

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:

**HARDWICK JOHNSON,
Council Member,
Town of Harpers Ferry**

**COMPLAINT NO. VCRB 2019-78
VCRB 2019-80
VCRB 2019-82
VCRB 2019-84
VCRB 2019-86**

CONCILIATION AGREEMENT

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

FINDINGS OF FACT

1. Hardwick Johnson ("Respondent" or "Johnson") is a member of the Harpers Ferry Town Council.
2. At all times pertinent herein, Johnson was a "public official" as defined in the Ethics Act, at W. Va. Code § 6B-1-3(k).
3. The Ethics Commission has jurisdiction over alleged violations of the Ethics Act committed by public officials, such as Johnson. W. Va. Code §§ 6B-1-1 through 6B-3-11.
4. On June 11, 2019, the town of Harpers Ferry held a municipal election. The Respondent was a sitting council member and seeking reelection to one of the five at-large seats on the Harpers Ferry Town Council.
5. Members of the Harpers Ferry Town Council receive \$2,000 annual compensation for their service.

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6. On June 17, 2019, the Board of Canvassers canvassed the election and declined to count six provisional ballots. The Board of Canvassers for the election was the outgoing Harpers Ferry Town Council, which included the Respondent.

7. Per a request from candidate Deborah McGee, the Board of Canvassers held a recount on June 26, 2019. The recount resulted in no changes, and the election results were certified on June 28, 2019.

8. The vote tallies for the five available seats were certified as follows: Barbara Humes, 91 votes; Jay Premack, 87 votes; Hardwick Johnson, 85 votes; Christian Pechuekonis, 84 votes; Charlotte Thompson, 84 votes; Nancy Singleton Case, 82 votes; Deborah McGee, 81 votes; Marjorie Flynn Yost, 81 votes; and Leah Howell, 15 votes.

9. On June 29, 2019, the five incoming members of the town council, including the Respondent, were sworn in.

10. On July 8, 2019, candidates Deborah McGee and Nancy Singleton Case filed a notice of election contest ultimately alleging that four of the six provisional ballots should have been counted.

11. On August 24, 2019, an election contest trial was held before the Harpers Ferry Election Contest Tribunal ("Tribunal"). The Tribunal's members were the mayor, recorder and the five newly elected council members, including the Respondent. W. Va. Code § 3-7-6 ("[T]he governing body of the municipality is the judge of any contest of a municipal election."). Four members of the Tribunal constitute a quorum.

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12. Candidates McGee and Case objected to the Respondent and fellow council member Charlotte Thompson serving on the Tribunal because their election was being contested.

13. Given the vote tallies as represented in the certified election results, the issue of whether to count the four provisional ballots could result in the Respondent, council member Thompson and council member Pechuekonis losing their seats. Council member Pechuekonis voluntarily disqualified himself and did not participate in the Tribunal.

14. The Tribunal concluded that it “ha[d] no legal authority to compel any one or more of its members to disqualify themselves from participating in any business that comes before the Town Council” and that “[d]isqualification is determined and undertaken on an individual basis.”

15. Relying upon the advice of counsel, the Respondent and council member Thompson participated in adjudicating the election contest maintaining that the rule of necessity required them to participate as members of the Tribunal. “The rule of necessity is an exception to the disqualification of a judge. It allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter.” Syl. Pt. 7, *State ex rel. Brown v. Dietrick*, 191 W.Va. 169, 444 S.E.2d 47 (1994).

16. The Respondent and council member Thompson asserted that a total of four members of town council serving on the Tribunal were in fact required to disqualify

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because they were named as defendants in the election contest. They maintained that the Tribunal would lack a quorum with four members disqualified, and the rule of necessity thus required their participation.

17. On September 11, 2019, the Tribunal, by a vote of four-to-two, entered an order declining to count the four provisional ballots.

18. The decision was timely appealed to the Circuit Court of Jefferson County. On November 6, 2019, the circuit court reversed the Tribunal ordering that the four provisional ballots should be counted. The circuit court did not address the argument that the Respondent and council member Thompson should have been disqualified. *Case v. Johnson*, No. 19-P-136 (Jefferson Cty. Cir. Ct. Nov. 6, 2019).

19. The circuit court's order was thereafter appealed to the Supreme Court of Appeals of West Virginia. On June 15, 2020, the Supreme Court issued an opinion affirming the portion of the circuit court's order concluding that the four provisional ballots should be counted. *Johnson v. Case*, No. 19-1018, (W. Va. June 15, 2020).

20. The Supreme Court also addressed the issue of whether the Respondent and council member Thompson should have disqualified themselves from participating in the election contest trial. The Supreme Court rejected the rule of necessity argument put forth by the Respondent and council member Thompson reasoning there was a quorum of four persons who were not impacted by the election contest available to serve on the Tribunal, namely, the mayor, the recorder, council member Humes and council member Premack. The Supreme Court thus concluded that the Respondent and council member

Thompson should not have participated in the election contest trial as members of the Tribunal.

21. The Respondent maintains that he continuously relied on the advice of counsel as to how to fulfill his legal duties and whether he should have participated in the election contest tribunal. The Respondent states that he believed that he was under a mandatory duty to participate in the tribunal pursuant to relevant caselaw regarding the rule of necessity.

22. "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." Powers v. Goodwin, Syl. pt. 3, 174 W.Va. 287, 324 S.E.2d 701 (W. Va. 1984).

RELEVANT LEGAL PROVISION

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

(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.

W. Va. Code § 6B-2-5(j)(3) states:

For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process

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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.

CONCILIATION OF VIOLATION

I, Hardwick Johnson, the Respondent, admit that I violated the voting provision in the West Virginia Governmental Ethics Act, at W. Va. Code § 6B-2-5(j)(1), when I, relying upon the advice of counsel, participated and voted in the election contest trial as a member of the Harpers Ferry Election Contest Tribunal.

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

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

1. A fine in the amount of \$750 to be paid within 30 days of entry of the Order approving the Conciliation Agreement.
2. A public reprimand, and
3. Training on the West Virginia Governmental Ethics Act, either in person or by viewing the training provided on the Ethics Commission's website, at ethics.wv.gov, within 30 days of entry of the Order approving the Conciliation Agreement. I shall provide written confirmation of the completion of this training to the Ethics Commission within five business days of completing the training.

I understand and agree that if the Ethics Commission fails to approve this Conciliation Agreement, then this Conciliation Agreement is null and void and the

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Complaint against me will proceed before the Probable Cause Review Board, where it will be processed in accordance with the West Virginia Code and Ethics Commission's Legislative Rules.

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

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

8/6/20

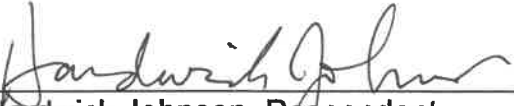
Date



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

7/17/2020

Date



Hardwick Johnson, Respondent

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COMMISSION'S ORDER

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

1. A fine in the amount of \$750 to be paid to the West Virginia Ethics Commission by September 8, 2020;
2. A public reprimand, and
3. Training on the West Virginia Governmental Ethics Act, either in person or by viewing the training provided on the Ethics Commission's website at ethics.wv.gov before September 8, 2020. Hardwick Johnson shall provide written confirmation of the completion of this training to the Ethics Commission within five business days of completing the training.

8/6/20
Date



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission