go-to guy to whom staff went with questions about valuation, because he was knowledgeable about real estate, business and financial matters. [T. 47-48, 404]. When Ms. Hajian became a supervisor in 2007, she would keep him in the loop about her activities. [T. 47-48]. He did oversee discipline of field personnel until 2004, when the Assessor curtailed Mr. Perry's responsibilities for being too heavy-handed. [T. 376, 381]. He managed the office when the Assessor was gone. His day to day duties covered annual farm reports, annual farm use exemptions, dealing with larger commercial taxpayers and industrial taxpayers, handling questions about tax procedures and dealing with difficult taxpayers when problems arose. [T. 375].

74. With respect to the increase in the appraised value of 1116 University Avenue, Henry Maxwell testified that he changed the values as a matter of routine when the sales listing form came across his desk, based upon the purchase price and the fact that it appeared to be an arms-length transaction. [T. 345-49]. He exercised his discretion in apportioning the price between the land and the building. [T. 353-54]. Mr. Perry did not

ask him to look at the property or change the values. [T. 349-50]. At the time he changed the assessment, September 2006, he had no direct supervisor. Mr. Robert Cleveland had left and Eva Hajan had not been named his supervisor, yet.

75. Regarding the understanding of the office staff of conflicts of interest, no one had an understanding that they could not buy or sell real estate or personal property in Monongalia County because they were statutorily charged with valuing such property annually. [T. 52, 358, 372-374]. They all understood that they could not purchase realty at a sheriff's sale being auctioned for unpaid taxes, although no one identified the source of that prohibition. [T. 52, 358, 374] The office practice was that no one changed the values for their own property, and they deemed it inappropriate to be involved in assessing property they wanted to sell or buy. [T. 39-40, 355].

76. The Assessor testified that regardless of the statutory directives, real property was not assessed annually. [T. 369]. If no changes were made to real estate values on a parcel, the computer system, maintained by the State Tax Department, placed the designation EOY ROLL on the record, and the same values were reported to the State as the year before. [T. 49]. Mr. Perry testified that he interpreted "annual assessment" to mean that the Assessors certify values of real property, personal property, minerals and public utilities at the same time each year, freeze the books and report the figures to the State Tax Department. In his opinion, it did not mean that action was affirmatively taken with respect to a specific piece of property. [T. 421-22].

STANDARD OF REVIEW

The Ethics Commission must prove beyond a reasonable doubt that Respondent violated the Ethics Act, W.Va. Code § 6B-2-4(r)(1). The West Virginia Supreme Court has approved a standard jury instruction which sets forth the standard for determining what constitutes proof beyond a reasonable doubt. The jury instruction reads:

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"-with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case. It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. 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 a convincing character that a reasonable person would not hesitate to rely and act upon it. The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. So if the jury, after careful and impartial consideration of all the evidence in the case, finds a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions-one of innocence, the other of guilt-the jury should of course [adopt the conclusion of innocence. State v. Goff, 166 W.Va. 47, 55, 272 S.E.2d 457,463 (W.Va. 1980) Applying this standard to the facts in this case, Respondent Perry violated the Ethics Act beyond a reasonable doubt.

CONCLUSIONS OF LAW

1. It is undisputed in this matter that Respondent Perry is a full-time public employee/official, subject to the restrictions of the Ethics Act. Accordingly, for purposes of this matter, Respondent Perry shall be deemed a full-time public servant who is subject to West Virginia Ethics Act.
2. The Commission's counsel has the burden of proving, beyond a reasonable doubt, that the facts alleged in the Amended Statement of Charges are true and constitute a material violation of the statute cited. W. Va. Code § 6B-2-4(r)(1).⁷
3. The Commission has not met its burden of proving that William Perry contacted James Jones from his place of public employment, and offered to purchase property in which Mr. Jones had an interest.
4. The Assessor's Office took "Regulatory Action" against Jones Property within the previous twelve months.

W.Va. Code 11-3-1 mandates that "all property shall be assessed annually as of the first day of July at its true and actual value[.]" The responsibility for determining the annual assessment for each property lies with an elected County Assessor and those in his/her employ. This assessment is then used as the basis for the levy of a property tax

⁷ Although the undersigned has referred to the party bringing this action as the West Virginia Ethics Commission, it is understood that the Commission, as a body, has not yet determined that a violation exists. The Probable Cause Review Board, composed of several members of the Commission, made a determination that probable cause exists, and it is the responsibility of the Commission's counsel to present evidence to prove the allegations in the Amended Statement of Charges.

upon the property owner. This assessment is a governmental action by the County Assessor, and constitutes a "regulatory action" upon the property owner.

The determination of an assessment as a "regulatory action" has also been upheld by the West Virginia Ethics Commission. In Advisory Opinion 96-52, the Ethics Commission held that a County Assessor's secondary employment by a property owner within the County violated W.Va. Code 6B-2-5(h). In reaching this conclusion, the Ethics Commission held: The Commission finds that County Assessors annually take regulatory action on persons who own land located in their Counties. This regulatory action is taken either personally or through subordinates who are employed by the Assessor. For this reason, the requester may not be employed by any person who owns land located in that County. W.Va. Ethics Commission Advisory Opinion 96-52.

As part of their assessment duties, the employees of the Assessor's office make value determinations on the property. The employees then enter the value into a master index system. The system registers the date the value is entered along with the initials of the person entering the value. This process constitutes the "annual assessment" of the property. Once entered, the assessment is complete and a property tax ticket is issued on or about July 15.

In this matter, the Monongalia County Assessor's office took regulatory action against the Jones Property within the twelve (12) months preceding Mr. Perry's spring 2007 offer to Mr. Jones. Specifically, on September 6, 2006, Henry Maxwell, an employee of the Monongalia County Assessor's office, entered and updated the value determination for 1116 University Avenue, Map 28A, Parcel 33, into the master index system used by the

Monongalia County Assessor's Office. He based the value determination upon the sales price of the property when Mr. Jones and his business partners purchased the property.

As a result of the action taken by Mr. Maxwell, Mr. Jones' property was reassessed at a higher value by the Assessor's Office. This regulatory action constituted an increase over the prior year assessment, and a higher tax levy.

5. Had such conduct occurred, (the alleged phone call from Mr. Perry to Mr. Jones) it would not have constituted a material violation of West Virginia Code § 6B-2-5(b) or 6(B)-2-5(h) (A) and (B), by Mr. Perry's use of his office telephone and the prestige of his office to offer to purchase real estate. An isolated instance of a public employee using the telephone for a five minute telephone conversation would be considered *de minimus* and not a material violation. The allegation that Mr. Perry identified himself as the Chief Deputy Assessor and stated that the owner paid too much for the property is also not a material violation. There is no allegation that Mr. Perry conveyed information to Mr. Jones that he was in a unique position to know, which might have been the case if the allegation had been that shortly after the property's valuation was increased at the Assessor's Office and before Mr. Jones had been officially informed, Mr. Perry made Mr. Jones aware of the increase as a means of persuading Mr. Jones to sell the property at a low price. At worst, the Commission alleges that simply by identifying himself by his title, Mr. Perry attempted to convey that his briefly stated opinion that Mr. Jones had paid too much carried more weight than another prospective purchaser. This certainly was not the effect it had on Mr. Jones.

6. The Commission did not prove that a material violation of either W. Va. Code § 6B-2-5(h)(A) or (B) occurred, again assuming that Mr. Perry did call Mr. Jones and offer to purchase 1116 University Avenue. 6B-2-5(h)(A) or (B)

7. With respect to W.Va. Code §6B-2-5(h)(A), the Commission did not prove beyond a reasonable doubt that Mr. Perry took regulatory action on the property by increasing its valuation on September 6, 2006 or that he knew that Henry Maxwell had taken such action within the preceding twelve months. In fact, the Commission introduced no evidence on that point other than to draw an inference that Mr. Perry could have checked the Assessor's data base or was aware of the office practice of using the purchase price on sales listing forms to provide market value. Such an inference might be stronger had Mr. Jones testified that Mr. Perry mentioned the increased property tax to persuade Mr. Jones to sell. It does not rise to the level of proof beyond a reasonable doubt.

With respect to W.Va. Code §6B-2-5(h)(B), the undersigned finds that by prohibiting a broad range of activity, buying or selling personal or real property from a person who has a matter pending before the agency on which the public employee is working or a subordinate is known to be working, the Legislature intended the matter being worked on to be interpreted more narrowly than the Amended Statement of Charges has done. The Amended Statement of Charges alleges that because the West Virginia Code requires all property, both real and personal, to be assessed annually, then all property in Monongalia County constitutes matters presently being worked on by Mr. Perry or by anyone in the office other than Assessor Pyles. This interpretation would mean that almost anyone in the Assessor's Office would need to obtain a waiver from the

Ethics Commission before buying or selling a home, buying a new or used vehicle from a dealership, buying a used vehicle from an individual, buying or selling farming equipment or even buying groceries from a grocery store, as long as the individual or business has real or personal taxable property located in Monongalia County. A basic tenant of statutory construction is:

Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made. Syllabus Point 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938).

Syl. pt. 4, *Snider v. Snider*, 209 W. Va. 771, 551 S.E.2d 693 (2001). In fact, the Legislature did not intend this extreme result. The commonplace definition or understanding of the phrase “working on a matter” would mean that some affirmative steps were being taken with respect to a specific item that would lead to a regulatory *action* being taken or at least a conscious decision not to take action. The imposition of a general statutory duty on the Assessors to assess annually all property under § 11-3-1 and obtain property tax reports filed by taxpayers does not convert inaction-in-fact to action *de jure*. As far back as 1863, the Legislature understood that Assessors and their deputies would own property, be required to file property tax forms and have their property (both personal and realty) assessed. W. Va. Code § 11-3-17 focuses on the specific act of assessing to avoid a conflict of interest:

The assessor and his deputies shall make the same returns under oath, of their property, required by other persons. The assessor shall personally assess the property of his deputies and one of the deputy assessors shall assess the property of the assessor; in all other respects the assessment shall be similar to the assessment of the property of other persons.

8. The undersigned concludes that W. Va. Code § 6B-2-5(h) (A) or (B) prohibits those in the Assessor's Office from buying or selling property from individuals when those employees are currently and actively engaged in some specific activity relating to the individuals' property that is leading to regulatory action being taken, such as an increase or decrease in valuation, a decision whether to exonerate, a reappraisal, an investigation into the value of assets, a legal determination of entitlement to a homestead exemption, and the like.

DISCUSSION

A. **The Commission did not prove, beyond a reasonable doubt, that William Perry contacted James Jones from his phone of public employment and offered to purchase property in which Mr. Jones had an interest.**

The Hearing Examiner has considered all of the evidence submitted in this matter. Including the testimony of all witnesses at the hearing on August 11, 2009, the exhibits introduced by all of the parties, the Commission and Mr. Jones, and the Recommended Decision with proposed Findings of Fact and Conclusions of Law, submitted by the parties.

The Threshold issue in this matter, the one that must be addressed first, before any further discussion, is whether the Commission has proved beyond a reasonable doubt, that Mr. Perry violated W.Va. Code §6B-2-5(h(A) which reads "No full-time official or full-time public employee may seek...to purchase, sell or lease real or personal property to or from any person who had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months..." This alleged

violation rests solely upon whether the Hearing Examiner, finds, beyond a reasonable doubt, that one phone call was made from Mr. Perry to Mr. Jones, wherein it is alleged Mr. Perry attempted to purchase real property from Mr. Jones.

It is the opinion of the undersigned Hearing Examiner that the Ethics Commission has not met the burden of proof required concerning an alleged violation of the West Virginia Ethics, W.Va. Code §6B-2-5-(h) (A) or (B).

The beyond a reasonable doubt standard has been set forth here in the “Standards of Review,” Section of this Recommended Decision and I required by the Ethics Act, W.Va. Code §6B-2-4(r)(l).

The only evidence presented by the Commission that such a phone call was made was the testimony of Mr. Jones, which is as follows:

Finding of Fact 57: With respect to the alleged phone call, Mr. Jones testified as follows: He was at his condominium, either just finishing a shower or just getting back from running. He saw the voice mail notification light blinking around 11:30 am and listened to the message. The caller identified himself as Deputy William Perry of the Assessor’s Office and left a return call number of 291-7225. He wrote the number down on a pad of paper by the telephone. He waited until 1:15 p.m. or 1:30 p.m. to call back because the caller had mentioned going to lunch. [T. 99]. The telephone number went directly to Mr. Perry’s office, and Mr. Perry answered. Mr. Perry said, “I’ve done research on your property and found that you paid too much for your property, and I will write you a check today for \$100,000 and take it off your hands.” Mr. Jones said “First of all you’re calling on county time, you’re using a county phone, that’s very unethical. You’re being paid by the taxpayers to conduct assessment business only—not to purchase property. You must think I’m a fool to take \$200,000 less than what I paid originally for the property. You know exactly what’s going on with that property because it has been all over the news. It’s a \$91 million building.” Mr. Perry hung up as soon as Mr. Jones said “This is unethical”. [T. 99-103]. On cross-examination, Mr. Jones stated that Mr. Perry “got very nervous and hung up.” [T. 155]. Mr. Jones acknowledged that Mr. Perry did not mention anything about the property taxes having been increased; nor did he make any threats about property taxes increasing. [T. 156]. Mr. Jones immediately telephoned one of his business associates, Fathlia Dosky, who has a 50% ownership interest in the LLC, to

tell her about the telephone call. He also "let his partner [Larry Stern] know." [T. 104]. In his sworn statement, Mr. Jones testified that he told Mr. Stern about the conversation when the latter came back from a walk. At the hearing, he amended his testimony to say that Mr. Stern was out of town on business. [T. 147].

The lack of evidence concerning the phone call and offer to purchase is further illustrated as follows:

1. Even though Mr. Jones indicated that Mr. Perry left a recorded phone message, in which he identified himself and gave his phone number, there is no actual evidence of an alleged recorded message.
2. There is no documentary evidence of the alleged phone call being made on any of Mr. Jones' phone bills.
3. Mr. Jones admits that only one phone call was made.
4. No contemporaneous complaints were made by Mr. Jones, concerning the alleged phone call from Mr. Perry, to the Assessor's office, or to any other public official.
5. Mr. Perry denies that he even made a phone call to Mr. Jones.
6. Mr. Jones only has an interest in said property and is not the sole owner.

In addition to the above-factors, the Hearing Examiner's finding is further influenced by the fact there is simply no evidence that Mr. Perry intervened directly or indirectly in any manner whatsoever, concerning the new assessment of Mr. Jones' property, which is additional evidence to the Hearing Examiner of Mr. Perry's lack of interest in the Jones property, especially in light of the fact that Mr. Jones felt strongly that

Mr. Perry retaliated against him by raising his property taxes concerning the property upon which Mr. Jones states Mr. Perry attempted to purchase.

B. The Assessor's office took regulatory action against the Jones property within the previous twelve months.

The Assessor's office is statutorily required to take regulatory action concerning the assessment of all property, both real and personal, including the Jones property and there is no evidence that the reassessment of the Jones property, was influenced in anyway by Mr. Perry. To the contrary, the evidence presented is that Mr. Perry had no role in the reassessment in the Jones property, and he did not attempt to influence the reassessment of the Jones property in any manner whatsoever. The reassessment of the property was the result of a routine administrative process. It is simply disingenuous to suggest anything improper about the reassessment of the Jones property. It was reassessed at a value of \$300,000.00. This amount was based upon the actual purchase price of \$300,000.00, (FOF 38), and an appraisal in the amount of \$300,000.00. (FOF 39)

Each party submitted numerous proposed Findings of Fact and Conclusions of Law concerning the regulatory actions taken by the Assessor's office. Some of these are omitted from this decision because the Hearing Examiner finds nothing to be improper about the regulatory action taken by the Assessor's office that would support an alleged ethical violation by Mr. Perry. More importantly, because the Hearing Examiner has previously determined that the Commission failed to prove that Mr. Perry made a phone call to Mr. Jones to purchase property, in violation of W.Va. Code §6B-2-

5(h), it is not necessary to decide whether Mr. Perry took regulatory action in violation of §6-B-2-5(h) (A) and (B) was violated.

However, the Hearing Examiner is mindful that he is making a recommended decision to the West Virginia Ethics Commission. The Commission may disagree with the Hearing Examiner's Findings and Conclusions that Counsel for the Commission did not prove, beyond a reasonable doubt, that Mr. William Perry contacted James Jones, from his phone of public employment, and offered to purchase property in which Mr. Jones had an interest. If the Commission disagrees with these Findings and Conclusions, the Hearing Examiner further Finds and Concludes that the Commission did not prove, beyond a reasonable doubt, that Mr. Perry took regulatory action on the Jones' property, in violation of §6B-2-5(a) (A) and (B), or §6B-2-5(b), for the reasons set forth in the Conclusions of Law, primarily because , it was not a material violation of the Ethics Code.

C. Credibility Issues

Both parties, in their Findings of Fact, spent a great deal of time commenting on the credibility of the major witnesses, those being Mr. Jones and Mr. Perry. The Hearing Examiner does not believe it is necessary to comment on all of these credibility issues in light of the finding that the Commission has not met its initial burden by proving beyond a reasonable doubt that Mr. Perry attempted to purchase property from Mr. Jones in violation of §6B-2-5(b) (A) or (B) or §6B-2-5(b). The finding that the Commission did not meet its burden of proof is not so much a conclusion by the Hearing Examiner on the credibility of Mr. Jones or Mr. Perry concerning the alleged phone call,

as it is a commentary on the legal insufficiency of the evidence that the phone call was made. The Hearing Examiner also finds that it is not necessary to comment on the credibility of the other witnesses for the same reasons set forth herein.

Accordingly, the Hearing Examiner did not adopt many of the proposed Findings of Fact or Conclusions of Law, proposed by the parties, concerning credibility issues.

D. Evidentiary Issues

The parties raised two significant evidentiary issues:

(1) The admissibility of the polygraph examination, asserted by the Commission.

(2) The admissibility of the testimony of William Lotspeich, Joyce Clay, and Robert Clay, under Rule 404(b) of the West Virginia Rules of Evidence, asserted by the Respondent.


In regard to the first evidentiary issue, the Hearing Examiner understands why the Respondent may have felt the necessity to take a polygraph exam when faced with the dilemma of trying to prove something that he did not do. As stated before, because the Commission did not meet its initial burden of proof, it is not necessary for the Hearing Examiner to consider the results of the polygraph exam and the testimony of the polygraph expert, and hence make a ruling on the admissibility of the polygraph exam.

In regard to the second evidentiary issue, it is within the discretion of the Hearing Examiner, as the Finder of Fact, to assign what weight, if any, he gives to the testimony of witnesses, including William Lotspeich, Joyce Clay, and Robert Clay.

Suffice it to say that the weight accorded to the testimony of William Lotspeich, Joyce Clay, and Robert Clay, was not given sufficient enough weight to satisfy the Commission's burden of proof as previously discussed herein.

RECOMMENED DECISION

For the reasons set forth herein, it is the recommendation of the undersigned Hearing Examiner to the West Virginia Ethics Commission, that the Amended Statement of Charges against Mr. Perry be dismissed.



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BEFORE THE STATE OF WEST VIRGINIA
ETHICS COMMISSION

IN RE: Complaint of James Jones
Against William Perry

I.D. No. VCRB 2007-25

CERTIFICATE OF SERVICE

I certify that I have served a true and correct copy of "Hearing Examiner's Decision" by sending the same first class mail on this the 28th day of March, 2011, to the following:

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