

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION 3

IN RE: PETITION PURSUANT TO W.VA. CODE § 6-6-7 FOR THE REMOVAL
OF WILLIAM KAWECKI, JENNIFER SELIN, NANCY GANZ, AND
MARTI SHAMBERGER

Civil Action No. 15-C-650

**ORDER DENYING PETITION TO REMOVE
PURSUANT TO W.VA. CODE § 6-6-7**

By previous Order, the Three-Judge Court set an evidentiary hearing for February 19, 2016. At the time of the evidentiary hearing, the Petitioner, George Papandreas, was present in person and with his counsel, Mark A. Kepple, Esq.¹ The Respondents William Kawecky, Jennifer Selin, Nancy Ganz, and Marti Shamberger, were not present, but their counsel, Lonnie C. Simmons, Esq., appeared in person and on their behalf.

Prior to evidence being taken, the Three-Judge Court advised the parties that it had reviewed the Respondents' Third Motion to Dismiss and the Petitioner's response. Among other things, counsel for Respondents incorporated by reference his previous arguments and contended that removal from office could not be based upon actions that occurred during a prior term of office. Counsel for Petitioners argued that removal could be predicated on acts that occurred during a prior term. The Three-Judge Court denied the Third Motion to Dismiss, but advised counsel that it would consider the issues raised in that motion in connection with the Court's ruling on the instant petition.

After considering the evidence adduced at the February 19, 2016, hearing, reviewing the Court File, and studying pertinent legal authority, the Court now makes the following Findings of Fact and Conclusions of Law.

¹ Other individuals who signed the petition were present at the hearing. See Transcript, Evidentiary Hearing, Page 5, Lines 13-16.

Findings of Fact

1. On October 8, 2015, George Papandreas (and other voters and residents of the City of Morgantown, Monongalia County, West Virginia) filed the initial "Petition Pursuant to W.Va. Code § 6-6-7 for the Removal of William Kawecki, Jennifer Selin, Nancy Ganz and Marti Shamberger," which alleged they were guilty of misconduct, malfeasance in office, incompetence, and neglect of duty as contemplated by W.Va. Code § 6-6-7. See Petition, paragraphs 2 and 3. Fifty-eight (58) signatures were affixed to the petition, including that of George Papandreas. *Id.*

2. Count I of the petition alleged that William Kawecki ("Kawecki") should be removed from office for violations of election law, *e.g.* directly soliciting employees of the City of Morgantown to give him money. See Petition, paragraphs 5-15.

3. Count I of the petition also alleged that Kawecki should be removed because he had a non-discretionary duty to forfeit his office for election law violations and because he failed to forfeit his office. *Id.*

4. Count II of the petition alleged that Nancy Ganz ("Ganz"), Jennifer Selin ("Selin"), and Marti Shamberger ("Shamberger") were among the council members that received the aforementioned email and were explicitly mentioned in the email as being endorsed by the Morgantown Together PAC. *Id.* at paragraph 16.

5. Count II further alleged that Ganz, Selin, and Shamberger utilized Kawecki as their agent to solicit contributions in violation of election law. *Id.* at paragraphs 17-19.

6. Count II alleged that Ganz, Selin, and Shamberger were under a non-discretionary duty to forfeit their offices for violating election laws and that they failed to forfeit their offices. *Id.* at paragraphs 20 and 21.

7. Count III alleged that Kawecki, Ganz, Selin, and Shamberger were guilty of malfeasance because of their conflicts of interest in violation of Article II, Section 2.05, of the City of Morgantown Charter ("Charter"). Specifically, the petition alleged that they had a substantial financial or substantial personal interest because each of them and their Morgantown PAC were benefactors of the Kawecki e-mail solicitation. *Id.* at paragraphs 22-24.

8. Count III further alleged that Kawecki, Ganz, Selin, and Shamberger were, thus, mandated to forfeit their offices and failed to do so in violation of the Charter. *Id.* at paragraph 25.

9. Count III also alleged that Kawecki, Ganz, Selin, and Shamberger engaged in official misconduct and malfeasance by condoning, and not protesting, the illegal Kawecki e-mail and illegal and unethical solicitation of money on behalf of Morgantown Together PAC. In addition, Kawecki, Ganz, Selin, and Shamberger had a non-discretionary duty to forfeit their offices because of their conflicts of interest and failures to forfeit their offices in violation of the Charter. *Id.* at paragraph 26.

10. Count IV alleged that Shamberger, Selin, and Ganz used their positions as councilpersons to improperly influence and prevent the Wards and Boundary Commission from fairly and appropriately redistricting the Fourth and Seventh Wards in such a manner as to equalize within the same number of voters. *Id.* at paragraphs 27 and 28. In other words, the Wards and Boundary Commission proposed a plan to bring the population of the Fourth and Seventh Wards to within nine (9) registered voters. *Id.* at paragraph 29. However, this plan would have placed Selin within the same Ward as Ganz. *Id.* at paragraph 30. The petition alleged that Shamberger, Selin, and Ganz rejected the Wards and Boundaries recommendations and developed another redistricting plan in violation of the City of Morgantown Charter that “preserved each of their claims to their political positions and incumbency.” *Id.* at paragraph 31. In addition, Kawecki was aware of the improper conduct, which benefitted his political agenda, and voted for and failed to stop the redistricting that benefitted the Morgantown Together PAC. *Id.* at paragraph 32. Consequently, Shamberger, Selin, Kawecki, and Ganz engaged in official misconduct and malfeasance in office and incompetence because they did not protest, but condoned, illegal re-districting efforts. *Id.* at page 33. Finally, Shamberger, Selin, Kawecki, and Ganz failed to forfeit their offices because of these violations. *Id.*

11. Count V alleged that Ganz and Shamberger used their positions in violation of the Charter to interfere with administration by requesting special favors and personal treatment from the police department. *Id.* at paragraph 39. Ganz and Shamberger also allegedly failed to forfeit their positions as required by the Charter. *Id.*

12. Count VI alleged that Selin advised City management to selectively enforce City of Morgantown laws, which usurped the police and the fire department jurisdiction to determine under what considerations the porch couch ban could be enforced. *Id.* at paragraphs 42-43. Selin also inappropriately used her position on counsel to prohibit development and discussion of legal options surrounding the “truck ban” ordinances. *Id.* at paragraph 44.

13. Count VI also alleged that Selin engaged in official misconduct and malfeasance for the aforementioned conduct as well as failing to forfeit her position as required by the Charter. *Id.*

14. By letter dated October 30, 2015, The Hon. Phillip D. Gaujot, Chief Judge, Division 3, Monongalia County Circuit Court, wrote The Hon. Margaret L. Workman, Chief Justice, of the West Virginia Supreme Court of Appeals, and requested that a Three-Judge Court be impaneled to preside over the case.

15. On November 2, 2015, Judge Gaujot entered an Order that, *inter alia*, found the petition conformed to the requirements of W.Va. Code § 6-6-7(b).

16. On November 5, 2015, by Administrative Order, Chief Justice Workman appointed The Hon. John Lewis Marks, Jr., Judge of the Fifteenth Judicial Circuit; The Hon. Richard A. Facemire, Judge of the Fourteenth Circuit; and The Hon. David H. Wilmoth, Judge of the Twentieth Judicial Circuit, to comprise a Three-Judge Court to be headed by Judge Marks for the purpose of taking all actions necessary and authorized by W.Va. Code § 6-6-7 in this removal action.

17. On or about December 1, 2015, Petitioner George Papandreas filed his “Motion to Amend Petition,” which further alleged that Selin “violated West Virginia election law because she knew or should have known that the distribution of a laminated sheet listing write-in candidates at the polling place at which she votes was a violation of election law, and neither reported the violation, nor took any action to prevent it.” See Motion to Amend Petition, paragraph 47.

18. A status conference was held December 3, 2015, and a motions hearing was held December 18, 2015. See Order *Following Status Conference and Setting Deadlines*, entered on or about December 8, 2015; and Order *Following Motions Hearing*, entered on or about December 29, 2015.

19. Although the Three-Judge Court granted the "Motion to Amend Petition," said amended petition was never filed and made an actual part of the record in this case. Nevertheless, the Three-Judge Court will decide the issues raised in said amendment.

20. At the February 19, 2016, evidentiary hearing, counsel for Petitioner George Papandreas objected to the Respondents not being present with their counsel. See Transcript, Evidentiary Hearing, Page 8, Lines 14-24, through Page 10, Lines 1-15. However, the Court observes counsel for Petitioner did not request subpoenas be issued from the Circuit Clerk to the individual Respondents to secure their attendance. See Order *Following Motions Hearing*, entered on or about December 29, 2015. (The Three-Judge Court believes that counsel's arguments from the hearings prior to the final hearing foreshadowed that Respondents' voluntary attendance and/or participation in the removal action might have been in issue.)

21. Petitioner George Papandreas called as witnesses at the final evidentiary hearing on February 19, 2016, the following: George Papandreas (himself), First Sgt. Scott Carl, Lyle Matthews, Glen Kelly, Jeff Mikorski, Heather Carl, Linda Tucker, Guy Panrell, Damien Davis, Roger Banks, Don West, and Wesley Nugent. See Transcript, Evidentiary Hearing, Pages 3-4.

22. Because certain of the Counts contained in the initial and amended petitions overlap, the Court will group related Counts together for purposes of discussion and determination.

23. Counts I-III concern the March 22, 2015, Kawecki solicitation email for the last election, which email was sent to over 200 people (55 of whom were either city, state, or federal employees). See Transcript, Evidentiary Hearing, Page 15, Lines 5-9; and Email, Tab A1, Joint Exhibit Book. Said email sought financial contributions or volunteers for Kawecki or the Morgantown Together PAC. *Id.* The e-mail also stated that "Morgantown Together has endorsed the following candidates for City Council: Rachel L. Fetty – 1st ward, Bill Kawecki – 2nd ward, Jenny Selin – 4th ward, Marty [sic] Shamberger 5th ward, Noel Hoffman – 6th ward, and Nancy Ganz – 7th ward[.]" *Id.*

24. West Virginia Code § 3-8-12(c) and (k) [2010] state:

(c) A person may not, in any room or building occupied for the discharge of official duties by any officer or employee of the state or a political subdivision of the state, solicit orally or by written communication delivered within the room or building, or in any

other manner, any contribution of money or other thing of value for any party or political purpose, from any postmaster or any other officer or employee of the federal government, or officer or employee of the State, or a political subdivision of the State. An officer, agent, clerk or employee of the federal government, or of this state, or any political subdivision of the state, who may have charge or control of any building, office or room, occupied for any official purpose, may not knowingly permit any person to enter any building, office or room, occupied for any official purpose for the purpose of soliciting or receiving any political assessments from, or delivering or giving written solicitations for, or any notice of, any political assessments to, any officer or employee of the state, or a political subdivision of the state.

(k) A person may not solicit any contribution, other than contributions to a campaign for or against a county or local government ballot issue, from any nonelective salaried employee of the state government or of any of its subdivisions: *Provided*, That in no event may any person acting in a supervisory role solicit a person who is a subordinate employee for any contribution. A person may not coerce or intimidate any nonelective salaried employee into making a contribution. a person may not coerce or intimidate any nonsalaried employee of the state government or any of its subdivisions into engaging in any form of political activity. The provisions of this subsection may not be construed to prevent any employee from making a contribution or from engaging in political activity voluntarily without coercion, intimidation or solicitation.

25. Section 2.05 of the Charter provides:

No member of Council shall vote upon or participate in the furtherance of any matter in which that Councilmember has, either directly or indirectly, a substantial financial or other substantial personal interest, as a member, manager, officer, bondholder or stockholder of any partnership, business, firm or corporation. Such interest shall include, but not be limited to, an interest in any contract furnishing material, services, or supplies to the City or to any contractor, or workmen for the City, any sale of land to or from the City, any lease to or from the City, annulment of any street, or any special privilege or right which may inure to the benefit of such Councilmember directly or indirectly, except as such privilege may benefit him generally as a citizen of the community.

See Charter, Tab G1, Joint Exhibit Book.

26. By letter dated April 28, 2015, Timothy G. Leach, Assistant General Counsel, advised Kawecky that his March 22, 2015, email was improper. Mr. Leach also stated in part:

You have admitted to the violation regarding the emails and have expressed contrition over what you describe as an unintended violation. We have attempted to weigh the extent of the impact and harm caused by the violation and balanced that against your cooperation and candor. We also take into account our resolution of other instances of inadvertent email delivery to government employees. Although approximately 55 government employees received the email at work, public and private objections appear to have been minimal. This office prefers to treat the matter as an educational experience for you, local officials, and this office. Accordingly, we do not intend to seek prosecution on this occasion. This is the same resolution we have reached in other cases[.]

See Letter, Tab A2, Joint Exhibit Book.

27. Although Kawecki sent the March 22, 2015, email, no evidence was adduced that Selin, Ganz, or Shamberger condoned and/or participated in this solicitation. Moreover, the Court observes that neither Rachel Fetty nor Noel Hoffman were alleged to have engaged in any wrongdoing although they, too, were mentioned in the email as having the endorsement of the Morgantown Together PAC.

28. Jeff Mikorski, Morgantown City Manager, testified that Kawecki apologized in the press and said the email was a mistake. See Transcript, Evidentiary Hearing, Page 94, Lines 1-3. Kawecki contacted Mr. Mikorski to advise that he had made a mistake and that the email should not have been sent. *Id.* at Page 95, Lines 13-17.

29. The Three-Judge Court finds that the March 22, 2015, Kawecki e-mail violation is *de minimis* and does not warrant the draconian sanction of the Respondents' removal from office.

30. Count IV concerns the redistricting of the Fourth and Seventh Wards and allegations that Respondents improperly influenced redistricting efforts.

31. Section 7.05(d) of the Charter provides:

(d) Specifications. Except as otherwise provided in Section 10.05, the ward boundaries shall be adjusted from time to time in accordance with the following specifications:

- (1) Each ward shall be formed of contiguous territory, and its boundary lines shall follow the precinct lines and the center lines of streets wherever practicable.
- (2) Each ward shall contain as nearly as practicable the same number of qualified voters, determined from the registration for the last statewide general election. This specification shall not be construed to require the adjustment of precinct boundaries or to require the sacrifice of compactness of wards for the sake of achieving equality of numbers of registered voters among the seven wards of the City. The report shall include a map and description of the boundaries of each of the wards.

In addition, Section 7.05(a) prescribes the number of wards, Section 7.05(b) sets forth the procedure for appointing Ward Boundary Commission members, and Section 7.05(c) contains the reporting requirement for the Commission to make a recommended plan and map for ward boundary adjustment. Notably, Section 7.05(e) provides that Council shall approve or disapprove the Ward

Boundary Commission's report/recommended plan and state its reasons therefore on the minutes of the Council meetings. Section 7.05(f) enables Council to introduce an alternate ordinance if it disapproves of the Commission's report/recommended plan.

32. The Ward and Boundary Commission proposed in 2014 to bring the number of registered voters to within nine (9) people, but City Council rejected the proposal and eventually adopted a plan that brought the number of registered voters to within 327 individuals. See Transcript, Evidentiary Hearing, Page 133, Lines 4-24, through Page 134, Lines 1-4; Page 155, Lines 20-24, through Page 156, Lines 1-3. George Papandreas testified that, historically, a 15 percent disparity in the number of registered voters would trigger redistricting. *Id.* at 43, Lines 15-18.

33. Guy Panrell, co-chair of the Wards and Boundary Commission, testified that the boundaries in pretty much all the wards had to change because nothing had been done since 1989. *Id.* at Page 144, Lines 20-24. "There were areas that were in certain wards, but as far as the maps were concerned, they weren't on the maps." *Id.* Bringing the number of registered voters to within 327 individuals was also thought to be more than a 15 percent variance. *Id.* Page 155, Lines 20-24, to Page 156, Lines 1-3. Notably, the Charter does not set forth a percentage of allowable variance. See Charter, Tab G1, Joint Exhibit Book, specifically Sections 7.05 and 10.05.

34. The voting on the Wards and Boundary Commission's proposal occurred in December 2014. *Id.* at Page 136, Lines 8-12. The Council election was April 28, 2015. *Id.* at Page 136, Lines 13-14.

35. The Charter, at Section 2.05 sets forth provisions concerning prohibitions and conflicts of interest. See, *specifically*, Finding of Fact 25, *supra*.

36. By letter dated February 12, 2014, Linda Little, CMC, Office of the City Clerk, wrote the West Virginia Ethics Commission for guidance as "to whether or not it is ethical for the affected Council persons to vote on a boundary adjustment which will compromise their prospects for re-election in 2015[.]" See Letter, Tab A3, Joint Exhibit Book "Additionally, it may be material for the Commission to know that the Council persons involved were elected in 2013 as part of a 5 member PAC called *Morgantown Together[.]*" *Id.*

37. Father Douglas Sutton, Acting Chairperson of the West Virginia Ethics Commission, wrote in Advisory Opinion No. 2014-10, Issued on March 6, 2014, "A **City Clerk** asks if the Ethics Act permits a Member of City Council to vote on a ward boundary adjustment that would place her residence in a neighboring ward, and if the Member of City Council who currently represents that ward may vote on that same adjustment. [Emphasis in original.]"

38. Father Sutton, further, opined:

[I]t is tempting to conclude that Councilperson A has a conflict of interest because she would want to stay in her current district for re-election purposes, and Councilperson B similarly has a conflict of interest because she would gain a strong opponent in her own district. Here, though, the Council is not voting to approve changes that will affect its current status. Under the Ethics Act, Councilperson A and Councilperson B have no more significant financial interest in redistricting for a future election than any other resident who will be eligible for office in 2015.

Likewise, the Ethics Act here does not draw a meaningful distinction between a Council member who is planning to run for re-election or not. While a particularly desirable section of the City might shift from one district to another, or shift the population in more or less desirable ways, hypothetical gains or losses generated by population shifts are not the type of private gain contemplated by W.Va. Code § 6B-2-5(b) or any other part of the Ethics Act. Therefore, both council members in question may vote on the Ward and Boundary Commission's recommendations[.]

See Advisory Opinion, Tab A3, Joint Exhibit Book; Charter, Section 2.05; and W.Va. Code § 6B-2-5(b) [2008], which provides, in 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[.]"

39. On November 18, 2014, Stephen R. Fanouk, then City Attorney, wrote the Ward and Boundary Commission members to advise of the effect of a 2012 West Virginia Supreme Court of Appeals decision on the City's Ward and Boundary Commission method of establishing ward boundaries. Mr. Fanouk reiterated his previous research concerning ward boundary line establishment pursuant to Charter language that established such boundary lines based upon the number of qualified voters. At that time, Mr. Fanouk saw no violation of any law by the Charter language because "(1) Morgantown City Council election[s] are non-partisan and (2) Morgantown's City Council elections are 'at large' elections; therefore, everyone in the City has the right to vote for a council member for each of the City's seven wards. There is no issue of either 'equal representation'

or 'gerrymandering' due to the fact that boundary lines within the City do not limit who one can vote for on City Council." See Letter, Table of Contents, Tab 7, Joint Exhibit Book.

40. Petitioner Papandreas testified that council members are still elected at large. See Transcript, Evidentiary Hearing, Page 44, Lines 20-22.

41. "An election at large" means "[a]n election in which a public official is selected from a major election district rather than from a subdivision of the larger unit." Black's Law Dictionary (10th ed. 2014), available at Westlaw.

42. In her April 3, 2015, letter to George Papandreas, Monongalia County Prosecuting Attorney, Marcia L. Ashdown, analyzed and opined that the matters of which he complained (Wards and Boundary-related issues and voting) did not constitute "malfeasance in office," under W.Va. Code § 6-6-7(b)(2)(3). See Letter, Table of Contents, Tab 8, Joint Exhibit Book.

43. The issue of the Wards and Boundary Commission and the Council's rejection of the Commission's proposed redistricting plan was public knowledge and publicized in the local news sometime before the 2015 election. See Transcript, Evidentiary Hearing, Page 151, Lines 14-24, through Page 152, Lines 1-14; Page 174, Lines 15-24, through Page 176, Lines 1-17. See also Newspaper Clippings, dated December 16 and 17, 2014, Tabs B5 and B6, Joint Exhibit Book.

44. Both Selin and Ganz were unopposed on the 2015 election ballot. See Transcript, Evidentiary Hearing, Page 153, Lines 1-24, through Page 154, Lines 1-2. No one filed against them, but one individual did run as a write-in candidate against Ganz. *Id.* at Page 187, Lines 20-24. Shamberger did not have opposition from a write-in candidate, but Kawecky did. *Id.* at Page 188, Lines 1-10. The only opposition to Shamberger, Ganz, Selin, and Kawecky were write-in candidates. *Id.* at Page 188, Lines 11-15.

45. Although motions were made to recuse the affected council members from voting on the proposed Wards and Boundary Commission plan, no motions were made to remove council members. *Id.* at Page 193, Lines 3-10.

46. The Three-Judge Court observes that the conduct of the Respondents alleged to be in contravention of the Charter occurred in 2014, which is a term prior to the 2015 election year.

47. From the totality of the evidence presented, the Three-Judge Court cannot find that the Respondents actions as concerns the Wards and Boundary Commission proposal and subsequent voting are unlawful or unethical in any way to warrant removal from office.

48. Count V alleges that Ganz and Shamberger used their positions in violation of the City of Morgantown Charter to interfere with administration by requesting special favors and personal treatment from the police department.

49. City of Morgantown Charter, Section 2.05, prohibits "interference of administration." "[T]he council or its members shall deal with City officers and employees who are subject to the direction and supervision of the City Manager solely through the Manager, and neither the Council nor its members shall give orders to any such officers or employees, either publicly or privately. Violation of this provision shall constitute ground for removal from office." *Id.*

That section, further, provides:

It is the intention of this subsection (d) that the Council shall act in all matters as a body, and it is contrary to the spirit of this section for any of its members to seek individually to influence the official acts of the Manager, or any other officer, or employee, or for the Council or any of its members to direct or request the appointment of any person to, or his removal from, office; or to interfere in any way with the performance by such officers or employees of their duties.

Id.

50. "Order" is undefined in the City of Morgantown Charter, but means "command, direction, or instruction." Black's Law Dictionary (10th ed. 2014), available at Westlaw.

51. "Interference" is also undefined in the City of Morgantown Charter, but means "1. The act of meddling in another's affairs. 2. An obstruction or hindrance." *Id.*

52. Petitioner Papandreas testified that "Anyone in Morgantown has the ability to contact anyone at the City in any regard that they want to with the exception of seven people." See Transcript, Evidentiary Hearing, Page 25, Lines 8-11. Meaning, according to his interpretation of the Charter, he believed the seven people that sit on City Council have no right to make the same contacts as other citizens although they have the same right to those services. *Id.* at Lines 11-16.

Petitioner Papandreas, further, testified that City Council members could communicate with the City Manager directly or through a website. *Id.* at Page 25, Lines 16-21.

53. Jeff Mikorski, Morgantown City Manager, on cross-examination, testified as to his understanding of what "interference of administration" or "ordering" City employees meant:

BY MR. SIMMONS:

Q. Are you a lawyer?

A. No, I'm not.

Q. I wanted to make sure I understood how you are applying the way you discussed the Charter provision about Council members not being able to order city employees.

If a city employee came up to a member of Council and asked the Council a question, does the Council member have to run out of the room and talk to you and give the answer, then you go back to the citizen?

A. That's not how communications have been dealt with in the past.

Q. Okay. Well, just under your view of the way the Charter is written, what does the City Council member do under the circumstances when a City employee approaches a Council member and asks the Council a question?

A. I would consider that just incidental information. Same thing if a Council member is at a board or commission and a staff member is also at a board or commission and that information is discussed during that process, it would be incidental. The concern is if there's a direct order that's followed through with from a Council member.

Q. And how do you define the word, 'order?' Or at least the way you apply it.

A. That they took direction directly from that Council member that would be different than what they would typically do or different than what I would require them to do.

Q. So under your discussion about 'incidental,' you can - - a City Council member can, in fact, have at least some conversations with a City employee without there being any concern about this Charter provision.

A. Well, that - - I mean, in the past, there have been - - I think all Council members have, at one point in time or another, talked to staff members, whether at social events or other events, and sometimes the fact of a Council violation is never brought up.

See Transcript, Evidentiary Hearing, Page 109, Lines 1-24, through Page 110, Lines 1-17.

54. The Three-Judge Court finds the Respondents did not interfere with administration by informing various City personnel of relevant issues, by discussing numerous issues and concerns with City personnel, and making requests for information or services.

55. The Court does not construe the emails found in the Joint Exhibit Book as “orders” that impermissibly “command, direct, or instruct” city personnel. The majority of these emails were written in 2013 and 2014, which is prior to the current 2015 election term. Here, Ganz and Shamberger did nothing that local citizens themselves could not do—contact City personnel and officials to address parking and street issues, area crime, placement upon a vacation “house watch” list, and/or other pertinent matters.

56. The Three-Judge Court is hard pressed to find that the emails contained within the Joint Exhibit Book constitute “meddling in another’s affairs” and “an obstruction or hindrance” that would keep City employees from performing their duties. More importantly, it is difficult to fathom how City of Morgantown business can be successfully conducted without elected City officials and City employees openly communicating with each other and exchanging information. The hypothetical situation that counsel for Respondents put forth to Jeff Mikorski demonstrates the absurdity that can result from the misapplication of the Charter’s interference with administration provisions.

57. Further, Petitioner Papandreas testified that the email documentation he received in response to his “right before Christmas” FOIA request was different than that received by Jim Manilla who had made a February 2015 FOIA request; that the email formats were different; that recipient information was omitted or abbreviated; that Mr. Manilla’s request was completed in 20 days; that Petitioner Papandreas’s “right before Christmas” request was completed in 50 days; and that Petitioner Papandreas received different emails from others, meaning emails that he already knew about had been “scrubbed” from what was produced to him. See Transcript, Evidentiary Hearing, Page 33, Lines 5-24, through Page 38, Lines 1-20; Page 53, Lines 8-24, through Page 54, Lines 1-7. But, Petitioner Papandreas conceded a new email system was in place. *Id.* at Page 36, Lines 16-18.

58. Jeff Mikorski, Morgantown City Manager, testified that he received a FOIA request directly from Petitioner Papandreas’s counsel for the emails. He conceded that what Petitioner

Papandreas received and what Mr. Manilla received should have been the same. Mr. Mikorski opined that the differences in email document production was because “the first one was probably printed out from a direct email.” Mr. Mikorski continued, “The second one appears to be through this search process, and I’m not sure why it would not provide the information.” Mr. Mikorski also stated that it was the first time searches were performed on the new email system, and he was not aware of the extent of the apparent differences. See Transcript, Evidentiary Hearing, Page 103, Lines 12-24, through Page 104, Lines 1-24.

59. Mr. Mikorski testified that it took 50 calendar days to respond to counsel for Petitioner Papandreas’s December 24th FOIA request, which Mr. Mikorski did not receive until December 29th. The delay in responding was also because of bereavement issues and the extent of the request. See Transcript, Evidentiary Hearing, Page 105, Lines 10-18. Moreover, Mr. Mikorski stated that “there was no order to remove emails from [his] office or [he] did not hear anyone discuss an order to remove emails.” *Id.* at Page 108, Lines 14-18.

60. The Three-Judge Court finds that insufficient evidence exists to demonstrate that any of the Respondents “interfered with administration,” or sought to “cover up” any possible wrongdoing concerning Petitioner Papandreas’s FOIA requests.

61. Count VI alleges that Selin advised city management to selectively enforce City of Morgantown laws concerning the porch couch ban and improperly prohibited development and discussion of legal options surrounding the “truck ban” ordinances.

62. Petitioner Papandreas testified that Selin impermissibly gave Glenn Kelly a “direct order to stand down” on working on the truck weight limit issue. See Transcript, Evidentiary Hearing, Page 28, Line 24, through Page 30, Line 1. The specific sentence at issue in the November 2014 email communications between Selin, Jeff Mikorski, and Glenn Kelly was Selin’s “Please do not work on increasing the weight limits on non-interstates without agreement of council.” See Email dated November 23, 2014, Tab C3, Joint Exhibit Book.

63. Glenn Kelly’s November 20, 2014, email memorializes his meeting with Senator McKinley’s representative about higher truck load limits on interstates and on selected routes to move

heavy truck traffic out of downtown Morgantown. *Id.* Selin's November 23, 2014, email response sought clarification on the weight limits discussed and also said, "Please do not work on increasing the weight limits on non-interstates without agreement of council. It would be better strategically to be all on the same page as we head into law suits [sic] and meetings with Legislators." *Id.* Glenn Kelly in his November 24, 2014, replied with additional thoughts regarding strategy and "building all possible bridges" to help achieve a desired outcome. *Id.*

64. After receipt of Selin's remark, Glenn Kelly approached his direct supervisor, Jeff Mikorski, and spoke with him about it. See Transcript, Evidentiary Hearing, Page 83, Lines 21-24, through Page 84, Lines 1-13. Mr. Mikorski advised Mr. Kelly to do what Selin said, and Mr. Mikorski would talk with Selin. *Id.*

65. The Three-Judge Court does not interpret Selin's November 23, 2014, email as a "direct order to stand down." Rather, Selin's November 23, 2014, email can be read to mean that no one person should hurry into things without agreement of council.

66. Petitioner Papandreas testified to "selective enforcement" of City of Morgantown ordinances concerning couches. See Transcript, Evidentiary Hearing, Page 41, Lines 17-24, through Page 42, Lines 1-19. At issue are the email communications involving Selin, Lloyd Matthews, and Damien Davis from October 31, 2014, and November 3, 2014. See Emails, Tab E1, Joint Exhibit Book.

67. The Three-Judge Court is hard pressed to find that Selin's email response amounts to "selective enforcement" of City of Morgantown ordinances concerning couches. The Court's review of Selin's response demonstrates that Selin merely agreed with Damien Davis's assessment that couches on private property were not an issue in this instance. In addition, Petitioner Papandreas did not provide the Three-Judge Court with any City of Morgantown ordinance(s), codes, or other legal authority concerning couches.

68. Lyle Matthews, former Assistant Director of the Public Works Department, testified that on January 12, 2016, the Mayor called his office to have snow removed from her street. See Transcript, Evidentiary Hearing, Page 61, Lines 19-24, through Page 63, Lines 1-19. Specifically,

Q. All right.

In your capacity as Assistant Director of the Public Works Department, have you ever come to knowledge of whether or not a councilperson has called the Department and asked for specific services?

A. Yes.

Q. Has that happened recently?

A. Yes, it has.

Q. Can you tell the Court about that?

A. It was probably the week of the 12th in January this year. My secretary had come out and told me that the Mayor had called and wanted to have her street plowed. When she told me that, I said, "Well, you know, I'm not going to pay - - let her go - - you know, I'm not going to talk to her or have her do anything." I said, you know, "I'll - - if you want to call Chuck or something, he's in that area, but I'm not going to pull him from one area to go make sure that she gets taken care of."

JUDGE MARKS: When did this happen?

THE WITNESS: This was, I believe, on the 12th day of January.

JUDGE MARKS: This year.

THE WITNESS: This year.

BY MR. KEPPLER:

Q. So, in other words, you believe - - or you tell me. I don't want to put words in your mouth. Was it a, "Hey, drop everything and come over and take care of me."

A. I was coming from one office to the other, and the secretary come out and she said, "Hey, the Mayor called and wanted to know if we'd go take care of that," so I said, "Well, you know, they're on their own routes. They'll get to it when they can. If you want to call Chuck, you can call Chuck and tell him, but I'm not going to call Chuck and have him pull off where he's at to go and take care of that there." Then at lunchtime when Chuck come in, he come in and said, "Hey, I took care of the Mayor's street." So obviously Erin must have called.

Q. And there's a priority of snowplow as to the - -

A. Yes. Yes.

Q. - - police - - clean up the police department and the fire departments first, and then - -

A. Right.

Q. - - work down.

A. Yeah. Do the main routes and then the secondaries and take care of police or accidents, ambulances.

Q. Does the Mayor live in a main route or by a police station or anything?

A. No, she doesn't.

Q. Okay, sir. Thank you for your time.

Id.

69. From the evidence adduced, the Three-Judge Court cannot find that the Mayor's January 12, 2016, request for services constituted "interference with administration." From the tenor of Lyle Matthew's testimony, he was not ordered, commanded, directed, or instructed to take any action. To the contrary, Lyle Matthew's testimony demonstrates he exercised his own discretion and gave the Mayor's request no special consideration.

70. Another allegation of wrongdoing concerns a laminated, write-in candidate card that was at Selin's polling place.

71. Selin advised City Council during its November 3, 2015, meeting that a laminated card identifying write-in candidates was at her polling place where she voted. See Regular Meeting Minutes, dated November 3, 2015, Tab F1, Joint Exhibit Book. According to the City Council Minutes, Selin stated that she did not do this, did not know that anyone was breaking the law, and that the same was "not new information." *Id.*

72. A police investigation of the "cards" and Selin was conducted, which eventually exonerated Selin from wrongdoing. See Transcript, Evidentiary Hearing, Page 123, Lines 21-24, through Page 126, Lines 1-17.

73. The Three-Judge Court finds that insufficient evidence was adduced to demonstrate that Selin had acted improperly in this specific regard.

74. Further, the Charter contains a forfeiture provision for bad acts. Specifically, Section 2.06(b)(2) provides that a Councilmember shall forfeit his or her office if he or she violates any express provision of the Charter. However, this Charter provision is not grounds for removal under the removal statute, W.Va. Code § 6-6-7. West Virginia statutory law (and the case law interpreting the same) set forth the applicable law for the removal of public officers and must be strictly construed.

75. Counsel for the parties have strenuously argued as to whether or not acts taken in a prior term of office are actionable for removal purposes under W.Va. Code § 6-6-7. However, the Three-Judge Court finds that such issue need not be decided because the particular acts complained

of do not rise to the level to warrant Respondents' removal from office regardless of when those acts occurred.

Conclusions of Law

1. West Virginia Code § 6-6-7(a) [1985] states:

Any person holding any county, school district or municipal office, including the office of a member of a board of education and the office of magistrate, the term or tenure of which office is fixed by law, whether the office be elective or appointive, except judges of the circuit courts, may be removed from such office in the manner provided in this section for official misconduct, malfeasance in office, incompetence, neglect of duty or gross immorality or for any of the causes or on any of the grounds provided by any other statute.

2. "The remedy for the removal from office of a public officer is a drastic remedy and the statutory provision prescribing the grounds for removal is given strict construction.' Point 2, Syllabus, Smith v. Godby, 154 W.Va. 190, 174 S.E.2d 165 (1970)." Syl. Pt. 1, Matter of Boso, 160 W.Va. 38, 231 S.E.2d 715 (1977).

3. "'Section 7, Article 6, Chapter 6, Code, 1931, expressly requires that to remove a person from office the charge against him must be established by satisfactory proof.' Point 3, Syllabus, Smith v. Godby, 154 W.Va. 190, 174 S.E.2d 165 (1970)." *Id.* at Syl. Pt. 2.

4. "'To warrant removal of an official pursuant to Code, 1931, s 6—6—7, clear and convincing evidence must be adduced to meet the statutory requirement of satisfactory proof.' Point 9, Syllabus, Evans v. Hutchinson, W.Va., 214 S.E.2d 453 (1975)." *Id.* at Syl. Pt. 3.

5. As a general rule offenses committed or acts done by a public officer during a previous term of office are not cause for removal from office in the absence of disqualification to hold office in the future or additional penalty imposed by law upon the person removed from office." Syl. Pt. 1, Smith v. Godby, 154 W.Va. 190, 174 S.E.2d 165 (1970).

6. In Wheeling Dollar Savings & Trust Co. v. Singer, 162 W.Va. 502, 510, 250 S.E.2d 369, 374 (1978), the West Virginia Supreme Court of Appeals defined the "clear and convincing" evidence standard:

[It] is the highest possible standard of civil proof defined as 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere

preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.' Cross v. Ledford, 161 Ohio St. 469 at 477, 120 N.E.2d 118 at 123 (1954). See also Fred C. Walker Agency, Inc, v, Lucas, 215 Va. 535, 211 S.E.2d 88 (1975).

7. The Three-Judge Court concludes that the facts of this case are not in dispute. Ultimately, Petitioner George Papandreas has failed to prove that the acts rise to the level to justify removing from office officials who have been duly elected by the electorate.

8. The Three-Judge Court, further, concludes that Petitioner Papandreas' instant petition should be and the same is hereby DENIED.

The Circuit Clerk is DIRECTED to send certified copies of this Order to each member of the Three-Judge Court and to all parties of record or their counsel.

The Circuit Clerk is, further, DIRECTED to remove this case from the Court's docket.

ENTER: June 10, 2016

[Signature]
The Hon. John Lewis Marks, Jr., Judge

[Signature]
The Hon. Richard A. Faemle, Judge 6/13/16

[Signature]
The Hon. David H. Willmoth, Judge

STATE OF WEST VIRGINIA, SS:
I, Jean Friend, Clerk of the Circuit and Family Courts of Monongalia County, State aforesaid do hereby certify that the attached ORDER is a true copy of the original Order made and entered by said Court.

[Signature] Circuit Clerk