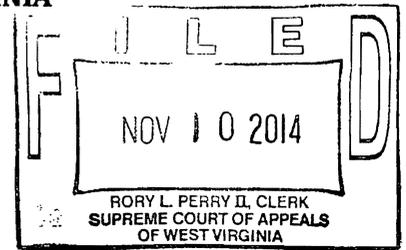


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



HERMAN TRACY FRENCH ON HIS OWN  
BEHALF AND IN BEHALF OF OTHER  
SIMILARLY SITUATED,

PETITIONER,

vs.) No. 14-0790

THE MERCER COUNTY COMMISSION AND  
MERCER COUNTY E-911

RESPONDENTS.

**PETITIONER'S BRIEF**

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## **ASSIGNMENT OF ERROR**

The Circuit Court erred in granting summary judgment on behalf of Respondents by ruling that they were not required to publish any notice of any meetings of Mercer County E-911 advisory board ever, pursuant to W.Va. Code Section 6-9A-1et. seq., after the County Commission published notice of its initial meeting which established the governing body of Mercer County E-911.

## **STATEMENT OF THE CASE**

Petitioner filed this action in the Mercer County Circuit Court pursuant to W.Va. Code Section 6-9A-6 of the Open Governmental Proceedings Act, commonly referred to as the “sunshine law”, against Respondents. His Complaint was that Mercer County E-911 (herein forth referred to as “E-911”) changed his mailing address as well as others without notice to him and the public of its meetings and without opportunity to be heard; deciding to make such changes, and that the address change adversely affected delivery of mail, his insurance rates, identity papers (drivers license, for example), and possible his credit rating. And further, that the renumbering was unnecessary considering technology available.

Respondents admitted that no notice was published of any meetings with regard to E-911 actions changing addresses for county residents; but stated E-911 was not a “governing body”, making “decisions” as defined in W.Va. Code Section 6-9A-2 (1) and (4). Therefore, their argument was once the County Commission created E-911, that entity was mandated to carry out the powers of the County Commission regarding streets and highways in implementing an enhanced emergency telephone system pursuant to W.Va. Code Section 24-6-6, without any public notice.

The Court below ruled in favor of Respondents on cross-motions for summary judgment and dismissed the complaint.

## **SUMMARY OF ARGUMENT**

There is no dispute of fact that E-911 never gave public notice of any meeting pursuant to the “sunshine law” from its inception, 1996 through 2014; except for when a building was purchased and vehicles were purchased, they advertised for bids.

E-911 is a “public agency” whose “governing body” made a “decision” at a “meeting” or meetings to take an “official action” that adversely affected Petitioner; as defined by W.Va. Code Section 6-9A-2. The Court’s decision violates the intent and purpose of the “sunshine law” as expressed in W.Va. Code Section 6-A-1.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is requested pursuant to Rule 19 (a) (4).

## **LAW AND ARGUMENT**

The Open Governmental Proceedings law states: “Open government allows the public to educate itself about government decision making through individuals’ attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated with the government. Public access to information promotes attendance at meeting, 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 Section 6-9A-1.

E-911 is a “public agency” as defined by W.Va. Code Section 6-9A-2 (7); as an agency or subunit of the County Commission. Its “Advisory Board” is the “governing body” as defined by W.Va. Code Section 6-9A-2 (4) that makes “decisions for or recommendations to a public agency”. Of course it is indisputable that the Mercer County Commission is a governing body of a public agency.

E-911 actions to renumber street addresses were “decisions” as defined in W.Va. Code Section 6-9A-2 (1), to take “official action” by “virtue of power granted by law”. Although the law implemented is codified by W.Va. Code Section 7-1-3cc, the argument of Respondents and the Court below’s ruling would mean that no subsidiary of an executive authority need ever give public notice of any meeting affecting citizens of West Virginia.

The holding that only a notice by the County Commission of its creating an E-911 system and giving all authority to its “Advisory Board” to do what it will, essentially says a state “officer” can delegate its powers to a subsidiary that can act without regard to the sunshine law. Appointed members of a Board such as E-911 are required to be informed of the sunshine law pursuant to W.Va. Code Section 6-9A-12.

It also should be noted that open meetings regulations exist for entities from Banking and Financial Institutions, Economic Development, Environment, Health, Education, Housing, Hospitals, Nurses, Lottery, Parkways, Racing, Regional Jail, State Park Authority, Vocational Rehabilitation to water, but none have ever been promulgated for E-911 Boards or for County Commissions. Yet 911 services are more personal to all citizens than many of these agencies, and the law does not on its face apply only to State-level governances, and the County Commission does post notice of all its meetings.

As stated the sunshine law includes in its mandate subdivisions that are empowered to make “decisions for or recommendations to a public agency” W.Va. Code Section 6-9A-2(4). It is undisputed that E-911 acted to make decisions for the County Commission, who regularly posts “sunshine law” notices of meetings (see e.g. Deposition of Bobby Hoge, Exhibit to Appendix page 23-24).

On the record it was undisputed that the County Commission never had a meeting about E-911 or its decisions after the initial meeting creating the Advisory Board of E-911, even though the E-911 law says an Advisory Board “shall adopt such policies, rules, and regulations as an necessary for its own guidance” and “The Board may make recommendations to the county or municipality concerning the operation of the system” (W.Va. Code Section 26-6-5(h)). Nothing of the kind ever occurred, and

according to E-911's argument below E-911 never made any "decisions" or took any actions. Ones supposes the whole thing just miraculously happened without anybody doing anything, like arbitrary renumbering street addresses and telling the Post Office to make changes.

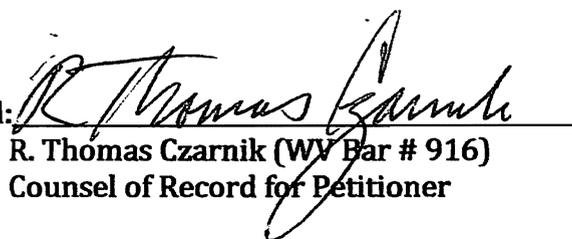
The limited exceptions to posting notice of meetings are enumerated in W.Va. Code 6-9A-4 and none apply to this case. Any action taken in violation of the "sunshine law" is voidable, W.Va. Code Section 6-9A-6. There is little case law on the sunshine law. Peters vs. County Commission, 209 W.Va. 94, 543 SE2d 651 (2000). Appalachian Power Company vs. Public Service Commission, 162 W.Va. 839, 253 SE2d 377 1979). (Internal meetings with staff don't require public notice); McComas vs. Board of Education, 197 W.Va. 188, 475 SE2d 280 (1996) (Assemblies where discussions leading up to a decision take place, are subject to the "sunshine law". The law should be applied to effect its fundamental purpose as set forth in Article 1).

#### **CONCLUSION**

The Court below erred in its ruling, and should have granted Summary Judgment to Petitioner. The decision should be reversed and be remanded for hearing regarding remedies, as suggested by McComas, supra.

Respectfully submitted.

Signed:

  
R. Thomas Czarnik (WV Bar # 916)  
Counsel of Record for Petitioner

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of November, 2014, true and accurate copies of the foregoing Petitioner's Brief were hand-delivered to the addressed counsel for all other parties to this appeal as follows:

Robert Holroyd  
1438 E. Main St.  
Princeton, WV 24740

Signed:   
R. Thomas Czarnik (WV Bar # 916)  
Counsel of Record for Petitioner