

14-1118

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

FILED
DATE 5/12/14
RH
CLERK
DEPUTY

WENDY J. MILLER, JOHN A. ELMORE,
B. WAYNE THOMPSON, OVID NEED and
BONNIE L. HAGGERTY,

Petitioners,

v.

CIVIL ACTION NO: 13-C-76
JUDGE FOX, JUDGE STONE, and
JUDGE STEPTOE

J. MICHAEL TEETS, COMMISSIONER;
WILLIAM E. KEPLINGER, JR, COMMISSIONER; and
THE HARDY COUNTY COMMISSION,

Respondents.

FINAL ORDER DENYING PETITION FOR REMOVAL

The three judges assigned to sit as a panel in this matter, Honorable Fred L. Fox, II, Honorable Thomas W. Steptoe, Jr., and Honorable Robert B. Stone, conducted a full evidentiary hearing on March 17, 18, and 19, 2014, upon the Petition for Removal of J. Michael Teets and William J. Keplinger, Jr., from the County Commission of Hardy County. Petitioners were represented by J. David Judy, III. Respondents were represented by Bridget M. Cohee and Amber M. Moore and Steptoe & Johnson PLLC. This tribunal, having considered all of the testimony and exhibits, and having given the Petitioners a full opportunity to present all of their evidence, without limitation, and hearing the arguments of the parties, hereby makes its findings of fact and conclusions of law:

FINDINGS OF FACT

I. Petitioners initiated this action on November 4, 2013, by filing a "Petition to Invalidate, Nullify, and Vacate the 'Special Emergency Ambulance Service Fee Ordinance,' The Ambulance Fee Implemented by Ordinance in Hardy County, West Virginia, and to Vacate and

Nullify the Purchase of the Building by the Hardy County Commission in Baker, West Virginia" ("Petition to Vacate") and the "Petition for Removal of J. Michael Teets and William E. Keplinger, Jr., from the County Commission of Hardy County, West Virginia" ("Petition for Removal").

2. The Petition to Vacate, filed pursuant to West Virginia Code § 6-9A-3, has been bifurcated, and those issues are deferred to the Circuit Court.

3. The Mathias-Baker area of Hardy County, West Virginia was previously provided adequate ambulance service by a 501(c) organization, the Mathias-Baker Volunteer Emergency Squad, Inc. (also referred to as the Mathias-Baker Rescue Squad ("MBRS") throughout the record).

4. As a result of improperly submitting claims for payment to Medicare and Medicaid, MBRS became unable to provide consistent service after being fined for these actions. It was also required to abide by a Corporate Integrity Agreement, dated October 11, 2011.

5. Faced with a request by MBRS for emergency funding or the prospect of closing its doors, the Hardy County Commission (the "County Commission") gave the MBRS \$300,000.00 during its December 20, 2011, regular meeting to continue to provide ambulance service to the Mathias-Baker area. This funding kept ambulance service operations going for some time, but the County Commission also recognized the need for a contingency plan.

6. The County Commission considered various options in maintaining emergency ambulance service, including contracting with a private company. An estimate from one such private company detailed expenses in excess of the \$300,000.00 given to MBRS, and the Commission would have been required to provide two ambulances and a building to the private provider.

7. In November 2012, the County Commission voted to create the Hardy County Emergency Ambulance Authority ("HCEAA") to coordinate adequate ambulance services for the residents of Hardy County.

8. On April 16, 2013, during a regular meeting, the County Commission was informed that MBRS would be unable to continue to provide ambulance service and would be closing its doors on May 1, 2013.

9. The County Commission was also informed that the building and equipment that had been in use to serve the Mathias-Baker area by MBRS were to be available pursuant to foreclosure and repossession by Capon Valley Bank.

10. In order to address the immediate need to meet its duty to provide adequate emergency ambulance service to residents of the County, the County Commission provided funding to the HCEAA.

11. The HCEAA, in turn, purchased two ambulances and a chase unit for \$120,000.00, and it was reimbursed \$50,000.00 from a state grant.

12. At a regular meeting of the County Commission, the HCEAA was also given the authority to bid at auction on the building in Baker, West Virginia (the "Baker Building") at the foreclosure sale on June 4, 2013. This building was previously used by the MBRS to provide emergency ambulance service.

13. Following the HCEAA's commitment to purchase the Baker Building at auction as the prevailing bid in a rigorous bidding competition, the County Commission scheduled and noticed two public hearings to discuss the implementation of a special emergency ambulance fee to support the HCEAA.

14. The purchase of the building and implementation of the fee were initially met with resistance by the public. Thus, on July 16, 2013, at a regularly scheduled meeting of the County Commission, a motion was made to not consummate purchase of the building and to not enact the fee. It passed by a vote of 2-1.

15. On August 2, 2013, those in attendance at a regular meeting of the County Commission and directly affected by the failure to provide adequate ambulance service to the Mathias-Baker area of the county, organized and made a presentation and argument that it was indeed the duty of the County Commission to take action. The residents also requested that the County Commission reconsider the July 16, 2013, vote.

16. Accordingly, a motion was made to go forward and to finalize the purchase of the Baker Building and to enact the ordinance assessing the special emergency ambulance service fee. The motion passed with a vote of 2-1, and the Order of Adoption of the ordinance was signed on August 20, 2013.

17. The Petition for Removal alleges that processes leading to the purchase of the Baker Building and the passage of the special emergency ambulance service fee ordinance to support the HCEAA violated West Virginia Code § 6-6-7 such that Commissioners Teets and Keplinger must be removed from their positions as county commissioners.

CONCLUSIONS OF LAW

18. West Virginia Code § 6-6-7(a) provides that

[a]ny person holding any county, school district or municipal office, . . . 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.

19. "Removal of such officers, however, is a drastic remedy and statutory provisions prescribing the grounds for removal are strictly construed." Syl. Pt. 2, *In re Election Contest Between Moore and Powell*, 200 W. Va. 335, 489 S.E.2d 492 (1997). "To warrant removal of an official pursuant to Code 1931, 6-6-7, clear and convincing evidence must be adduced to meet the statutory requirement of satisfactory proof." Syl. Pt. 2, *George v. Godby*, 174 W. Va. 313, 325 S.E.2d 102 (1984) (internal quotations and citation omitted).

20. West Virginia Code § 6-6-1 provides that

[T]he term 'neglect of duty,' or the term 'official misconduct,' as used in this article, shall include the willful waste of public funds by any officer or officers, or the appointment by him or them of an incompetent or disqualified person to any office or position and the retention of such person in office, or in the position to which he was appointed, after such incompetency or disqualification is made to appear, when it is in the power of such officer to remove such incompetent or disqualified person.

21. Malfeasance in office has been defined as "doing an act which is positively unlawful or wrongful." *Daugherty v. Ellis*, 142 W. Va. 340, 357, 97 S.E.2d 33, 42 (1957). "To establish malfeasance in office it is not necessary to show a specific intent to defraud, or that the act is criminal or corrupt in character." *Id.* at 357-58, 97 S.E.2d at 42-43 (citation omitted). In other words,

malfeasance is the doing of an act which an officer had no legal right to do at all and that when an officer, through ignorance, inattention, or malice, does that which he has no legal right to do at all, or acts without any authority whatsoever, or exceeds, ignores, or abuses his powers, he is guilty of malfeasance.

Id. at 358, 97 S.E.2d at 43 (citation omitted).

22. "The term 'incompetence,' as used in this article, shall include the wasting or misappropriation of public funds by any officer, habitual drunkenness, habitual addiction to the

use of narcotic drugs, adultery, neglect of duty, or gross immorality, on the part of any officer.”

W. Va. Code § 6-6-1.

23. “Misconduct in office is any wilful unlawful behavior by a public officer in relation to the duties of his office.” *Layne v. Hayes*, 141 W. Va. 289, 297-98, 90 S.E.2d 270, 275 (1955).

24. There are five primary grounds upon which Petitioners rely in arguing that Respondents Teets and Keplinger should be removed from office. Each ground will be discussed in turn.

Purchase of the Baker Building

25. Petitioners claim that the purchase of the Baker Building constituted an unnecessary use of taxpayer money. Petitioners note that a station house was available for use by the HCEAA. Additionally, Petitioners claim that the Mathias-Baker Volunteer Fire Company was attempting to obtain licensing to operate an emergency ambulance service, but the County Commission declined to assist that entity with its licensing endeavors and, instead, elected to go into competition with the Mathias-Baker Volunteer Fire Company.

26. This tribunal finds that these actions do not amount to official misconduct, malfeasance in office, incompetence, neglect of duty, or gross immorality. The County Commission considered various options prior to deciding to purchase the Baker Building. After weighing the options, the County Commission decided that the Baker Building was the best option for the County. Notably, the Baker Building was constructed specifically for housing an ambulance service, whereas the other building available for use would need extensive renovations to prepare it to lawfully house an ambulance service. Additionally, the County Commission's purchase of the Baker Building put it in the taxpayers' hands: the building has

rooms available for parties or other community functions, and it currently is used as a polling station. The building is centrally located and ideal for responding to emergencies throughout the county, and pursuing other options would have nonetheless required the expenditure of money without guarantees of future use or availability of both a building and equipment. Finally, the County Commission's purchase of the building ensures that Hardy County residents do not find themselves in a situation similar to the one necessitating the purchase of the building and creation of the HCEAA in the first instance. Specifically, the Baker Building cannot now be leveraged and subject to foreclosure. In sum, the County Commission considered various options to bring adequate and consistent emergency ambulance service back to Hardy County residents and ultimately concluded that purchasing the Baker Building was in the County's best interest. The fact that citizens may disagree with this decision does not warrant removing Commissioners Teets and Keplinger from office.

Enactment of the Special Emergency Ambulance Service Fee Ordinance and Implementation of the Fee

27. Petitioners take issue with the enactment of the "Special Emergency Ambulance Service Fee Ordinance" and implementation of the fee pursuant to that ordinance.

28. West Virginia Code § 7-15-17 specifically authorizes a county commission to, "by ordinance, impose upon and collect from the users of emergency ambulance service within the county a special service fee."

29. Petitioners may disagree with the implementation of the fee and ordinance, but Respondents Teets and Keplinger, and the County Commission in general, were authorized by statute to enact the challenged ordinance and fee. Petitioners' disagreement with the enactment

does not render Commissioners Teets and Keplingers actions unlawful, nor does it warrant their removal from the County Commission.

Ownership of Highlands Bankshares, Inc. Stock

30. Petitioners argue that Commissioner Teets should not have participated in voting to expend funds to pay off mortgages that would benefit Capon Valley Bank, which is owned by Highlands Bankshares, Inc., because Commissioner Teets owns 6,672 shares in Highlands Bankshares, Inc. These shares amount to approximately a 0.5% interest in Highlands Bankshares, Inc.

31. Our Court has held that,

[w]hile charges for the removal of a public officer need not be set out in the strict form of an indictment, they should be sufficiently explicit to give the defendant notice of what he is required to answer and to enable him to make due preparation to contest and disprove the particular act or acts constituting the alleged offense charged against him.

Syl. Pt. 2, *Wysong v. Walden*, 120 W. Va. 122, 52 S.E.2d 392 (1938).

32. "The requirement of Code, 6-6-7, that the charges preferred against an officer 'shall be reduced to writing and entered of record' are mandatory, and compliance therewith is necessary to give the court jurisdiction of the proceeding." *Swim v. Leeber*, 143 W. Va. 782, 787, 105 S.E.2d 136, 139 (1953) (internal quotations and citation omitted).

33. This Court first notes that Petitioners failed to plead conflict of interest. At no time did they move to amend their Petition to include any charges of a conflict of interest. As such, this Court has no jurisdiction to consider this issue.

34. In the interest of judicial economy, however, this Court finds no conflict of interest under these facts in any event. First, West Virginia Code § 7-1-5a provides that "[e]ach county commissioner present during any county commission meeting when any question is put

shall vote unless he is immediately and particularly interested therein. . . . The disqualifying interest must be such as affects the member directly, and not one of a class." Here, Commissioner Teets is a stockholder in a class of stockholders. Thus, even assuming that stock ownership in a holding company that owns a bank attempting to foreclose on a building could be a disqualifying interest, the interest does not affect him directly.

35. Additionally,

[p]ublic officials . . . 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)(1)(A). Here, Commissioner Teets owns less than 5% of the outstanding stock of Highlands Bankshares, Inc. In fact, he owns less than a 1% interest. Accordingly, Commissioner Teets's voting on matters tenuously involving Highland Bankshares, Inc. does not amount to a conflict of interest necessitating removal.

Failure to Solicit Competitive Bids

36. Petitioners argue that Commissioners Teets and Keplinger knowingly and intentionally failed to obtain competitive bids for the ambulance equipment purchased by the HCEAA. Petitioners claim that this conduct amounts to malfeasance and official misconduct.

37. The Emergency Ambulance Service Act mandates that "[a] purchase of or contract for all supplies, equipment and materials and a contract for the construction of facilities by any authority, when the expenditure required exceeds the sum of ten thousand dollars, shall be based on competitive sealed bids." W. Va. Code § 7-15-16.

38. As set forth above, official misconduct is defined as the wilful waste of public funds. Malfeasance is defined as doing an act that is positively unlawful.

39. During testimony on this issue, Gregory L. Ely, Hardy County Clerk, testified that he was asked by members of the HCEAA if it could purchase the three vehicles at issue without obtaining sealed, competitive bids. Mr. Ely called the State Auditor's Office for advice. He was informed that the HCEAA could purchase these vehicles because of the emergency situation created by the lack of ambulance service and because the vehicles were in foreclosure.

40. Failing to solicit competitive bids does not amount to official misconduct or malfeasance in this instance. Commissioners Teets and Keplinger did not wilfully waste public funds by purchasing the vehicles at foreclosure. These vehicles were needed to maintain adequate ambulance service in Hardy County. Moreover, their actions do not constitute malfeasance as the act was not "positively unlawful" due to the advice received from the State Auditor's Office. Accordingly, these actions do not mandate removal from office.

Failure to Properly Notice Meetings

41. Petitioners cite to various meeting agendas and minutes in arguing that issues concerning the purchase of the Baker Building and implementation of the ambulance fee were not properly noticed.

42. These issues are properly before the Circuit Court, which is considering Petitioner's Petition to Vacate.

43. The Open Governmental Proceedings Act, codified at West Virginia Code § 6-9A-1 *et seq.* vests the circuit court with the authority to enforce its provisions. "The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article." W. Va. Code § 6-9A-6. Consequently,

the allegations concerning improper noticing are left to the Circuit Court, and violations of this sort are remedied in a manner other than by removing county commissioners from their elected positions.

Motions for Attorneys' Fees

44. With respect to Respondents' motion for attorneys' fees, the Supreme Court of Appeals of West Virginia noted that West Virginia Code § 11-8-31a authorizes reimbursement of attorneys' fees when a person has successfully defended against an action seeking his or her removal from office. *State ex rel. Smith v. Mingo Cnty. Comm'n*, 228 W. Va. 474, 478-79, 721 S.E.2d 44, 48-49 (2011). Reimbursement is authorized from the "governing body of the governmental entity of which a person is an official." W. Va. Code § 11-8-31a. As such, "it is clear that the Legislature intended to vest local governing bodies, *not* the three-judge courts, with the authority to reimburse a public official for a reasonable amount of attorney's fees incurred in the course of successfully defending against a removal action." *Smith*, 228 W. Va. at 478-79, 721 S.E.2d at 48-49. Consequently, this tribunal is not the appropriate body from which Respondents should request reimbursement.

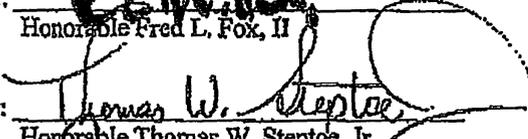
45. Petitioners, in turn, have no legal right to attorneys' fees in this matter as they have not substantially prevailed.

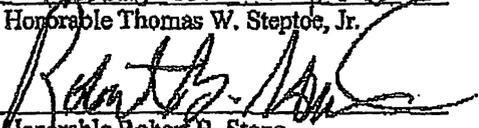
WHEREFORE, the Court denies the "Petition for Removal of J. Michael Teets and William E. Keplinger, Jr., from the County Commission of Hardy County, West Virginia,"

The Clerk of the Court shall send attested copies of this Order, as entered, to Counsel of Record.

Entered this 01 day of MAY, 2014.

Enter: 
Honorable Fred L. Fox, II

Enter: 
Honorable Thomas W. Steptoe, Jr.

Enter: 
Honorable Robert B. Stone

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FILED
DATE 8-8-14

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

WENDY J. MILLER, JOHN A. ELMORE,
B. WAYNE THOMPSON, OVID NEED,
and BONNIE L. HAGGERTY,
Petitioners,

CLERK
RS
DEPUTY

v.

Case Number 14-C-17
Senior Status Judge Andrew N. Frye, Jr.

J. MICHAEL TEETS, COMMISSIONER;
WILLIAM E. KEPLINGER, JR., COMMISSIONER;
and the HARDY COUNTY COMMISSION,
Respondents.

FINAL ORDER

Now comes this Court, the Honorable Andrew N. Frye, Jr. presiding, after careful consideration of the record made in Hardy County Circuit Court Civil Action Number 13-C-76; the arguments of counsel held on July 8, 2014; and a thorough review of relevant law and does hereby make the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

Procedural Posture

1. The Petitioners are Hardy County residents and taxpayers who are challenging the actions of the Hardy County Commission, under the provisions of W.Va. Code §7-15 - et seq. and W.Va. Code §6-9A-3, wherein it passed a Special Ambulance Fee Ordinance and approved the purchase of a building in the Baker, West Virginia area, to house its upstart Ambulance Service. This case initially included a request to impeach Hardy County Commissioners Teets and Keplinger; however, that matter was previously bifurcated from these issues and tried before a three judge panel. Inasmuch as the impeachment issue was tried first, it retained the original case number of 13-C-76 and the remaining bifurcated issues were reassigned case number 14-C-17.

2. The bifurcation issue was ruled upon by the three judge panel on the date of the trial and, although much of the evidence for all the issues were intertwined and indeed presented

to the three judge panel over the course of the three day bench trial, the three judge panel only ruled on the impeachment issue.

3. The matter was returned to the Circuit Court of Hardy County. The West Virginia Supreme Court of Appeals assigned the matter to the Honorable Andrew N. Frye, Jr., Senior Status Judge, upon the recusal of the Honorable Judges Carl and Parsons.

4. Subsequently, Petitioners' counsel filed a motion to proceed in civil action 14-C-17 based upon the record developed in civil action number 13-C-76. Respondents did not oppose the motion, but rather filed a Motion for Summary Judgment alleging that the findings in civil action number 13-C-76 were *res judicata* and that this Court is bound by the findings of fact contained within said Final Order.

5. Inasmuch as it was the Petitioners who requested bifurcation and inasmuch as the three judge panel lacked jurisdiction to decide any issue outside of the impeachment question, this Court is not bound by the findings in the Final Order and therefore the Motion for Summary Judgment is DENIED.

6. Accordingly, the Petitioner's Motion to Proceed on the Record is GRANTED. Additionally, Petitioners' oral motion to move exhibits 34-46 into the record is likewise GRANTED without objection.

Relevant Factual Background

7. Hardy County's emergency ambulance service consisted of independent providers which constituted a mix of paid and volunteer crews. The three main entities as of the fall of 2011 were Fraley Ambulance Service (with primary coverage area in and around the eastern half of the county); Mathias-Baker Rescue Squad (covering the Mathias and Baker areas of Hardy County); and the Wardensville Rescue Squad (covering the Wardensville area constituting the

westernmost part of the county). On November 20, 2011, it was brought to the attention of the Hardy County Commission that the Mathias-Baker Rescue Squad was having financial difficulties and approached the Hardy County Commission to request funding to remain solvent. The Hardy County Commission voted to provide the funds in the amount of \$300,000.00 to the Mathias-Baker Rescue Squad to keep it in operation. On October 9, 2012, the Hardy County Commission held an emergency meeting in response to the sudden closure of the Mathias-Baker Rescue Squad. At a regular meeting held on November 20, 2012, the Hardy County Commission created the Hardy County Emergency Ambulance Authority pursuant to W.Va. Code §7-17-4. *Trial Exhibit D12*, March 17, 2014.

8. At the time of the closure, Mathias-Baker Rescue Squad was in possession of several ambulances and a building, all of which were pledged as collateral to secure numerous notes held by the Capon Valley Bank for both the purchase of equipment and for the loan it required to pay its federal fine for defrauding Medicaid/Medicare. Members of the Mathias-Baker Rescue Squad did for a time continue to operate as a fully volunteer entity, however, that operation ceased on or about May 1, 2013.

9. Prior to each meeting, the Hardy County Commission sends the following legal advertisement to run in the classified section of the Moorefield Examiner newspaper and posts same on the courthouse door:

NOTICE OF HARDY COUNTY COMMISSION MEETING

The public and news media are hereby notified that the Hardy County Commission will hold a meeting in Room 101 at the Hardy County Courthouse, 204 Washington Street, Moorefield, WV on (day of week), (date and year) at 9:00 A.M.

The County Commission meeting will be open to all members of the public. A quorum of the County Commission is scheduled to meet and make decisions and take official action on matters scheduled on the meeting agenda.

Any person desiring to address the County Commission should contact the County Clerk's Office at the telephone number and/or address below.

A copy of the meeting agenda is available, in advance, to any member of the public and/or news media at the Hardy County Clerk's Office, Room 111, 204 Washington Street, Moorefield, WV 26836 or by contacting the Hardy County Clerk's Office at telephone number 304-530-0250 or facsimile number 304-530-251 (sic).

Trial Exhibit P1, Meeting Notices, March 17, 2014.

10. On January 2, 2013, the Hardy County Commission convened its first meeting of 2013. During said meeting, the Hardy County Commission tended to electing a Commission President and making commission board appointments amongst its membership. A schedule of regular meeting terms was neither determined nor ordered for the year 2013. *Trial Exhibit P1, January 2, 2013 Meeting Minutes, March 17, 2014.*

11. On March 5, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the Moorefield Examiner Newspaper. This same generic meeting notice is posted on the front door of the courthouse by the clerk. Two agendas are prepared for the meeting – the document titled "AGENDA" consisting of exonerations/settlements/consolidations/orders/payroll registers/and estates is entered into the County Clerk Order Book signifying its official nature. A second document titled "APPOINTMENTS – HARDY COUNTY COMMISSION MEETING" is also prepared consisting of individuals who either request in advance to address the commission or who "walk-in" the day of the meeting seeking an opportunity to address the Hardy County Commission. This second document, while provided in discovery and made a part of the official

record in this matter, *is not* entered into the Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes¹.

On the date of the meeting the typed appointment agenda contained nothing regarding the proposal of a Special Emergency Ambulance Fee. During the meeting, the Hardy County Commission requested its attorney to "do an ordinance to establish a fee §7-15-15". *Handwritten Clerk Minutes*, March 5, 2013. Same notation appears in the typed minutes from this date. *Trial Exhibit D16A*, March 17, 2014. At some point, Prosecuting Attorney See's secretary was given a copy of a Special Ambulance Fee Ordinance from another county, and retyped same substituting Hardy County for the other county in the document. *Lucas See Testimony*, *Trial Transcript Volume II*, p. 85, lns. 12-24, March 18, 2014.

12. On April 16, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the Moorefield Examiner Newspaper. This same generic meeting notice is posted on the front door of the courthouse by the clerk. Two agendas are prepared for the meeting -- the document titled "AGENDA" consisting of exonerations/settlements/consolidations/orders/payroll registers/and estates is entered into the County Clerk Order Book signifying its official nature. A second document titled "APPOINTMENTS - HARDY COUNTY COMMISSION MEETING" is also prepared consisting of individuals who either request in advance to address the commission or who "walk-in" the day of the meeting seeking an opportunity to address the Hardy County Commission. This second document, while provided in discovery and made a part of the official

¹ The Court ascertained this information from the face of the individual documents. The "AGENDA" bears a number stamp denoting its page number in the Order Book. Its page number is consecutive to the minutes from its respective meeting. None of the "APPOINTMENT" agendas bear number stamping to denote entry into the Order Book.

record in this matter, *is not* entered into the Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes.

On the date of the meeting the typed appointment agenda contained the following relevant portion: "11:00 - Emergency Ambulance Authority Update and Request". This appointment agenda was not posted on the courthouse door two days prior to the meeting, was not contained within the generic notice of meeting published in the Moorefield Examiner, and the County Clerk could not testify as to when the agenda was finalized inasmuch as items were allowed to be added to the agenda up until the day of the meeting. At this meeting, the Hardy County Commission, upon hearing an update that Mathias-Baker Rescue Squad (the volunteer effort) was no longer in service, approved a request for funding from the Emergency Ambulance Authority in the amount of \$250,000.00 for the purchase of two ambulances and a chases vehicle and operating expenses. *Trial Exhibit D18A, March 17, 2014.*

13. On May 21, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the Moorefield Examiner Newspaper. This same generic meeting notice is posted on the front door of the courthouse by the clerk. Two agendas are prepared for the meeting -- the document titled "AGENDA" consisting of exonerations/settlements/consolidations/orders/payroll registers/and estates is entered into the County Clerk Order Book signifying its official nature. A second document titled "APPOINTMENTS - HARDY COUNTY COMMISSION MEETING" is also prepared consisting of individuals who either request in advance to address the commission or who "walk-in" the day of the meeting seeking an opportunity to address the Hardy County Commission. This second document, while provided in discovery and made a part of the official

record in this matter, *is not* entered into the Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes.

On the date of the meeting the typed appointment agenda contained the following relevant portion: "Jenny Moore & Greg Greenwalt EAA Update". This agenda was not posted on the courthouse door two days prior to the meeting, was not contained within the generic notice of meeting published in the Moorefield Examiner, and the County Clerk could not testify as to when the agenda was finalized inasmuch as items were allowed to be added to the agenda up until the day of the meeting. At this meeting, the Mr. Greenwalt advised the Hardy County Commission that ambulance service had not been interrupted and that the two ambulances and chase unit that the HCEAA purchased were in service and housed at the Grant County Mulch building in Baker, WV. Mr. Greenwalt requested that the Hardy County Commission go into executive session to discuss the purchase of property. The Commission went into executive session and upon conclusion thereof took no vote on the matter, *Trial Exhibit D20A, March 17, 2014.*

14. On two separate occasions, the Hardy County Commission and Capon Valley Bank representatives, namely Alan Brill, Fred Brooks, and Jack Walters met to discuss the purchase of the Baker building prior to the auction. Bank CEO Brill testified that these meetings dealt primarily with "procedure" and what the "timeframe would be" with regard to foreclosure on the collateral. *Alan Brill Testimony, Trial Transcript Volume II, p. 63, ln. 5-21, March 18, 2014.*

15. On June 4, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the Moorefield Examiner Newspaper. This same generic meeting notice is posted on the front door

of the courthouse by the clerk. Two agendas are prepared for the meeting -- the document titled "AGENDA" consisting of exonerations/settlements/consolidations/orders/payroll registers/and estates is entered into the County Clerk Order Book signifying its official nature. A second document titled "APPOINTMENTS - HARDY COUNTY COMMISSION MEETING" is also prepared consisting of individuals who either request in advance to address the commission or who "walk-in" the day of the meeting seeking an opportunity to address the Hardy County Commission. This second document, while provided in discovery and made a part of the official record in this matter, *is not* entered into Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes.

On the date of the meeting the Clerk's typed appointment agenda contained the below relevant portion which was *handwritten in* as follows: "11:15 Jerry & Greg Authorize Amb. Authority to purchase Bld. @ Baker. Req. §6-9a-4(9) -- AJ. 9:54 out exc. 10:19". This agenda was not posted on the courthouse door two days prior to the meeting, was not contained within the generic notice of meeting published in the Moorefield Examiner, and in fact it does appear and this Court so finds that the notations made by the Clerk indicate that these individuals appeared before the County Commission on the morning of June 4, 2013 to make this request with no prior notice to the public whatsoever. Nevertheless, the Hardy County Commission voted to "Authorize the Emergency Ambulance Authority to bid on the Mathias/Baker Building". The Hardy County Commission then retired to executive session to discuss the building purchase. No mention of the source of purchase price funds appears on the record. The commission meeting was declared ended at 10:50 a.m., and accordingly this Court finds that it was impossible for the individuals to have met with the commission as indicated on the appointment agenda at 11:15 a.m. *Trial Exhibit D21*, March 17, 2014. In addition, this Court

finds that the admission of County Clerk Ely during his testimony that there was no notice to the public that the County Commission was going to purchase the building and present the Commission with a proposed budget based upon the fee during the meeting on June 4, 2013. Greg Ely Testimony, Trial Testimony Volume I p. 188, lns. 13-24; p. 189, lns. 1-18, March 17, 2014.

16. Conveniently June 4, 2013 was also the date of the Trustee sale of the Mathias-Baker Rescue Squad building which was conducted at 11:00 a.m. at the Hardy County Courthouse. This sale had been properly noticed to the public by three successive weeks of publication in the Moorefield Examiner. At the sale, Jerry Moore of the HCEAA bid against the E.A. Hawse contingent for the Mathias-Baker Building and prevailed with a high bid of One Million One Hundred Thirty Thousand Dollars (\$1,130,000.00). Trial Exhibit P17, March 17, 2014. The Ambulance Authority paid the required sale deposit of \$50,000.00 from its own funds on the date of the sale. Greg Greenwall Testimony, Trial Transcript Volume II, p. 242, lns. 20-23, March 18, 2014.

17. On June 18, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the Moorefield Examiner Newspaper. This same generic meeting notice is posted on the front door of the courthouse by the clerk. Two agendas are prepared for the meeting – the document titled “AGENDA” consisting of exonerations/settlements/consolidations/orders/payroll registers/and estates is entered into the County Clerk Order Book signifying its official nature. A second document titled “APPOINTMENTS – HARDY COUNTY COMMISSION MEETING” is also prepared consisting of individuals who either request in advance to address the commission or who “walk-in” the day of the meeting seeking an opportunity to address the Hardy County

Commission. This second document, while provided in discovery and made a part of the official record in this matter, is *not* entered into Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes.

On the date of the meeting the typed appointment agenda contained the following relevant portion: "10:45 HCEAA Jerry Moore/Greg Greenwalt fuel cards, medic, building etc". This agenda was not posted on the courthouse door two days prior to the meeting, was not contained within the generic notice of meeting published in the Moorefield Examiner, and the County Clerk could not testify as to when the agenda was finalized inasmuch as items were allowed to be added to the agenda up until the day of the meeting. At this meeting, the Hardy County Commission, upon hearing the HCEAA presentation wherein the HCEAA represented that it had approached three different lenders with regard to securing financing to complete the purchase of the Baker building, approved a line item addition to its budget to give the HCEAA a guarantee of \$100,000.00 per year to enable the HCEAA to secure a loan to pay for the building that it successfully bid upon at the public auction. Additionally, the Hardy County Commission was reminded that it had scheduled a public hearing about a Special Emergency Ambulance Fee on June 24, 2013. Furthermore, the County Commission discussed how to bill the public for the Special Emergency Ambulance Fee and decided to have it done in-house. *Trial Exhibit D22, March 17, 2014.*

18. On June 24, 2013 and on July 15, 2013, the Hardy County Commission convened public meetings to hear comments on the enactment/adoption of a "Special Emergency Ambulance Service Fee" in accordance with W.Va. Code §7-15-17. The Hardy County Commission caused a legal advertisement of the meetings to be published in the Moorefield Examiner newspaper. The Court would note that the notice in the Moorefield Examiner for the

... second meeting incorrectly stated that the date of same was July 3, 2013. No ordinance was presented to the public to comment upon, rather the notice advised that "[t]he proposed fee amounts being considered are \$10.00, \$12.00, or \$14.00 per month. The proposed fee will/may be applicable to all property owners with property that has a residence upon it." *Trial Exhibit D23*, March 17, 2014. The information in the notice provided the complete extent of publically reviewable information regarding the proposed ordinance.

19. At some point Commissioners Wade, Keplinger, and Teets all had separate consultations with Gary Johnson, CEO of EA Hawse about the potential of a lease for the Baker Building and/or allowing him to purchase the building and lease part of it back to the County. *Gary Johnson Testimony, Trial Transcript Volume II*, p. 172-174, March 18, 2014.

20. On July 2, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the Moorefield Examiner Newspaper. This same generic meeting notice is posted on the front door of the courthouse by the clerk. Two agendas are prepared for the meeting – the document titled "AGENDA" consisting of exonerations/settlements/consolidations/orders/payroll registers/and estates is entered into the County Clerk Order Book signifying its official nature. A second document titled "APPOINTMENTS – HARDY COUNTY COMMISSION MEETING" is also prepared consisting of individuals who either request in advance to address the commission or who "walk-in" the day of the meeting seeking an opportunity to address the Hardy County Commission. This second document, while provided in discovery and made a part of the official record in this matter, *is not* entered into Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes.

On the date of the meeting the typed appointment agenda contained the following relevant portion: "11:00 Jerry Moore & Greg Greenwalt HCEAA Emergency Ambulance Fee Discussion". During the presentation by the HCEAA, the HCEAA requested guidance from the Commission on how to proceed with the building purchase and the selection of a fee amount and how to impose same. Commissioner Teets inquired of the HCEAA "how they felt about checking on a 99 year lease with EA Hawse...?" Mr. Moore advised that he felt it to be improper to contact Mr. Johnson (CEO of EA Hawse) inasmuch as "we were bidding on that property at the direction of the Commission, and I did not think it was appropriate to contact Mr. Johnson prior to that process being over and since that time, there is some possibility in dealing with him in some manner that I am not aware of, but if that is the commissions desire, we can go talk to him." In the course of the discussion, Commissioner Teets advised the HCEAA representatives that "since there are 15 on that board [HCEAA] representing throughout the county, I think you all should make the decision to tell us what you want us to do, not us tell you what to do." In response to this admonishment, Mr. Moore commented that "[w]e are at a position here that commitments have been made for the purchase, and what do we need to do with regards to the purchase of the facility, that needs to be taken care of. If you want us to talk to Mr. Johnson, we can do that, but we do not know what you want us to talk to them about."

Trial Exhibit D24, March 17, 2013.

21. On July 16, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the Moorefield Examiner Newspaper. This same generic meeting notice is posted on the front door of the courthouse by the clerk. Two agendas are prepared for the meeting – the document titled "AGENDA" consisting of exonerations/settlements/consolidations/orders/payroll registers/and

estates is entered into the County Clerk Order Book signifying its official nature. A second document titled "APPOINTMENTS - HARDY COUNTY COMMISSION MEETING" is also prepared consisting of individuals who either request in advance to address the commission or who "walk-in" the day of the meeting seeking an opportunity to address the Hardy County Commission. This second document, while provided in discovery and made a part of the official record in this matter, *is not* entered into Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes.

On the date of the meeting the typed appointment agenda contained the following: "10:15 Emergency Ambulance Fee & Ordinance Set amount &/or adopt ordinance". During the discussion of the issue, Commissioner Teets advised that "Commissioner Keplinger and [myself] feel we gave every effort we could along with the Ambulance Authority trying to setup an organization for years to come ..."; at the close of discussion, Commissioner Wade moved to not purchase the building at Baker which was seconded by Commissioner Keplinger and the motion passed with Commissioners Keplinger and Wade voting in the affirmative. Commissioner Wade also moved not to impose the fee, motion was seconded by Commissioner Keplinger, and the motion passed with both Commissioners Wade and Keplinger voting in the affirmative. *Trial Exhibit D25, March 17, 2014.*

22. On August 2, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the Moorefield Examiner Newspaper. This same generic meeting notice is posted on the front door of the courthouse by the clerk. Two agendas are prepared for the meeting - the document titled "AGENDA" consisting of exonerations/settlements/consolidations/orders/payroll registers/and estates is entered into the County Clerk Order Book signifying its official nature. A second

document titled "APPOINTMENTS - HARDY COUNTY COMMISSION MEETING" is also prepared consisting of individuals who either request in advance to address the commission or who "walk-in" the day of the meeting seeking an opportunity to address the Hardy County Commission. This second document, while provided in discovery and made a part of the official record in this matter, *is not* entered into Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes.

On the date of the meeting the typed appointment agenda contained the following relevant portion: "10:30 George Crump ET ALS EAA Fee". During this meeting, Mr. Crump appeared and told the commission that the Commission should proceed to buy the building and enact the fee. As reflected in the minutes of that meeting, Commissioner Teets stated "I can speak for JR (Commissioner Keplinger) and myself, we both feel we should own the building and have the fee." *Trial Exhibit D26, typed minutes page 2, March 17, 2014.* Furthermore, Mr. Teets commented that "[w]e were looking at the building for years to come and its (sic) bad that we have not bought it; they have given us an extension. *Trial Exhibit D26, typed minutes page 2, March 17, 2014.* After the discussion, Commissioner Keplinger moved to set the fee at \$10.00 per month and buy the building. The motion passed with Commissioners Teets and Keplinger voting in the affirmative. Later on in the meeting and during an unrelated discussion, Commissioner Keplinger moved to "transfer funding to the authority to pay the entire amount and not borrow any money for the building". The motion passed with Commissioners Keplinger and Teets voting in the affirmative. *Trial Exhibit D26, March 17, 2014.*

23. With regard to this purchase, Greg Greenwalt testified to the fact that the County Commission did pay for the structure in full. He further testified that the Ambulance Authority did "check with predominantly all the local lenders to secure what the rates would be and what

terms and conditions we could ... secure funding for the balance of the structure." *Greg Greenwalt Testimony, Trial Transcript Volume II*, p. 243, lns. 20-24, March 18, 2014. Mr. Greenwalt further testified that the Ambulance Authority did not rule out financing the building through local lenders, but rather "the County Commission chose to purchase a building outright so it became a mute issue for the Ambulance Authority". *Greg Greenwalt Testimony, Trial Transcript Volume II*, p. 244, lns. 1-5, March 18, 2014.

24. On August 6, 2013, the sale of the Baker building closed and the Hardy County Commission went into possession of same. *Trial Exhibit P15, March 17, 2014*. The Hardy County Commission purchased the building outright utilizing funds from its building fund. *J.R. Keplinger Testimony, Trial Transcript Volume III*, p. 94, ln. 2-15. March 19, 2014.

25. On August 20, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the *Moorsfield Examiner Newspaper*. Two agendas are prepared for the meeting – the document titled "AGENDA" consisting of exonerations/settlements/consolidations/orders/payroll registers/and estates is entered into the County Clerk Order Book signifying its official nature. A second document titled "APPOINTMENTS – HARDY COUNTY COMMISSION MEETING" is also prepared consisting of individuals who either request in advance to address the commission or who "walk-in" the day of the meeting seeking an opportunity to address the Hardy County Commission. This second document, while provided in discovery and made a part of the official record in this matter, *is not* entered into Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes.

On the date of the meeting, the Appointment agenda contained the following relevant portion: "Order adopting fee ordinance -- fee ordinance-order creating special checking

acct". This meeting signified the first appearance of the actual fee ordinance document. After discussion about the enactment date and the fact that the ordinance did not reflect the payment of ten dollars per month (as was previously approved by the Hardy County Commission at its August 2, 2014 meeting), but rather a fee requirement of \$120 per year, Commissioner Keplinger moved to adopt the ordinance, backdating adoption of same to July 1, 2013, and the motion passed with Commissioners Keplinger and Teets voting in the affirmative. The Court also finds that the County Clerk's handwritten meeting notes contain the following statement "Rose - going to have start putting agenda on website". *Trial Exhibit D27 and D28, March 17 2014.*

26. An *Order of Adoption* was entered contemporaneously with the approval of the Special Emergency Ambulance Fee Ordinance. Contained as an attachment thereto are two notices of publication referencing the public meetings held on the issue. Only one notice published listed the correct date of the public meeting. No notice is given for the second public meeting which was held July 15, 2013. And the notice advising the date of the meeting wherein the matter would be voted upon indicated, in the first instance, a date prior to the second public meeting and, in the second instance, a notice reflecting the improper date all-together of a Hardy County Commission meeting. *Trial Exhibit D28, March 17, 2014.* None of the aforementioned notices actually successfully paired subject matter with meeting date. This Court is uncertain as to why the Hardy County Commission would include said defective notices with their *Order of Adoption*.

27. On October 15, 2013, the Hardy County Commission convened a meeting. Prior to said meeting, the Hardy County Clerk caused to be published a generic notice of meeting in the Moorefield Examiner Newspaper. Two agendas are prepared for the meeting - the document titled "AGENDA" consisting of exonerations/settlements/consolidations/orders/payroll

registers/and estates is entered into the County Clerk Order Book signifying its official nature. A second document titled "APPOINTMENTS - HARDY COUNTY COMMISSION MEETING" is also prepared consisting of individuals who either request in advance to address the commission or who "walk-in" the day of the meeting seeking an opportunity to address the Hardy County Commission. This second document, while provided in discovery and made a part of the official record in this matter, is *not* entered into Police and Fiscal Order Book with the "AGENDA" document and the meeting minutes.

On the date of the meeting, the typed Appointment agenda contained the following relevant portion: "Christie Snyder, Margie Newton Fee Ordinance". A discussion ensued regarding the roll-out of the ordinance including the issue of a potential amendment to the fee ordinance, which would make it the same as the Berkeley County ordinance (the ordinance which served as the template of the Hardy County Ordinance). County Attorney Lucas See was asked for his opinion on the matter as to whether an amendment could be made and he stated that "if the Ordinance was adopted without a public hearing then the amendment would not need a public hearing". In accord with that opinion and to address the issue, Commissioner Keplinger moved to amend the Hardy County Ordinance with the language that was left out of it and is contained within the Berkeley County Ordinance. The Motion passed with Commissioners Keplinger and Teets voting in the affirmative. *Trial Exhibit D31*, March 17, 2014.

28. In Defendants' *Motion to Dismiss Petition* filed on December 9, 2013, Defendants make the following observation, "At most there may be properly alleged a technical procedural error ... that is [not enough] to nullify the ordinance." *Motion to Dismiss Petition*, p. 4, December 9, 2013.

Conclusions of Law
W.Va. Code §7-1-2 Sessions of County Commissions

29. The administration of the public's business by a county commission is codified in Chapter 7 of the West Virginia Code. The specific areas over which a county commission has jurisdiction are limited by both the West Virginia Constitution and by legislative enactment, in other words, "[t]his corporation of the county court, created by statute, must depend both for its powers and the mode of exercising them upon the true construction of the statute creating them."

Goshorn's Ex'rs v. County Ct. of Kanawha County, 26 S.E. 452, 453 (W. Va. 1896).

30. With respect to the requirements of notice to allow the exercise of county commission power, W.Va. Code §7-1-2 provides that:

The county court of each county shall hold four regular sessions in each year at the courthouse thereof, at such times as may be fixed upon and entered of record by the court. It may also hold special sessions, whenever the public interests may require it, to be called by the president with the concurrence of at least one other commissioner; and the commissioner, if any, not concurring therein, must have at least twenty-four hours' notice of the time appointed for such special session. A notice of the time of such special session, and of the purpose for which it will be held, shall be posted by the clerk of the court, at the front door of the courthouse of the county, at least two days before such session is to be held. If such commissioner, after due notice thereof, shall willfully fail to attend such special session, he shall forfeit not less than five nor more than twenty dollars.

In construing what qualifies as a regular versus a special session, the West Virginia Supreme Court of Appeals has held that "[w]e do not take judicial notice of the regular terms of county courts, which are held at such times as may be fixed upon and entered of record by the county court. Doak v. Smith, 116 S.E. 691, 692 (W. Va. 1923) overruled on other grounds by Meadows v. Meadows, 468 S.E.2d 309 (W. Va. 1996). Furthermore, the West Virginia Supreme Court of Appeals has examined the issue of regular sessions and declared that unless the "order providing

for regular terms [setting a date certain], is absolutely void, there can be no doubt that ... [an action of the county commission on the regular session dates] occurred at a regular term, when the court might transact any lawful business." State ex rel. Conley v. Thompson, 130 S.E. 456, 460 (W. Va. 1925).

31. The difference between a regular and special session is not mere verbiage. Under W.Va. Code §7-1-2, the type of meeting is critical to the manner in which valid actions may be taken because it is the source of county commission jurisdiction. The West Virginia Supreme Court of Appeals has previously recognized with respect to county commission jurisdiction that:

[C]ounty courts in this State at their special sessions are not courts of general jurisdiction but are inferior courts of very limited jurisdiction. Their jurisdiction is not only limited to such cases as the county courts had jurisdiction of, but at the special terms it is by the statute we have quoted confined to the transaction of such business as the public shall have been notified they would attend to by a notice thereof posted by the clerk of the court at the front door of the court-house of the county at least two days before the session. It is necessary therefore that the record of such a special session of the county court should on its face show, that such notice was so posted at the front-door of the court-house of the county, and that the particular case or business, which the county court has undertaken to hear and determine or to transact, comes fairly within the purpose named in such notice, as the purpose, for which such special session was particularly called.

Mayer v. Adams, 27 W. Va. 244, 252-53 (1885).

In the Mayer case, the Tucker County Court (now Commission) attempted to decide an election result dispute at a time outside of its fixed regular session. A special session was called pursuant to the statute, however, there was no proof that the requisite notice was posted two days prior to the meeting. Nevertheless, the election contest was settled and the notice issue was appealed. The West Virginia Supreme Court of Appeals found that the actions

of the county commission were inappropriate because the commission was proceeding without jurisdiction. The remedy and appropriate presumption are laid out by the Mayer decision:

As the judgment of any court is absolutely void, if it appears, that there was a want of jurisdiction, the marked difference between courts of general and of limited jurisdiction is that in the one case, where the contrary does not appear, it will generally be presumed that it had jurisdiction, while in the other the presumption will be against the jurisdiction, unless it appears.

Mayer v. Adams, 27 W. Va. 244, 252 (1885).

The West Virginia Supreme Court subsequently recognized this rule and restated the principle as follows:

In the case of an inferior court, board, or body, required to keep a record, the facts essential to give it jurisdiction must appear in its proceedings, else its action will be void and open to attack collaterally; but, if its record state such facts, its jurisdiction will not be open to attack, nor can such facts be disproven in a collateral proceeding, nor will any error appearing therein affect its action.

Syl. pt. 3, Shank v. Town of Ravenswood, 43 W. Va. 242, 27 S.E. 223 (1897).

Furthermore, it is established that county commissions are "created by statute, and possessed only of such powers as are expressly conferred by the Constitution and Legislature ... [i]t can do only such things as are authorized by law, and in the mode prescribed". Barbor v. County Ct. of Mercer County, 85 W. Va. 359, 101 S.E. 721 (1920).

32. Accordingly, under the statutory scheme and in light of the case law, regular sessions must be fixed in advance to give county commissions jurisdiction while special sessions must comply with the notice requirements within W. Va. Code §7-1-2 to give the county commission jurisdiction over matters it wishes to consider outside of those dates previously set as regular sessions. The regular verses special session is not a distinction without difference, it is

fundamental, jurisdictional, and cannot be construed as meaningless. It is against this legal framework, that the actions of the Hardy County Commission are analyzed.

33. There is no record of a fixed regular term of the Hardy County Commission for the year 2013. The first meeting of 2013, held on January 2, 2013 wherein the Hardy County Commission elected a president and where the Commissioners were assigned to committees did not include a discussion or adoption of any fixed regular term meeting dates.

34. Each meeting during the year 2013 was set at the meeting immediately prior to the date of said meeting. These meeting dates were announced by the Commission President and the record does not indicate any objection from the two other Commissioners. Accordingly, they appeared to concur with the setting of the next meeting.

35. All generic notices published in the Moorefield Examiner newspaper and posted on the front door of the Courthouse indicate that "[t]he public and news media are hereby notified that the Hardy County Commission will hold a meeting ...". The notice makes no mention of the meeting being a regular fixed session of the Hardy County Commission. The announcement of the next meeting by the Commission President likewise makes no mention of the object of the next meeting or its classification.

36. The only mention of the word "regular" appears in the typed minutes that are entered in the Police and Fiscal Order Book after said minutes are approved at the subsequent meeting. This post meeting designation does not suffice. Jurisdiction over a matter is a prerequisite, not a post-script.

37. In applying the presumption that a county commission lacks jurisdiction unless same is established in the record, the Hardy County Commission did not have jurisdiction to decide those matters complained of by the Plaintiffs – the purchase of the Baker Building (two

separate votes on June 4, 2013 and August 2, 2013) and the passage of the Special Emergency Ambulance Fee (two separate votes on August 2, 2013 and August 2013), as a result of said matters not being decided at a regular term fixed upon the record of the County Commission and the complete lack of statutory notice being given to validate those actions pursuant to the special meeting notice requirements contained in W.Va. Code §7-1-2. In accord with the Mayer decision, motions passed and the subsequent actions taken as a result thereof in these improper meetings are nullities.

W.Va. Code §6-9a-3 Open Governmental Proceedings Act

38. The Open Governmental Proceedings Act, W.Va. Code §6-9a-et seq., directs public bodies to conduct official business in the open. Specifically, the Legislative rationale for enacting the OGPA is described as follows:

The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them...

Open government allows the public to educate itself about government decisionmaking through individuals' attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government...

Public access to information promotes attendance at meetings, improves planning of meetings, and encourages more thorough preparation and complete discussion of issues by participating

officials. The government also benefits from openness because better preparation and public input allow government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to public needs. Public confidence and understanding ease potential resistance to government programs.

W. Va. Code § 6-9A-1 (in part).

39. W.Va. Code §6-9a-3 is the portion of the OGPA that sets out the meeting requirements for government bodies. County Commissions, in addition to the mandates of W.Va. Code §7-1-2 are likewise required to follow the dictates of W.Va. Code §6-9a-3. The pertinent portions of W.Va. Code §6-9a-3 direct government bodies as follows:

(a) Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, all meetings of any governing body shall be open to the public.

(d) Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media.

(i) Upon petition by any adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section.

W. Va. Code § 6-9A-3.

40. The term "meeting" under the OGPA is defined as

(5) "Meeting" means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or Court of Claims proceeding;

(B) Any on-site inspection of any project or program;

(C) Any political party caucus;

(D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

W. Va. Code Ann. § 6-9A-2(5).

41. Petitioners have alleged that the Hardy County Commission violated the OGPA through a series of meetings which lacked the requisite notice to adequately inform the public of the issues the Hardy County Commission was either deliberating and voting upon at any given meeting.

42. Based upon the record, this Court finds significant and chronic violations of the OGPA in the conduct of Hardy County Commission business, specifically the following:

a. The practice of maintaining an "agenda" and a second "appointment" list by the Hardy County Commission is inherently deceptive and violates the OGPA. This practice, especially the exclusion of this list from the Police and Fiscal Order Book, creates an incomplete record of the transaction of the public's business. The Court does not doubt that Clerk Ely would provide the "appointment" list if it were requested, however, the ever-changing nature of this "appointment" list as matters were added by county agencies and the public up until and on the day of the meetings, made it an unreliable record of the business that was to be transacted.

b. The second issue with the "appointment" list is its lack of adequate description as to exactly what business would transpire at the meeting. Specifically, the Court is referencing the August 2, 2013 meeting wherein the "appointment" list contained the notation "10:30 George Crump ET ALS EAA Fee". The official action which followed during that meeting was a vote to set the fee at \$10.00 per month. This notation on the August 2, 2013, "appointment" list is in stark contrast to the "appointment" list from July 16, 2013, wherein the following appointment was listed: "10:15 Emergency Ambulance Fee & Ordinance Set amount &/or adopt ordinance". The official action following this "appointment" was a vote to refuse to set a fee. Even for a member of the public that had been faithfully following the actions of the Hardy County Commission, a citizen would be required to attend every single meeting because one would be unable to anticipate exactly what matter may be presented and immediately voted upon by the Commissioners at any given time.

c. The proceedings had before the Hardy County Commission on June 4, 2013 represent an atrocious violation of not only the OGPA, but of the public trust. Allowing Mr. Moore and Mr. Greenwait to be "walk-ins" at the meeting, request the purchase of the Baker building, and be granted the authority to do same by the County Commission without any notice to the public is the exact behavior the OGPA is meant to safeguard. The factual findings above detail the offending actions, however, this Court is deeply troubled that the "appointment" document indicates that this request was scheduled for 11:15 a.m. when in fact the encounter between the Commissioners and these individuals occurred much sooner as evidenced by the fact that the meeting had adjourned at 10:50 a.m.

d. The August 2, 2013 meeting is also deeply troubling. During the course of this meeting, the County Commission, based upon an "appointment" with George Crump who came to discuss the "EAA Fee", the County Commission voted to approve a \$10.00 per month Special Fee and buy the Baker building in a single vote and on a separate vote decided to transfer the funds to do same to the authority from the county budget so the Baker building could be purchased outright with no need for financing. No member of the public would have been able to anticipate that any of these events would transpire based upon an "appointment" with George Crump to discuss the EAA Fee. Additionally, the vote to move the funds from the County to the Authority was done with no discussion, no mention of total cost, and no mention of what source of funds the county would be drawing upon to pay for the Baker building.

e. The August 20, 2013 meeting is also concerning regarding the *Order of Adoption* of the Ordinance. From a review of the testimony, it would appear that the August 20, 2013, meeting was the first time the actual Ordinance was publically disseminated and it did not faithfully reflect the actual vote taken on August 2, 2013 which approved an ordinance that charged \$10.00 per month. The remainder of the seven page document was not publically available or publically explained by the Commissioners prior to the adoption of same. The two notices of public meetings to discuss the proposal that are contained in the Order of Adoption are misleading inasmuch as the Ordinance itself was not available to the public at either meeting and County Attorney See later opined to the County Commission that the Ordinance was not passed pursuant to a public hearing. Therefore, any insinuation by the attachment

of these notices indicating that the public meetings were either a pre-requisite to or an integral part of the process of passing the Ordinance in its final form are false.

43. Additional violations of the OGPA are also apparent from a review of the evidence. As the Court reviewed the record of minutes from the Hardy County Commission, it was struck by the lack of meaningful discussion before important decisions were made. Specifically the Court considers the following instances as impermissible private meetings of the Hardy County Commission:

a. Bank Meetings – Alan Brill, CEO of Capon Valley Bank testified that he, his assistant, and the bank’s attorney personally met with all three county commissioners on two different occasions. These meetings were represented during his testimony as meetings to determine the banks foreclosure procedure regarding the Baker building. These meetings occurred prior to the auction. The Court does not believe it requires two meetings with the bank to find out when the bank would be foreclosing. These meeting were obviously deliberative in nature regarding the County Commission’s interest in purchasing the building. And since the County Commission had already been discussing the matter as a quorum, there was not much need for notice or discussion of same at the meeting on June 4, 2013 where they voted to bid on the Baker building.

b. Consultations between Commissioners JR Keplinger and Michael Teets – Commissioner Teets represented on the record at the August 2, 2013 meeting that he “could speak for JR and [myself] that we both feel we should own the building and have the fee.” *Trial Exhibit D26, typed minutes page 2, March 17, 2014.* Inasmuch as Commissioner Keplinger voted against doing both things at the meeting immediately

prior to the August 2, 2013 meeting, it is obvious that a private meeting between two commissioners (which constitutes a quorum for conducting county business) did occur during the weeks between the re-vote.

c. Change in posture by the County Commission as to source of funds for Baker building purchase – After the Ambulance Authority was the high bid for the Baker building, it first appeared on the record that the financing details were far from finalized. On June 18, 2013, the HCEAA representatives appeared before the Hardy County Commission to request a letter of credit to allow them to try and finance the building. The Commissioners approved a \$100,000.00 line item instead. At subsequent meetings of the County Commission, nothing is mentioned regarding financing the building. It appears from the record and from Mr. Greenwalt's testimony that the HCEAA fully intended to finance the purchase until the August 2, 2013 meeting whereat the County Commission with no discussion on the matter, voted to purchase the building from County funds and forego financing the building. It does not appear on the record where the funds were pulled from in the County budget and no specific amounts were noted in the motion. Clearly a shift in posture from financing the building through the Ambulance Authority to pulling the funds out of the County budget to purchase same outright (a 1.13 million dollar proposition) would have necessitated deliberation amongst the County Commissioners. From the reading of the minutes, any deliberation on this issue occurred in a forum other than at a County Commission meeting.

d. On July 2, 2013, Commissioner Teets brings up for the first time that the HCEAA should talk to EA Hawse regarding a long term lease. This change in posture

was not at all anticipated by the HCEAA and Mr. Moore voiced his confusion as to what the County Commission wanted in this regard. Apparently, behind the scenes deliberations with Mr. Johnson involving, at various times, all three commissioners were the contextual background behind this request. Mr. Johnson testified that Mr. Keplinger made representations to him in which it appeared that Commissioner Keplinger had been deliberating the issue of the building purchase with Commissioner Teets.

44. The foregoing instances of meetings in violation of the OGPA cannot be overlooked or ignored. All these instances lead to some sort of official action by the Hardy County Commission and none of these instances fit into the meeting exception clause of the OGPA. The business of the Hardy County Commission cannot be conducted in private and a meeting held to rubberstamp decisions already deliberated and made. It is paramount that proceedings of government be transparent. The Hardy County Commission, by and through its actions, has denied the citizenry of Hardy County a meaningful opportunity to observe, participate in, and understand the decisions being made on its behalf.

45. The remedy for violations of the OGPA is for the Court to invalidate any action taken at any meeting for which notice did not comply with the requirements of the OGPA. In making the decision to invalidate a decision, the Court would note that the Hardy County Commission's violations of the OGPA did not just happen at one meeting but represents a chronic and systemic problem in the manner in which the Hardy County Commission does all its business. Even though the Commission did attempt to inform the public through its public meetings, it still fell short on providing actual, useful information to the public to allow them to ask relevant questions inasmuch as the Commission did not have a copy of the ordinance

available (same had been requested to be drafted on March 5, 2013) and also did not publically disseminate the financial information it received from the Ambulance Authority regarding the anticipated revenue via each rate. None of the subsequent actions have provided a cure to the problems inherent in the decision-making process regarding the purchase of the Baker building and the adoption (and backdating) of the Ordinance. Accordingly, those actions are void.

46. Although the Hardy County Commission has previously admitted that a "properly alleged ... technical procedural error" existed, it asks for same to be excused under W.Va. Code §7-15-18. Without extensive discussion, this Court does not believe that the "saving" section of the Ambulance Authority section can possibly trump the mandates of the OGPA. The "procedural error" present in this case is overwhelming in its impact on the public and cannot be excused or ignored by this Court.

ACCORDINGLY, it is hereby ORDERED:

1. The vote of the Hardy County Commission taken during meetings held on June 4, 2013, and August 2, 2013, relating to and authorizing the purchase the building at Baker and the use of Hardy County funds to finance same are **VOID**.

2. The vote of the Hardy County Commission taken during meetings held on August 2, 2013, and August 20, 2013, authorizing the institution of a Special Emergency Ambulance Fee and adopting and Ordinance to accomplish same are **VOID**.

3. The Hardy County Commission shall forthwith refund all moneys to those citizens which have previously paid the Special Emergency Ambulance Fee.

4. Exceptions to any adverse rulings are hereby **SAVED**.

5. The Circuit Clerk shall provide a copy of this Order to all counsel of record and shall provide an attest copy of this Order to the Clerk of the Hardy County Commission for entry into the Police and Fiscal Order Book.

6. Nothing remaining to be done in this matter, the Circuit Clerk shall remove it from the docket and place it among the actions ended.

ENTERED this 8th day of August 2014.


JUDGE

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

WENDY J. MILLER, JOHN A. ELMORE,
B. WAYNE THOMPSON, OVID NEED,
and BONNIE L. HAGGERTY,
Petitioners,

CLERK
RS
DEPUTY

v.

Case Number 14-C-17
Senior Status Judge Andrew N. Frye, Jr.

J. MICHAEL TEETS, COMMISSIONER;
WILLIAM E. KEPLINGER, JR., COMMISSIONER;
and the HARDY COUNTY COMMISSION,
Respondents.

ORDER GRANTING TEMPORARY INJUNCTION

Now comes this Court, the Honorable Andrew N. Frye, Jr. presiding, being in receipt of Petitioners' *Motion to Enforce the Final Order of August 8, 2014 and Motion for Injunctive Relief* and the *Supplement* to same. It would appear that it is necessary to resolve the outstanding issues that exist in this matter and that further Hardy County Commission actions at this time would only serve to further complicate a final resolution.

ACCORDINGLY, it is hereby ORDERED:

1. The Hardy County Commission is hereby enjoined from taking any votes or otherwise considering the issues of the special emergency ambulance fee ordinance or the purchase of the Baker building at its meeting until such time as a full hearing may be had on Petitioners' *Motion*.
2. Respondents shall also appear and show cause as to why the refunds have not been processed as directed by prior order of this Court. The Court is informed that the Hardy County Commission has in its employ two individuals who send out bills to the residents of Hardy County for the Special Emergency Ambulance Fee. The Court does not understand why these same individuals did not send the Court Ordered refunds.

3. Both parties shall be prepared to conduct a full evidentiary hearing and present any legal argument on the remaining issues, specifically, the Petitioner's argument under W.Va. Code §7-15-4 and the issue of whether the void purchase of the building can be merely confirmed by vote or if something more is required pursuant to the case law interpreting W.Va. Code §6-9a-3.

4. The parties shall likewise be prepared to argue the Petitioners' *Motion for Attorney Fees; Motion of Wendy J. Miller to Withdraw*; and any other motions which shall be properly filed and noticed prior to the hearing.

5. Any party who desires to add additional parties to this action may do so. The Court will not be joining additional entities of its own volition. If new parties are added prior to the hearing, the joining party shall provide notice of the hearing. Any newly joined party will have the opportunity to appear at and participate in the hearing. In the event that a petition to add a new party is not served prior to the hearing, the joining party shall have a copy of the petition available to the Court on the date of the hearing.

6. Counsel for the parties shall confer on a date for the hearing and notice same once a date and time are determined.

7. The Circuit Clerk shall fax a copy of this order today to all counsel of record to provide notice of the injunction. The Circuit Clerk shall likewise immediately provide an attest copy of this Order to the Clerk of the Hardy County Commission for entry into its Police and Fiscal Order Book. The original signed copy of this Order will follow by mail.

TRUE COPY

TEST:

Kimberly Hartman
 Clerk of Said Circuit Court

Rockey
 Page 2 of 2

ENTERED this 29th day of August 2014.

Andrew J. Frye
 JUDGE

FILED

DATE 10-10-14

IN THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA

RS

DEPUTY

WENDY J. MILLER, JOHN A. ELMORE,
B. WAYNE THOMPSON, OVID NEED,
and BONNIE L. HAGGERTY,
Petitioners,

v.

Case Number 14-C-17
Senior Status Judge Andrew N. Frye, Jr.

J. MICHAEL TEETS, COMMISSIONER;
WILLIAM E. KEPLINGER, JR., COMMISSIONER;
and the HARDY COUNTY COMMISSION,
Respondents.

FINAL ORDER

On the 29th day of September 2014, this matter came on before the Court, the Honorable Judge Andrew N. Frye, Jr. presiding, same having been previously noticed for hearing this date to address numerous outstanding Motions. The Petitioners were present in person and by their counsel, J. David Judy, III. The Respondents were present in person and by counsel, Bridget Cohee.

The Court took the testimony of Respondents' witnesses County Clerk Greg Ely and HCEAA President Greg Greenwalt both of whom were sworn and subject to cross-examination. Upon consideration of the nature of their testimony and the numerous times Respondents' counsel attempted to garner testimony relating to matters that have previously been testified to by both of these individuals, and given that Respondents' counsel based her examination of the witnesses on a misreading of Peters v. Wood County Commission, 205 W.Va. 481, 519 S.E. 2d 179 (1999), the Court terminated further testimony and hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

• *Rule Show Cause*

1. The Court issued a Rule Show Cause against the Respondents on August 29, 2014 inasmuch as it was represented to this Court that none of the Special Emergency Ambulance Fee refunds had been sent to those individuals who had previously paid same. These refunds were ordered on August 8, 2014 to be made forthwith.

2. Respondents submitted exhibits 1-3 at the hearing in support of the position that all refunds have been made. The Court has reviewed the records and it would appear that the checks were issued on September 12, 2014. It would further appear from the testimony of Clerk Ely that there are several checks which have been issued incorrectly (inclusion of deceased former property owners on the check and jointly to parties who are no longer married) and will have to be reissued to allow same to be cashed by the property owner. It would also appear from Clerk Ely's testimony that although the refund checks were issued on September 12, 2014, some of them were not mailed out until as late as the week before the hearing.

3. Based upon the foregoing testimony and representations, this Court finds the lack of urgency exhibited by the Respondents in returning property owner's fees to be offensive to this Court; however, the object of contempt is to enforce the Order and it would appear that the Respondents have now, under threat of contempt sanctions, substantially complied with same.

• *Petition for Attorney Fees*

4. Petitioners have requested attorney fees in this matter and have submitted affidavits detailing their fees and expenses in maintaining this action. Respondents have objected to any award of attorney fees to the Petitioners.

5. Under W.Va. Code § W.Va. Code §6-9A-7(b) (Open Governmental Proceedings Act - OGPA),

(b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust.

6. The Respondents allege in their written response that the Hardy County Commission was justified in its actions because there was not adequate emergency ambulance service in portions of Hardy County during the time these illegal meetings were being held. Respondents further allege that the Petitioners are not able to claim the full amount of their bill inasmuch as the majority of the charges related to the three judge panel. Finally the Respondents argued during the hearing that the holding in the case of Peters v. County Com'n of Wood County, 205 W.Va. 481, 519 S.E. 2d 179 (1999), required the Petitioners to prove that the Respondents intended to violate the Open Governmental Proceedings Act.

7. Respondents' first argument of substantial justification is without merit. The County Commission's duty under W.Va. Code §7-15-4 is to "cause emergency ambulance service to be made available where such service is not otherwise available". This duty is further qualified by the fact that a county commission is not required to impose a duty to cause such service to be provided unless the commission has the funds available to do so and the County Commission is not required to cause such service to be provided beyond a level commensurate with the amount of funds actually available for such purpose. The adequacy language the Respondents seize upon is contained within the legislative intent but is not part of the specific description of duty. Therefore, this Court will apply the duty as directed -- that the County

Commission shall cause ambulance service to be made available where it is not otherwise available.

8. As this Court has previously found, the Mathias-Baker Rescue Squad was forced, as a result of its fraudulent activity and accompanying penalty and fine, to cease operations of its rescue squad. The argument Respondents seem to advance is that they were enveloped in a constant state of emergency which would justify their violations of the OGPA which continued for months beginning in May 2013 and continuing throughout that summer and early fall.

9. The timeline of events simply does not support this assertion inasmuch as on November 20, 2011, it was brought to the attention of the Hardy County Commission that the Mathias-Baker Rescue Squad was having financial difficulties and approached the Hardy County Commission to request funding to remain solvent. The Hardy County Commission voted to provide the funds in the amount of \$300,000.00 to the Mathias-Baker Rescue Squad to keep it in operation. On October 9, 2012, the Hardy County Commission held an emergency meeting in response to the sudden closure of the Mathias-Baker Rescue Squad. At a meeting held on November 20, 2012, the Hardy County Commission created the Hardy County Emergency Ambulance Authority pursuant to W.Va. Code §7-17-4. *Trial Exhibit D12*, March 17, 2014. On May 1, 2013, the volunteer squad also called Mathias-Baker ceased to run calls because the creditors of the Mathias Baker Rescue Squad were foreclosing on the collateral. The vote to purchase the property and the actual purchase occurred on June 4, 2013. The imposition of the special emergency ambulance fee and the second affirmative building vote occurred on August 20, 2013. Accordingly, the Hardy County Commission was aware at least as early as November 20, 2011 that there were significant problems with the operation of the Mathias-Baker Rescue Squad.

10. During the pendency of this "emergency", ambulance service was being provided to all areas of Hardy County. On May 21, 2013, Greg Greenwalt, HCEAA vice-president appeared before the Hardy County Commission and advised the commissioners that ambulance service had not been interrupted. *Trial Exhibit D20A*, March 17, 2014. During the trial of this matter, HCEAA President Jerry Moore (who served as president of the HCEAA during the alleged emergency time period) likewise confirmed that ambulance service remained available in Hardy County, specifically the question was propounded: "In fact, there has never been a sensation [sic] (cessation) of ambulance service in Hardy County even after Mathias Baker Rescue Squad went under, has it?" Mr. Moore responded "Not to my knowledge." *Jerry Moore Testimony, Trial Transcript Day II*, p. 105, lns. 13-16 (March 18, 2014). Furthermore, it would appear that the Mathias-Baker Fire Department had contacted both the County Commission and the HCEAA for some financial assistance in completing its state requirements to obtain a license to operate an EMS service in the Mathias-Baker area—said requests were ignored. *Jerry Moore Testimony, Trial Transcript Day II*, p. 109, lns. 16-23 (March 18, 2014). Instead the County Commission, through the HCEAA was in competition to establish an ambulance service to compete with Mathias-Baker Fire Company's ambulance endeavor. *Jerry Moore Testimony, Trial Transcript Day II*, p. 109, ln. 24 and p. 110 lns. 1-5 (March 18, 2014).

11. As for the affidavit of attorney fees submitted by the Petitioners, the Court is of the opinion that these fees are justified in this case. The original petition was filed November 4, 2013 and assigned case number 13-C-76. On November 21, 2013, a three judge panel was assigned to hear the Petition by the West Virginia Supreme Court of Appeals. On December 9, 2013, the Respondents filed a *Motion to bifurcate*¹ the issues for trial. The matter was scheduled

¹ This Court has previously misidentified the Petitioners as having filed this motion in the Final Order of August 8, 2014. Said designation was in error.

for a three day trial before the three judge panel which commenced on March 17, 2014. On the first day of the trial, the three-judge panel announced from the bench that it was granting the Respondents' *Motion to Bifurcate* and directed that the non-impeachment issues be identified as a separate civil action (14-C-17). At the conclusion of the proceedings in case number 13-C-76, the remaining issues in case number 14-C-17 were assigned to the Honorable Andrew N. Frye, Jr., Senior Status Judge, for decision. Subsequently, Petitioners moved the Court to proceed with the remaining issues utilizing the testimony and exhibits introduced during the three day trial before the three judge panel. Respondents did not object to this Motion and same was granted and the decision in this matter was based upon the existing record from case number 13-C-76 (with the addition of Petitioners' exhibits 34-46 which were admitted into evidence without Respondents' objection).

12. The statute allows for the award of fees and expenses incurred by the prevailing party in litigating a violation of the OGPA. The Respondents complain that the fees charged are for both the three-judge panel and for the proceedings under the meeting violations. However, the procedural history clearly shows that both the Petitioners and Respondents had to prepare their individual cases for the entirety of the petition inasmuch as the three-judge panel did not direct the bifurcation until the morning of trial. As further proof of the level of comingled preparation – the record made before the three judge panel was sufficient to make the requisite determinations needed for the remaining issues in the matter. Additionally, the Respondents did not object to the Petitioners request to proceed on the evidentiary record made during the trial in resolving the remaining issues. Therefore, the Petitioners are not foreclosed from an award of attorney fees simply because the same record was utilized in two different decisions.

13. Finally, the Respondents argued throughout the hearing that the award of attorney fees is based upon a finding by this Court that the County Commission intentionally violated the OGPA. Respondents extensively referenced the Peters v. County Com'n of Wood County, 205 W.Va. 481, 519 S.E. 2d 179 (1999), case as the standard this Court should apply in its determination of attorney fees. The Court has reviewed the Peters decision both prior to and after the hearing and find absolutely no requirement in Peters that an intention to violate the OGPA must be shown in order for the Petitioners to recover attorney fees. Peters deals with the OGPA and its relation to attorney-client privilege. The repeated misrepresentation of the holding in this decision and its accompanying questioning of witnesses was not well received by the Court.

14. Other than a generalized objection to the Affidavit for Attorney Fees, the Respondents have made no specific challenges to any charged amount. Therefore the Court does award unto the Petitioners attorney fees in the amount of \$112,000.00.

• *Respondents' Motion to Amend and Correct Prior Filing*

15. On August 18, 2014, Respondents filed a *Motion to Alter or Amend* the final Order dated August 8, 2014. Within said *Motion* was an attachment denoted as Exhibit B which purported to show the County Commission's compliance with its own rules for conducting meetings. However, this document was, in actuality, a draft of new rules that had yet to be approved by the Hardy County Commission. In this Court's Order denying the Motion, the Court pointed out the error. Subsequently, Respondents filed a *Motion to Amend and Correct Prior Filing* to replace Exhibit B with the correct document.

16. In its Motion, the Respondents rehash numerous arguments that have already been reviewed by the Court and request that the corrected exhibit be included in the file.

17. The Court will allow the correct exhibit to be included in the record, but will not give the Respondents a second bite at the apple with a detailed response to the Motion.

• *Respondents' Motion to Join the Capon Valley Bank and Jack Walters, as Trustee of the Capon Valley Bank*

18. In its post-trial motions, Respondents have maintained that this matter was flawed from the beginning inasmuch as the Petitioners did not join the Capon Valley Bank or the Trustee under the Deed of Trust securing the Baker building, Jack Walters. In light of the Respondents' repeated call for joinder of these parties, the Court directed that the Respondents file a motion to join whomever they desired for the Court to consider.

19. Rule 19(a) of the West Virginia Rules of Civil Procedure "requires two general inquiries for joinder of a person who is subject to service of process. First, is his presence necessary to give complete relief to those already parties? Second, does he have a claim that, if he is not joined, will be impaired or will his nonjoinder result in subjecting the existing parties to a substantial risk of multiple or inconsistent obligations?" Syl. pt. 1 (in part), Wachter v. Dosert, 172 W.Va. 93, 303 S.E.2d 731(1983). Furthermore, it has been held that "[I]t is a misapplication of Rule 19(a) of the West Virginia Rules of Civil Procedure to add parties who are neither necessary nor indispensable, who are not essential for just adjudication, and who have a separate cause of action entirely." Syl. pt. 2, Glover v. Narick, 184 W.Va. 381, 400 S.E.2d 816 (1990) (overruled on other grounds by State ex rel Packard v. Perry, 221 W.Va. 526, 655 S.E.2d 548 (2007)).

20. Upon review of the *Motion to Join*, the Court finds that the Capon Valley Bank and Jack Walters are not indispensable parties to the present action. This Court has already decided the issues between the Petitioners and Respondents as they related to the matters raised in the Complaint. The determination as to whether the Respondents violated the OGPA and

statutory meeting notice requirements did not require either the Capon Valley Bank or Mr. Walter's participation in the litigation.

21. While this Court recognizes that the Respondents planned to try to hold a meeting that complied with the OGPA and reaffirm the purchase of the Baker building, this Court specifically finds that this option is not viable inasmuch as the original process was so fundamentally and procedurally flawed that nothing short of starting the process completely over would satisfy the requirements of the OGPA and the holding in McComas v. Board of Education of Fayette County, 197 W.Va. 188, 475 S.E.2d 280 (1996). In McComas, the West Virginia Supreme Court of Appeals directed the Fayette County Board of Education to restart the entire statutorily mandated school consolidation process based upon one private meeting held between the superintendent and a quorum of board of education members to discuss the consolidation of schools one day prior to a public meeting wherein the vote was made to consolidate the schools. From this *single* violation of the OGPA, Justice Cleckley, observed that "those facts—seriousness of the violation, intent, and possible effects—to be the most important considerations in fashioning an appropriate remedy and, in this case, their combination means any corrective action would have to be of a very significant nature. It may well be that nothing short of starting the entire process over could have provided an adequate cure." McComas, 197 W.Va. at 202, 475 S.E.2d at 294.

22. In the *Final Order* dated August 8, 2014, this Court specifically enumerated *eight significant violations* of the OGPA – some of which represented singular violations of the OGPA while others were chronic in nature. The Court will not recount all the violations previously found by this Court, suffice it to say, the violations found were far more serious and chronic than the single violation noted in McComas. Therefore, the Respondents' contention

that somehow merely conducting a legal meeting and voting to confirm the building purchase and the enactment of a fee shows that the Respondents have yet to comprehend that the pattern of behavior that the Respondents engaged in prior to the purchase of the building and the enactment of the fee were serious violations of the OGPA and the statutory requirements of W.Va. Code §7-1-2 and same cannot be easily dismissed or perfunctorily affirmed by a simple vote.

23. As for the involvement of the Capon Valley Bank and Mr. Walters, the Respondents' violations of the OGPA and their nonconformity with W.Va. Code §7-1-2 were matters between the Respondents' and the citizens of Hardy County (as were advanced by the Petitioners). The Respondents' insistence that the Petitioners could not litigate the issue without joining these parties is without merit. Petitioners were able to litigate the entire issue without either party being joined. It is not, and should not, be up to citizens to litigate issues that exist between the Respondents, Capon Valley Bank, and Mr. Walters. Respondents have had the option and opportunity to join these parties from the inception of the litigation and have chosen not to do so.

24. The Court would also note that the Capon Valley Bank was certainly on notice of all issues existing between the parties and did not seek intervene in the matter either. In fact, the Court would note that the CEO of Capon Valley Bank, Alan Brill, was a witness called by the Petitioners and testified under cross-examination that the Bank "did not want the bank's name involved ..." and "didn't want the bank's name tied to it [the lawsuit] in any way, shape, or form". *Alan Brill Testimony, Trial Transcript Day II*, p. 73, lns 23-24, p. 74, lns.4-5, (March 18, 2014).

25. Accordingly, this Court finds that the Capon Valley Bank and Mr. Walters were not indispensable parties to the litigation, never sought to intervene in this matter, and have separate causes of action entirely from the violations of the OGPA and the lack of notice under W.Va. Code §7-1-2 which were the issues litigated between the Petitioners and Respondents.

• *Motion of Wendy Miller to Withdraw as Party Petitioner*

26. The Motion of Petitioner Wendy Miller to withdraw as a Petitioner in this matter is GRANTED.

• *Petitioners' Motion for Injunctive Relief*

27. The Petitioners have requested that a permanent injunction issue to prevent the Respondents from re-establishing the special emergency ambulance fee. The Respondents have opposed this *Motion*.

28. The Respondents have asserted that the fee is necessary under W.Va. Code §7-15-4 inasmuch as the Respondents are required to provide adequate ambulance service to everyone in Hardy County. Respondents have alleged that the current situation in the county is not adequate, as testified to by Greg Greenwalt, President of the HCEAA. The Court would note for the record that Mr. Greenwalt is serving on the HCEAA as a Hardy County Commission appointee and has no experience in emergency services beyond what he has gained in his time as a HCEAA member from 2012 to the present. Mr. Greenwalt testified that two volunteer ambulance services cover the eastern portion of Hardy County -- namely Wardensville Rescue Squad and Mathias Baker Volunteer Fire Department. These two ambulance agencies are both in service and licensed by the State of West Virginia to provide ambulance service. Between these two agencies there are five ambulances operable to cover the eastern portion of the county. These services also have mutual aid agreements to assist in providing coverage. Mr. Greenwalt

was not able to provide more information about these services because neither group provides information to the HCEAA.

29. Conversely, Mr. Greenwalt testified that the HCEAA has 2-3 paramedics in its employ, owns two ambulances that it does not run on emergency calls, and has yet to begin providing any training to certify additional drivers or emergency medical technicians (EMTs). Currently any training initiatives have been spearheaded by either Wardensville or Fraley's Ambulance Service (the entity that serves the western portion of the county). As for the Baker Building, it currently serves as the duty station for one paramedic on a shift, serves as a garage for the two ambulances when not on loan to other ambulance agencies, and also houses the two chase vehicles that are available for the paramedic on duty to use.

30. Mr. Greenwalt likewise presented a projected budget for the HCEAA which was prepared on March 12, 2014 which showed the proposed distribution of the special emergency ambulance service fee should same be made available to the HCEAA. It would appear that for a total budget of \$928,500.00, the HCEAA would only be able to employ three or possibly four paramedics and a director; would not hire EMTs or drivers; would not run its own ambulances; and would spend \$75,000.00 on utilities at the Baker Building. The proposed budget also indicates that the HCEAA intended to compensate the volunteer rescue squads at a rate of \$100.00 per call. However, \$708,500.00 of the emergency ambulance service fee was budgeted solely to the HCEAA for its personnel and overhead at the Baker Building.

31. This issue of "adequate" emergency ambulance service has been put forward by the Respondents on a number of fronts; however, this Court finds that the Respondents' reliance on the legislative section's preamble to be misplaced in the face of a clear directive outlining what the county commission *actually* has a duty to provide. W.Va. Code §7-15-4 states that a

county commission "shall cause emergency ambulance service to be made available to all the residents of the county where such service is not otherwise available". The duty is further qualified under this section to state that the "article shall not be construed in such manner as to impose a duty to cause such emergency ambulance service to be provided unless the commission shall make an affirmative determination that there are funds available therefor by inclusion of a projected expenditure for such purpose in the current levy estimate." If the funds are available then the "commission shall not be under a duty to cause such service to be provided beyond a level commensurate with the amount of funds actually available for such purpose."

32. The Respondents' adequacy argument is not well taken. This Court is satisfied from the testimony that the three ambulance services in Hardy County – Wardensville, Mathias-Baker Fire Department, and Fraley's are fully licensed providers by the State of West Virginia. The Court has reviewed the requirements for licensure from the West Virginia Department of Health and Human Services Bureau of Public Health Office of Emergency Medical Services as contained in W.Va. CSR §64-48-4 and takes judicial notice that these ambulance services are subject to State oversight and inspection regarding numerous issues which impact the quality of service the ambulance companies provide. Specifically, the Court would note that W.Va. CSR §64-48-4.17 requires the following with respect to ambulance response:

Availability. — EMS agencies shall ensure that service for which they are licensed is available to the public or population served within their regular operating area on a twenty-four (24) hour continuous basis either by providing the service themselves or by written agreement with another licensed EMS agency.

Therefore, it would appear that the Respondents' complaints regarding the inadequacy of response of these volunteer units would be better directed towards the licensing agency for a thorough investigation rather than to this Court in Respondents' motions. The Office of

Emergency Services is far more qualified than the Circuit Court of Hardy County to make determinations on the appropriateness and adequacy of ambulance service -- if the Office of Emergency Services has granted a license to these agencies then the Court has no reason to believe that they are not in compliance with W.Va. CSR §64-48-4, et seq.

33. Inasmuch as Mr. Greenwalt testified that both volunteer ambulance providers on the eastern side of Hardy County -- Wardensville and Mathias-Baker Fire Department - are licensed by the State of West Virginia and in service, the Court finds no reason to declare the rescue squad's response to be inadequate and finds it rather disturbing that the HCEAA has such a negative view of the volunteers who are providing ambulance service in Hardy County.

34. This Court recognizes that "[t]he county court is a corporation created by statute, and possessed only of such powers as are expressly conferred by the Constitution and Legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given. It can do only such things as are authorized by law, and in the mode prescribed." Syl. pt. 3, Barbor v. County Court of Mercer County, 85 W.Va. 359, 101 S.E. 721 (1920). Having dispensed with the adequacy argument and with the referenced legal backdrop, it is important to break down what is actually statutorily required of the Hardy County Commission. The plain language of W.Va. Code §7-15-4 requires the county commission to cause emergency ambulance service to be made available to all the residents of the county where such service is not otherwise available. By testimony from Respondents' witness Greenwalt, it is clear that state-licensed ambulance service is presently available throughout Hardy County. Therefore, under the statute, the Hardy County Commission is not presently required to do anything with respect to ambulance service.

35. In the event that ambulance service was not "otherwise available" to all residents of Hardy County, the Hardy County Commission is only obligated to provide ambulance service if it makes an affirmative determination that there are funds available in the levy estimate for that service but the Hardy County Commission is not obligated to provide emergency ambulance service beyond a level commensurate with the funds actually available for such purpose.

36. A review of the levy estimates and projected budget for the Hardy County Commission in fiscal year 2012-2013 indicates that \$9,000 was budgeted for the Ambulance Authority. Fiscal year 2013-2014 indicates that \$6,935.00 was set aside for the HCEAA. Fiscal year 2014-2015 makes absolutely no mention of HCEAA funding which might be available from the county. *Petitioners' Exhibit 1-3* (September 29, 2014).

37. Having found that three licensed ambulance services are providing emergency ambulance service for Hardy County, the Court finds that there exists no affirmative duty under W.Va. Code §7-15-4 for the Hardy County Commission to establish its own ambulance service to compete with the efforts already in place. Furthermore, the Court would find that the budget of the Hardy County Commission for the prior three fiscal years have allotted only \$15,935.00 to the HCEAA. Under the statute—there is no duty for the Hardy County Commission to provide ambulance service in excess of the budgeted amount.

38. As for the correlation between W.Va. Code §7-15-4 and §7-15-17, this Court, having found that the Hardy County Commission has no duty to provide ambulance service inasmuch as same is available, does likewise find that the imposition of a special emergency ambulance service fee cannot not be allowed. The power to impose the fee in W. Va. Code §7-15-17 is derived from the duty to provide ambulance service in W.Va. Code §7-15-4. Inasmuch as emergency ambulance service is otherwise available throughout Hardy County, any

imposition of a special emergency ambulance fee by Hardy County Commission is an improper use of the power delegated to the Hardy County Commission in W.Va. Code §7-15-4.

39. Finally, upon review of the proposed budget of the HCEAA dated March 12, 2014, it would appear that this budget includes expenses for maintenance and upkeep at the Baker Building. However, from the trial testimony, it is apparent that the Baker Building will be utilized for dinners, fundraisers, weddings, anniversaries, a polling place, and a potential location for the Baker library. *J. Michael Teets Testimony, Trial Transcript Day III*, p. 130, ln. 24, p. 131, lns. 1-10 (March 19, 2014). These uses of the Baker Building while the maintenance, insurance, and upkeep are proposed to be paid out of the special emergency ambulance fee, constitute a use of fee funds which violates the limited uses for fee funds under W.Va. Code §7-15-17 inasmuch as these uses of the building are not "providing emergency ambulance service to the residents of the county". *Id.* In light of these anticipated uses, the fee appears to be a tax which has not been approved by Hardy County voters.

• *Re-payment of County Funds*

40. This Court has previously voided both the purchase of the Baker Building and the ordinance as a result of violations of the OGPA and W.Va. Code §7-1-2. While the fees have been substantially refunded to those individuals who paid, the coffers of Hardy County – and more specifically the Courthouse improvement fund - are still short \$1,130,000.00.

41. Turning to the issue of repayment, it would appear that inasmuch as the Hardy County Commissioners who approved the purchase of the building did so at a meeting of the Hardy County Commission wherein they lacked jurisdiction based upon a failure of statutory notice, then the individual commissioners who voted to approve the purchase, namely individual

Respondents Teets and Keplinger, are liable to Hardy County for the funds improperly expended.

42. In a prior decision dealing with personal liability of county commissioners for unlawful expenditures, the West Virginia Supreme Court of appeals held that "[t]he members of a county court who participate in making such unlawful allowances...are individually liable therefor, jointly and severally. Syl. pt. 2, County Ct. of Tyler County v. Duty, 77 W.Va. 17, 87 S.E. 256 (1915). In the Duty case, the county commissioners approved numerous payments that they were not authorized to make. Finding a lack of jurisdiction to make these payments, the court directed repayment reasoning that "[i]t is no defense to the action that the parties to the unlawful payment may have been mistaken as to the law, and may have acted without any corrupt design. Their liability does not depend upon a criminal intent, but rests upon lack of jurisdiction, or want of express authority in law, to make the payments. Ignorance of the law does not excuse." Duty, 17 W.Va. at 78, 87 S.E. at 257.

43. In this case, Commissioners Teets and Keplinger voted to purchase the Baker Building at a meeting that was improperly noticed. The lack of proper notice was not merely a violation of the OGPA, but also a violation of W.Va. Code §7-1-2. The case law is clear that the requirements of W.Va. Code §7-1-2 are jurisdictional. The jurisdictional defect committed made the expenditure of funds unlawful. Accordingly, the imposition of joint and several liability upon the members voting in the affirmative for this unlawful expenditure is appropriate.

44. The entry of a judgment against Respondents Teets and Keplinger and in favor of the Respondent Hardy County Commission creates a conflict situation as this case proceeds forward to judgment execution. This Court has been somewhat concerned given the tenor of the Respondents' filings that Respondents Teets and Keplinger view their personal interests in this

matter as one in the same as Respondent Hardy County Commission. This Court specifically references the lengthy emotional argument contained in the *Reply to Response of Petitioners to Hardy County Commission's Motion to Alter or Amend the Final Order*, wherein Respondents' counsel requested that this Court "reprimand the Petitioners and specifically counsel, J. David Judy, III for this public disrespect, which is not necessary ... and completely out of place in the legal setting" and admonishing this Court that "[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials." *Reply*, p. 5 (August 21, 2014). This Court would note that it has observed no disrespectful argument from the Petitioners which would warrant any sort of admonishment. The Court does note that Respondents' counsel would be well-served to follow her own good advice in showing respect to the Court inasmuch as two paragraphs later, Ms. Cohee scolds the Court because: "[t]he draconian language in the Final Order perpetuates this negative view of Commissioners, which is not warranted and should be altered and amended ...". *Reply*, p. 6 (August 21, 2014).

45. The Court finds no need to revisit its use of established case law, regardless of when the case was decided.

46. The Court is further troubled after a review of Ms. Cohee's itemized statement of legal services wherein it would appear that she routinely discussed case strategy and information with only Respondent Commissioners Teets and Keplinger and failed to include Commissioner Wade² in any meeting about the case³ until August 19, 2014 -- 9 days after the entry of this Court's *Final Order*.

47. With this backdrop, it does appear that the interests of the Hardy County Commission, as an institution, are in need of representation -- particularly as it relates to the

² The Court would note that it appears Counsel spent time calling members of the bar regarding the appointment of this Senior Status Judge as well as communicating with a local legal prognosticator.

³ The billing cycles entered into evidence date from May 13, 2014 to August 29, 2014.

immediate appeal of this matter wherein Respondent Commissioners are attempting to have the judgment rendered against them in favor of Co-Respondent Hardy County Commission overturned.

• *Respondent's Motion for Stay*

48. Subsequent to the issuance of this Court's ruling from the bench, Respondents filed a Motion for Stay of the August 8, 2014 *Final Order*, the August 29, 2014 *Order Granting Temporary Injunction*, and the present Order which granted a judgment against Respondents Teets and Keplinger. The Court has reviewed the *Response* and *Reply*.

49. The Court is extremely troubled by what appears to be an effort by Commissioner Teets to dispose of his personal assets in anticipation of an adverse ruling. While the status of these transfers will be litigated another day, it is obvious that these land transfers, much like this entire episode in Hardy County history, quite simply stink.

50. Furthermore, Commissioners Teets and Keplinger have demonstrated to this Court that they are not inclined to follow the Orders of this Court, specifically, the Commissioners refused to issue the refunds as directed in the August 8, 2014 Order, same only issuing after this Court's Show Cause Order entered on August 29, 2014.

51. This Court will not stay its August 8, 2014 or August 29, 2014 Order. The Court will stay the execution of the judgment for 60 days and will consider an extension of same on the basis of a good faith effort being made by said judgment debtors to secure repayment of the debt either through their performance bonds or through other meritorious means. Any extension of the stay will require bond to be posted.

ACCORDINGLY, it is hereby ORDERED:

1. The Court declines to hold Respondents in Contempt for their delayed issuance of the refund checks.

2. The Petitioners' *Motion for Attorney Fees* is GRANTED. Judgment is rendered in favor of the Petitioners and against the Hardy County Commission for attorney fees in this matter in the amount of One Hundred Twelve Thousand Dollars (\$112,000.00), plus interest at a rate of 7% per annum. The Hardy County Commission is hereby directed to pay this sum directly to counsel for the Petitioners, J. David Judy, III, Attorney at Law.

3. Respondents' *Motion to Amend and Correct Prior Filing* is GRANTED to allow the correction of record and DENIED with respect to matters previously decided.

4. Respondents' *Motion to Join the Capon Valley Bank and Jack Walters, as Trustee of the Capon Valley Bank* is DENIED.

5. *Motion of Wendy Miller to Withdraw as Party Petitioner* is GRANTED.

6. Petitioners' *Motion for Injunctive Relief* is GRANTED. The injunction shall remain in place regarding the ordinance unless and until ambulance service is not otherwise available to all residents of Hardy County.

7. Judgment is rendered against J. Michael Teets and William J. R. Keplinger, jointly and severally, and in favor of the Hardy County Commission in the amount of One Million, One Hundred Thirty Thousand Dollars (\$1,130,000.00) plus interest at a rate of seven percent (7%) per annum.

8. J. Michael Teets and William J.R. Keplinger are further Ordered not to dispose of or transfer any assets until the judgment is satisfied in full. The bonding company for Commissioner Teets and Keplinger shall be notified of the judgment rendered against the Commissioners.

9. In light of the conflict now existing between the Respondents and their Counsel, the Court directs the Hardy County Prosecuting Attorney, Lucas See, to perform his duty and protect the interest of the Hardy County Commission in this and any future proceedings regarding this matter.

10. Respondents Teets and Keplingers' Motion for Stay is GRANTED, in part, and DENIED, in part. A stay of execution on the judgment will issue as hereinbefore authorized. All prior Orders will remain in full force and effect.

11. Objections to any adverse rulings of this Court are SAVED.

12. The Circuit Clerk shall provide a copy of this Order to all Counsel of Record, to Lucas See, and to the bonding company for the County Commission. The Circuit Clerk shall likewise provide an attest copy of this Order to the Clerk of the Hardy County Commission for entry into the Police and Fiscal Order Book.

13. Nothing remaining to be done in this matter, it shall be removed from the docket and placed among the actions ended.

ENTERED this 10th day of October 2014.


JUDGE