

No. 35272 – *State of West Virginia ex rel. Marshall County Comm., et al. v. Phyllis H. Carter, Admin. Law Judge*

**FILED**

**January 29, 2010**

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RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Ketchum, J., dissenting:

I respectfully dissent from the majority opinion, because I believe that governmental bodies cannot operate effectively if their executive session (closed session) discussions are subject to lawsuits. The majority opinion essentially eviscerates a governing body's ability to freely discuss anything – no matter how embarrassing it might be to a public employee – behind closed doors.

The Legislature allows governing bodies to go into closed session only in a few specifically described instances. The purpose for allowing these severely limited closed sessions is to allow the Government to function properly in a few delicate areas, such as to discuss employment questions that might be embarrassing to an employee. The few exceptions to open meetings permit the public to observe and participate in their government's decision making, but allow closed sessions on delicate matters. *W.Va. Code*, 6-9a-1 [1999].

Prior to 1999, the West Virginia Open Meetings Act implied that minutes of closed sessions were required. The Act, when amended in 1999, made plain that executive session minutes, "if any are taken," are not available for inspection. *W.Va. Code*, 6-9a-5

[1999]. If the Legislature intended to make the discussions in executive session subject to lawsuits, it would have required minutes or recordings of the executive sessions of governing bodies.

It must be remembered that no vote or action can be taken in executive session. *W.Va. Code*, 6-9a-4(a) [1999]. Any vote on a matter considered in executive session must be taken later in the public meeting. This allows for public discussion on the matter by any member of the governing body.

In addition, I believe that the plaintiff is statutorily estopped from discovering the discussions that took place in executive session. The plaintiff was seeking employment with the defendant. The meeting to discuss his employment was properly noticed to the public. *W.Va. Code*, 6-9a-4(b)(2)(A) allows a governing body to go into executive session to discuss the prospective employment of a prospective employee unless the prospective employee “requests an open meeting” on the subject. In other words, the affected prospective employee can prohibit an executive session to consider his or her employment. The plaintiff did not make this request and is equitably estopped from obtaining the executive session discussion, recording, or minutes in a lawsuit.

It is clear that West Virginia has a very expansive open meeting law that allows for public scrutiny of government decisions. A public body should be permitted to go into

executive session for the limited reasons specified in the Open Governmental Proceedings Act, without those private discussions being the subject of a lawsuit.

Accordingly, I dissent.