

NO. 35272

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

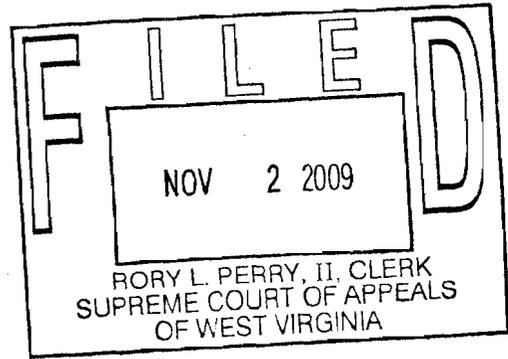
**MARSHALL COUNTY COMMISSION and
MARSHALL COUNTY COMMUNICATION 911,**

Petitioners,

v.

**JOHN R. BRIGGS and the WEST
VIRGINIA HUMAN RIGHTS COMMISSION,**

Respondents.



**RESPONSE OF THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
TO PETITION FOR WRIT OF PROHIBITION**

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**RESPONSE OF THE
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On October 13, 2009, the West Virginia Human Rights Commission received this Court's order issuing a rule to show cause why a writ of prohibition should not be ordered against the West Virginia Human Rights Commission and the administrative law judge assigned to the underlying human rights proceeding. Pursuant to Rule 14(d) of the Rules of Appellate Procedure, the West Virginia Human Rights Commission [hereinafter sometimes referred to as Commission] hereby submits the following Response in support of its contention that Chief Administrative Law Judge Phyllis H. Carter's discovery ruling is neither clearly erroneous as a matter of law nor an abuse of discretion.¹ The Commission respectfully requests that this Court refuse to issue the requested writ of prohibition.

¹On September 21, 2009, the West Virginia Human Rights Commission submitted an informal Response to the instant Petition at the request of this Court pursuant to Rule 14(b) of the Rules of Appellate Procedure. Inasmuch as no developments have occurred in the underlying proceeding since September 21, 2009, the instant Response is substantially similar to the Commission's original Response. The Commission incorporates herein by reference its original Response.

I. STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

The West Virginia Human Rights Commission is a legislatively-created state agency charged with the responsibility of seeking to eliminate discrimination in the State of West Virginia. W. Va. Code § 5-11-1 *et seq.* The Commission accepts, docketed and investigates allegations of employment, housing and public accommodation discrimination. Upon a finding of probable cause to credit a complainant's allegations of unlawful discrimination, the Commission is statutorily authorized to convene administrative public hearings to adjudicate such complaints. W. Va. Code §§ 5-11-8(d) and 5-11-10.

In April 2008, John R. Briggs contacted the West Virginia Human Rights Commission to initiate a Human Rights Commission investigation into the Petitioners' failure to hire him for either of two telecommunicator vacancies which he applied for and which were filled by the Marshall County Commission and Marshall County Communication 911 in February and March 2008. Mr. Briggs is a person with a disability within the meaning of the West Virginia Human Rights Act. It is undisputed that Mr. Briggs has a significant vision impairment. Mr. Briggs contends that Petitioners engaged in unlawful discriminatory practices in violation of the West Virginia Human Rights Act by failing to hire him for either of these two telecommunicator positions because of his disability.

A. Petitioners' Hiring Process for Two Telecommunicator Vacancies

In late November and early December 2007, Marshall County Communication 911 solicited applications for two telecommunicator position vacancies. The print advertisement that 911 Director Larry Newell placed to announce the vacancies sought applicants who were citizens, in good physical and mental health, and who possessed good moral character.²

John R. Briggs made a timely application for the two telecommunicator vacancies, and provided all of the information requested as part of the application process. Mr. Briggs contends that he is qualified for the position of telecommunicator. In addition to meeting

²Petitioners published this solicitation in the local paper and provided a copy of the advertisement to the Commission during the discovery process.

the minimum requirements for the position, Mr. Briggs asserts that he has significant dispatching experience as well as related training and education. He previously worked for several years as a dispatcher for the Marshall County, West Virginia, cities of McMechen and Glen Dale.³ In addition, Mr. Briggs is an Association of Public Safety Communications Officials International, Inc. (APCO) certified dispatcher.⁴ While not required for the position, Mr. Briggs also possesses a bachelors of science degree in Criminal Justice from West Liberty State College.

On February 21, 2008, Petitioner Marshall County Communication 911 interviewed applicants for the telecommunicator positions. Director Larry Newell conducted these interviews with the assistance of Supervisor Rich Farley. Petitioners did not interview Mr. Briggs. Of the nine individuals Petitioners selected for interview, seven had no dispatching experience whatsoever.

On February 26, 2008, the Marshall County Commission held a special session meeting. At this meeting, among other items of business, the Marshall County Commission considered Mr. Newell's hiring recommendation of one of the applicants interviewed on February 21, 2008, for a telecommunicator position.⁵ The Marshall County Commission did not convene an executive session during this meeting. At this meeting, the Marshall County Commission approved Mr. Newell's hiring recommendation.

Petitioners conducted two additional interviews in association with the remaining telecommunicator vacancy. Petitioners invited Barbara Ware, an applicant who was initially

³McMechen and Glen Dale are West Virginia municipalities located in Marshall County, West Virginia. Until January 7, 2008, McMechen operated its own dispatch service for the town police, volunteer fire department, and water and municipal services. John Briggs was one of the persons employed by the City of McMechen as a dispatcher. In late 2007, McMechen elected to transfer dispatch responsibilities for its municipality to Marshall County Communication 911. It was during this period of time that Petitioners solicited telecommunicator applications and Mr. Briggs applied for these positions.

⁴Mr. Briggs completed the forty hour certification class and all of the associated requirements. APCO certification is not required to be hired as a telecommunicator by the Petitioners, but all new hires who have not completed the forty hour APCO course are sent for this training.

⁵The Marshall County Commission must approve hiring decisions for Marshall County Communication 911.

interviewed on February 21, 2008, back for a second interview. Petitioners also interviewed Mr. Briggs. These two interviews were conducted on March 5, 2008. Mr. Newell conducted these interviews with the assistance of Supervisors Nancy Gongola and Rich Farley.

The Marshall County Commission held a special session meeting on March 11, 2008. According to the minutes, the Marshall County Commission entered into executive session with Mr. Newell to discuss a "personnel matter."⁶ The minutes *do not* reflect that the Marshall County Commission entered executive session to discuss legal advice. Moreover, it is undisputed that Petitioners' counsel was *not* present for this meeting.

The March 11, 2008, meeting minutes reflect that once the meeting reentered open session, Mr. Newell recommended Barbara Ware for the remaining telecommunicator position. Exhibit A to Commission's September 21, 2009 Response, pp. 2-3. The Marshall County Commission approved Newell's recommendation. Mr. Briggs was advised by letter, dated March 11, 2008, that he had not been selected for hire by the Petitioners for the telecommunicator positions.

Mr. Briggs contends that the Petitioners' hiring decisions were based, at least in part, on impermissible consideration of his disability. Petitioners contend below that the successful applicants were better qualified than Mr. Briggs.

B. Procedural Posture Before the West Virginia Human Rights Commission

The Commission conducted an investigation into Mr. Briggs' complaint and determined that probable cause existed to credit Mr. Briggs' allegations of unlawful discrimination. Once the determination of probable cause was made, Mr. Briggs' complaint was assigned to an ALJ for adjudication pursuant to W. Va. Code § 5-11-10.

The West Virginia Human Rights Act authorizes the Commission to "[d]elegate to an administrative law judge who shall be an attorney, duly licensed to practice law in West

⁶A copy of the March 11, 2008, Marshall County Commission meeting minutes was attached as Exhibit A to the September 21, 2009, Response of the West Virginia Human Rights Commission to Petition for Writ of Prohibition and is incorporated herein by reference. The public meeting notice text, which is incorporated into the special session meeting minutes, indicated that the purpose of the meeting was to audit claims, to act upon rebates and to consider any other matters which could properly be brought before the Marshall County Commission at that time. See Exhibit A to September 21, 2009, Response.

Virginia, the power and authority to hold and conduct hearings. . .to determine all questions of fact and law presented during the hearing and to render a final decision on the merits of the complaint, subject to the review of the commission[.]” W. Va. Code § 5-11-8(d)(3). Mr. Briggs’ complaint was assigned to Chief Administrative Law Judge Phyllis H. Carter for adjudication. ALJ Carter entered an Order on November 24, 2008, setting the public hearing in this matter for June 9-10, 2009.⁷

During the discovery process, the Commission sought to discover the specifics regarding the substance of communications between 911 Director Larry Newell and the Marshall County Commission regarding Mr. Briggs and/or the telecommunicator hiring decisions. There is no dispute that these were proper areas of inquiry for discovery in a failure to hire case pursuant to the West Virginia Human Rights Act. The Commission sought specific details of these communications to probe the Petitioners’ motivation for the hiring decisions and to test Petitioners’ proffered explanations for not selecting Mr. Briggs.

The Commission propounded multiple interrogatories that sought information about the decisional process and the specific communications between Mr. Newell, his subordinate supervisors, and the Marshall County Commission. In response to these discovery requests, Petitioners produced a copy of the minutes from the March 11, 2008, meeting and acknowledged that conversations occurred between Mr. Newell and the Marshall County Commissioners. Otherwise, Petitioners did not provide any specific information concerning the substance of the communications between Mr. Newell and the Marshall County Commission regarding Mr. Briggs or the hiring decisions.

The Commission deposed 911 Director Larry Newell and sought to obtain directly from him specific information about the substance of his communications with the Marshall County Commission as they related to Mr. Briggs and the February and March 2008 telecommunicator hiring decisions. The Commission was unable to obtain any specific information concerning these communications from Mr. Newell in his deposition. At deposition, Mr. Newell testified that he could not remember what he discussed with the Marshall County Commission at the February 26, 2008, meeting where his hiring

⁷The public hearing in this matter has since been continued by the ALJ in light of the ongoing proceedings associated with her discovery ruling.

recommendation to fill the first telecommunicator position was approved.⁸ He had no specific recollection of the March 11, 2008, meeting where the Marshall County Commission approved the hiring of applicant Ware, and did not recall the substance of the discussion on that date.⁹ However, during the course of his deposition, Mr. Newell did disclose that he believed his communications with the Marshall County Commission about the hiring decisions were recorded and may still exist on audio tape.¹⁰ Prior to this

-
- ⁸ Q: Do you remember anything about your meeting with the Marshall County Commission, the meeting where you recommended Ms. Blake, do you remember anything that you discussed?
A: Nothing significant or out of the ordinary comes to mind.
Q: Does anything significant or ordinary come to mine?
A: No. No, I mean it just seemed the normal course.
Q: Do you recall any questions that you were asked by the Commission during that session?
A: That's where I'd have to check, you know, the files and -
Q: Where would you -
A: - from the Commission's files not from my files.

Deposition of Larry Newell, Vol. II, p. 175. See Exhibit A, p. 2.

- ⁹ Q: Do you recall the meeting where you made this recommendation to the County Commission?
A: Not specifically, no ma'am.
Q: Do you recall if there was any discussion of the relative merits of Ms. Ware versus Mr. Briggs in that meeting?
A: Without having the notes or the tape or - of what the Commission has, I do not recollect.

Deposition of Larry Newell, Vol. II, pp. 222-223. See Exhibit A, p. 3.

- ¹⁰ Q: When you went to the Commission meeting and recommended Ms. Blake for hire, did you discuss with them the manner in which you decided who to interview on February 21st?
A: I am not certain. I'd have to - - I mean I know they would quote stuff, you know, frequently for those interviews or those personnel part; it's different than their regular public record.
Q: Okay.
A: They keep it separate and I'd have to review it to see if there was anything but I don't offhand remember anything.

disclosure by Mr. Newell, the Commission was unaware of the existence of such a recording.

Thereafter, having been unsuccessful in obtaining specific information about the hiring decision communications and conversations between Director Newell and the Marshall County Commission either through written discovery or the deposition of Director Newell, the Commission sought to discover a copy of the March 11, 2008, recorded conversation from Petitioners. The Petitioners confirmed the existence of the audio recording, but objected to producing the recording. They assert that the recording is protected from discovery by the executive session privilege, the attorney-client privilege, the work product doctrine, and because the request seeks the thoughts and impressions of counsel for Petitioners. No privilege log was produced by the Petitioners and, at least initially, they did not provide any explanation of why they claimed the identified privileges applied to the March 11, 2008, recording.

On April 16, 2009, the Commission and Mr. Briggs filed a Motion to Compel the production of the March 11, 2008, recording. Petitioners opposed the Commission's Motion, reasserted their claims of privilege, and sought a Protective Order from the ALJ.

On May 11, 2009, Administrative Law Judge Carter conducted a telephonic hearing to consider pending discovery motions. During the hearing, she heard arguments from the parties regarding the Commission's motion to compel production of the March 11, 2008, recording and the Petitioners' response and request for protective order.

C. Administrative Law Judge Carter's Discovery Ruling

After considering the arguments of the parties, ALJ Carter concluded that the appropriate way to resolve the discovery dispute was to conduct an *in camera* review of

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- Q: So the Marshall County Commission records the personnel matters discussed in non-public sessions?
A: I think so but I'm not 100 percent certain. It'd have to be checked on.

Deposition of Larry Newell, Vol. II, pp. 173-174. See Exhibit A, p. 2.

the recording.¹¹ The ALJ directed the Petitioners to produce a copy of the audio recording by 5:00 p.m. on May 27, 2009. She further explained that the purpose of the *in camera* review “is to establish whether or not the recorded conversations, during which counsel for the Respondents [Petitioners] was not present, are either in whole or in part protected by a recognized privilege and therefore exempt from discovery.” *Order Providing for In Camera Review of Recordings in Dispute in Response to Commission’s Motion to Compel and Respondents’ Motion for Protective Order*, p. 5. After conducting an *in camera* review of the recording, ALJ Carter indicated that she would issue a further ruling advising the parties what, if any, portion of the recorded conversation would be subject to discovery.

While it is implicit in the ALJ’s ruling that she rejected the Petitioners’ interpretation of the Open Governmental Proceedings Act as barring all civil discovery, ALJ Carter took Petitioners’ claims of potential privilege very seriously. In her Order, the ALJ specifically noted the basis for the Petitioners’ claim of attorney-client privilege and the work product doctrine,¹² and acted to ensure that the claim of privilege would be given all due consideration. Moreover, the ALJ endeavored to ensure the confidentiality of the Petitioners’ executive session recording by ruling that even if she later decided that the

¹¹A copy of the ALJ’s Order is provided as Exhibit A to the Petition. It should be noted that the entry date of May 27, 2009, on the Order is erroneous. The Certificate of Service accompanying the Order, which is not provided as part of Petitioners’ Exhibit A, indicates that the Order was mailed to the parties on May 15, 2009.

¹²The ALJ noted that

Respondents [petitioners] contend that the record of the conversation is protected by the attorney-client privilege and the work product doctrine because Director Newell and Ms. Frohnapfel discussed legal advice about the hiring decisions with the Marshall County Commissioners in the closed session. Respondents assert that they contacted counsel and sought legal advice about the hiring decisions in anticipation of possible litigation. They further assert that the advice was obtained to avoid and/or prepare for possible litigation related to the outcome of the hiring process. No attorneys were directly involved in the session; however, because legal advice was discussed in the closed meeting, Respondents contend that the record of the meeting is protected by the attorney-client privilege and the work product doctrine.

Petitioners’ Exhibit A, p. 2.

recording, or portions of the recording, were not subject to a recognized privilege and therefore discoverable, any portions of the recording ultimately provided to the Commission “must be maintained in a confidential manner and may not be disclosed to any third party without the prior approval and permission of this tribunal.” *Order Providing for In Camera Review of Recordings in Dispute in Response to Commission’s Motion to Compel and Respondents’ Motion for Protective Order*, p. 5.

ALJ Carter’s discovery Order balances the interests of the parties and declines to grant the Commission the requested discovery until and unless an *in camera* review supports making the recording, or portions thereof, available. Her ruling is consistent with guidance previously offered by this Court and articulated in Syllabus Point 2 of State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 658 S.E.2d 728 (2008):

The general procedure involved with discovery of allegedly privileged documents is as follows: (1) the party seeking the documents must do so in accordance with the reasonable particularity requirement of Rule 34(b) of the West Virginia Rules of Civil Procedure; (2) if the responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege; (3) the privilege log should be provided to the requesting party and the trial court; and (4) if the party seeking documents for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court *must hold an in camera proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.*

Id. (emphasis supplied).

The instant Petition for Writ of Prohibition is Petitioners’ fourth attempt to challenge the ALJ’s discovery ruling.¹³ These intervening proceedings resulted in a continuance of the public hearing and a delay with regard to when Petitioners were required to provide the audio tape to the ALJ for *in camera* review. On August 13, 2009, after the various proceedings initiated by the Petitioners were resolved and/or dismissed, ALJ Carter issued

¹³For a detailed account of the legal proceedings initiated by the Petitioners in association with the ALJ’s discovery ruling, see the September 21, 2009, Response of the West Virginia Human Rights Commission to Petition for Writ of Prohibition, pp. 8-10.

a Revised Order requiring Petitioners to produce the March 11, 2008, recording no later than 5:00 p.m. on Friday, August 28, 2009. On that date, Petitioners filed the instant Petition before this Court.

II. STANDARD OF REVIEW

This Court has established a detailed standard of review for determining whether a writ of prohibition should be entertained. "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code 53-1-1." Syl. pt. 2, State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977). However, a writ of prohibition is an extraordinary remedy, to be granted in the rare circumstances where the narrow requirements are met.

We have previously cautioned that writs of prohibition provide a drastic remedy, and should be invoked only in extraordinary situations. See State ex rel. Frazier v. Hrko, 203 W. Va. 652, 657, 510 S.E.2d 486, 491 (1998) (citing State ex rel. Allen v. Bedell, 193 W. Va. 32, 36, 454 S.E.2d 77, 81 (1994) (Cleckley, J., concurring)). As a consequence, the prohibition remedy is tightly circumscribed.

Health Management, Inc. v. Lindell, 207 W. Va. 68, 72, 528 S.E.2d 762, 766 (1999).

Accordingly, this Court "uses considerable caution when called upon to issue a writ of prohibition[.]" State ex rel. Wausau Business Ins. Co. v. Madden, 216 W. Va. 776, 780, 613 S.E.2d 924, 928 (2005).

Petitioners do not claim that the ALJ lacked jurisdiction to rule on the discovery dispute below. Rather, they seek prohibition based upon a perceived "abuse of discretion." Petition for Writ of Prohibition, p. 7. Where, as here, the claim is not that the tribunal is without jurisdiction, but that it has exceeded its legitimate authority, the courts will not grant a writ of prohibition unless the tribunal's order is "clearly erroneous as a matter of law."

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way

that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Feathers v. W. Va. Board of Medicine, Syl. pt. 2, 211 W. Va. 96, 562 S.E.2d 488 (2001), *citing* State ex rel. Hoover v. Berger, Syl. pt. 4, 199 W. Va. 12, 483 S.E.2d 12 (1996).

“A writ of prohibition is available to correct a clear legal error resulting from a trial court’s abuse of discretion in regard to discovery orders.” Syl. pt. 1, State Farm Mut. Automobile Ins. Co. v. Stephens, 188 W. Va. 622, 425 S.E.2d 577 (1992).

Courts will not even entertain discretionary writs of prohibition unless the violation of law is “clear cut.”

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

State ex rel. Stanley v. Sine, Syl. pt. 1; 215 W. Va. 100, 594 S.E.2d 514 (2004), *citing* Hinkle v. Black, Syl. pt. 1, 164 W. Va. 112, 262 S.E.2d 744 (1979) (emphasis supplied).

Petitioners have correctly identified the legal standard of review for the consideration of a writ of prohibition. However, their Petition is devoid of any application of the appropriate standard of review to the ALJ’s discovery ruling. Petitioners have taken no steps to explain how the facts of this case, in light of the five factors considered by this Court when entertaining petitions for discretionary writs of prohibition, weigh in favor of granting a writ. Petitioners have failed to demonstrate any abuse of discretion by the ALJ,

and they have provided no legal basis upon which this Court can conclude that the discovery ruling below was clearly erroneous as a matter of law.

**III. A WRIT OF PROHIBITION
SHOULD NOT BE ISSUED UPON THIS PETITION.**

The ALJ did not commit clear legal error or abuse her discretion when she declined to acknowledge an executive session evidentiary privilege. The ALJ has not violated the separation of powers doctrine by declining to graft an executive session evidentiary privilege into the Open Governmental Proceedings Act, W. Va. Code § 6-9A-1 *et seq.* ALJ Carter's discovery ruling ordering an *in camera* review of the audio recording of the Marshall County Commission's March 11, 2008, executive session meeting comports with the general procedure for evaluating discovery disputes involving claims of privilege as articulated by this Court and is neither clearly erroneous as a matter of law nor an abuse of discretion. The statutory authority conferred upon the Commission's administrative law judges to conduct public hearings empowers Commission ALJs to resolve discovery disputes raised by parties to administrative proceedings, even when such disputes involve claims of privilege.

The Commission and Mr. Briggs respectfully request that this Court refuse to issue a writ of prohibition in this matter.

A. The ALJ Did Not Commit Clear Legal Error When She Declined to Adopt the Petitioners' Contention That the Open Governmental Proceedings Act Creates an Executive Session Evidentiary Privilege Barring the Discovery of All Executive Session Communications in Civil Rights Claims.

ALJ Carter declined to adopt the Petitioners' argument that the Open Governmental Proceedings Act establishes an absolute bar to the civil discovery of communications which occur during the executive sessions of a public agency. Otherwise, the ALJ would not have ordered an *in camera* review of the executive session recording. This decision by the ALJ is consistent with the plain language of the Open Governmental Proceedings Act, does not conflict with any West Virginia case law arising from the Open Governmental Proceedings Act, is consistent with this Court's interpretation of the discovery rights of civil

litigants to materials otherwise exempt from public review by FOIA, is not clearly erroneous, and does not involve an abuse of discretion.

In their efforts to shield highly relevant communications between Mr. Newell and the Marshall County Commissioners from discovery, Petitioners essentially are asking this Court to treat the Human Rights Commission's discovery request as if it were a request by a member of the general public. Petitioners have refused to recognize any distinction between a request by a member of the general public and the Respondents herein, parties to an employment discrimination claim with a very serious interest in whether the executive session included any discussion of illegal motives or any other information which may tend to establish Mr. Briggs' claim. Moreover, Petitioners simply ignore the fact that the OGPA is entirely silent on whether civil litigants may obtain access through discovery to information and documents related to executive session proceedings.

1. **The Open Governmental Proceedings Act Establishes the Extent to Which Meetings of Public Entities Must Be Open to the General Public.**

Petitioners contend that "[i]t is believed that the legislature intended to extend a privilege to all matters properly discussed in executive session." Petition for Writ of Prohibition, p. 8. While the Petitioners refer to the Open Governmental Proceedings Act as the source of this belief, they identify no statutory authority or case law that supports their contention. Moreover, despite the Petitioners' belief, the language of the Open Governmental Proceedings Act, W. Va. Code § 6-9A-1 *et seq.*, evidences no such intent.

The Open Governmental Proceedings Act is designed to ensure that, to the broadest extent practical, the business undertaken by public entities is as transparent as possible. It establishes the parameters of *public access* to meetings of public agencies. It is entirely silent with regard to the civil litigation discovery process.

The OGPA requires that meetings held by governmental entities be properly noticed and open to the public. W. Va. Code § 6-9A-3. The actual legislative intent is clearly established within the Act in the section entitled "Declaration of legislative policy."

The Legislature hereby finds and declares that the 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 finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decisionmaking.

W. Va. Code § 6-9A-1.

This declaration of legislative policy does not establish a desire to create an evidentiary privilege, nor does it indicate that public agencies “must be allowed the freedom to discern and discuss information and policy without the fear of reprisal.” Petition for Writ of Prohibition, p. 11. The clear and unambiguous intent of the OGPA is to balance public access to and participation in government with the need for the efficient operation of public bodies. W. Va. Code § 6-9A-1.

The Legislature recognized that in order for government to operate effectively, public agencies need some latitude to discuss certain matters outside the purview of the general public. To strike a balance between public access to government and an efficiently operating government, the Legislature established an itemized list of specific, limited exemptions to the public meeting requirement. W. Va. Code § 6-9A-4. When a public entity has occasion to take up matters that fall within the twelve exemptions, the OGPA establishes a protocol for the governmental body to enter a closed executive session.¹⁴

¹⁴Petitioners mischaracterize the operation of W. Va. Code § 6-9A-4 when they assert that “executive sessions of a governing body are exempted from the Open Governmental Proceedings Act pursuant to West Virginia Code.” Petition for Writ of Prohibition, p. 11. Executive sessions of otherwise public meetings are not exempted from the Open Governmental Proceedings Act. Rather, the OGPA authorizes such executive sessions in specifically designated, limited circumstances. W. Va. Code § 6-9A-4.

Id. An executive session is defined as “any meeting or part of a meeting of a governing body which is closed *to the public.*” W. Va. Code § 6-9A-2(2) (emphasis supplied).

“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation,” State v. Elder, Syl. pt. 2, 152 W. Va. 571, 165 S.E.2d 108 (1968); see also Little v. West Virginia Adjutant General, 223 W. Va. 790, 679 S.E.2d 622 (2009). Petitioners’ articulated belief that the Legislature intended to create an executive session privilege by enacting the OGPA is not grounded in the plain language of the Act. The OGPA does not establish any prohibition on civil litigation discovery. The declaration of legislative policy does not evidence any intent for this Act to govern anything other than public access to executive session meetings. The word “privilege” does not appear anywhere in the Act.

The plain meaning of the OGPA is clear.¹⁵ Public agencies must conduct public business in properly noticed public meetings unless one of twelve exemptions applies. If an articulated exemption applies, the agency may enter executive session to take up the matter outside the purview of the general public. W. Va. Code § 6-9A-1 *et seq.*

2. West Virginia Law Has Not Adopted an Executive Session Evidentiary Privilege.

While the OGPA shields some limited discussions by public bodies from the eyes of the general public, it does not create a legal privilege. True legal privileges provide significantly greater protection than merely shielding discussions from public scrutiny. Because of this, privileges should not be “lightly created nor expansively construed, for they are in derogation of the search for the truth.” United States v. Nixon, 418 U.S. 683, 710 (1974).

Petitioners have failed to provide any persuasive legal authority to support their contention that the recordings of the March 11, 2008, Marshall County Commission executive session are protected from discovery pursuant to an executive session privilege. West Virginia law has never recognized or adopted a blanket executive session evidentiary privilege. This Court has never applied the Open Governmental Proceedings Act as a

¹⁵Petitioners do not assert that the language of the Open Governmental Proceedings Act is ambiguous.

general bar to the civil discovery of information or records from a properly convened executive session. The plain language of the OGPA does not create a statutory evidentiary privilege for executive sessions.

The only case Petitioners cite in support of their invocation of the “executive session privilege” is an unpublished decision by the Fourth Circuit of Appeals arising out of the Eastern District of Virginia.¹⁶ Washington-Dulles Transp. Ltd., v. Metropolitan Washington Airport Auth., 87 Fed. Appx. 843 (4th Cir. 2004). However, Petitioners misconstrue both the decision and the implications of this case.

In Washington-Dulles, Washington-Dulles Transportation [WDT] filed suit against the Metropolitan Washington Airport Authority [MWAA] challenging the MWAA’s decision to award a taxi concession contract to another entity. Id. at 843. There were several occasions when the MWAA Board met in executive session, with their attorneys present, to discuss the bids. Ultimately, the MWAA voted to award the contract to another bidder. Id. at 846.

While the case was before the Eastern District of Virginia, WDT sought to discover information about conversations that occurred during the MWAA’s executive sessions. MWAA objected to discovery into the executive sessions and raised the attorney-client privilege as well as the work product doctrine. Id. at 847. In its decision, the Fourth Circuit pointed out that WDT was given two opportunities to obtain the information it sought from the executive sessions. First, MWAA was agreeable to allowing deposition questions of its CEO regarding the executive session so long as WDT agreed that the testimony would not constitute a waiver of the attorney-client privilege or the work product doctrine. Id. at 848. WDT declined this offer. Second, the lower court clearly directed WDT to ask foundational questions during the CEO deposition so that the court would have the necessary information to consider the question of privilege. Id. Since WDT failed to follow the judicial direction it received, it was not granted discovery into the executive session. The Fourth

¹⁶Pursuant to its Local Rules, the Fourth Circuit Court of Appeals disfavors the citation of unpublished decisions issued prior to 2007 except for the purpose of establishing *res judicata*, estoppel, or the law of the case. *Local Rule 32.1*.

Circuit found no abuse of discretion in the district court's handling of the discovery issue. Id.

Petitioners wrongly assert that the Fourth Circuit "upheld the District Court when that Court determined that some of what is discussed during executive session is privileged. An exception was held to exist [sic] regarding ordinary business matters." *Petition for Writ of Prohibition*, p. 14.

What the Fourth Circuit actually did in this unpublished decision was recall that the lower court had concluded that "some of what occurs in a closed executive session *might* be privileged" and that "ordinary facts pertaining to business matters [discussed in executive session] cannot be shielded merely by the presence of an attorney." Washington-Dulles, 87 Fed. Appx. at 848 (emphasis supplied). The Fourth Circuit never discussed an executive session evidentiary privilege of the kind Petitioners seek to invoke in this case.

It is clear that the Fourth Circuit was not establishing or endorsing a generalized executive session evidentiary privilege with this unpublished decision. Rather, the court was simply acknowledging that sometimes proceedings that occur during an executive session may otherwise be privileged. This acknowledgment is unsurprising and absolutely consistent with West Virginia law. For example, this Court has determined that it is proper for a governmental entity to enter executive session to obtain legal advice.¹⁷ Syl. pt. 5, Peters v. County Commission of Wood County, 205 W. Va. 481, 519 S.E.2d 179 (1999). Any such legal advice would be privileged pursuant to the attorney-client privilege, not because of an executive session evidentiary privilege.

In a sense, Petitioners have the argument backwards. An agency may enter executive session to take up a privileged matter; a matter does not become privileged and not subject to civil discovery by virtue of having been discussed in an executive session.

Moreover, had the Legislature intended to address the issue of civil litigation discovery in the OGPA, it could have authorized legislation similar to the open meetings

¹⁷Conversely, a public body may not enter into executive session merely because their attorney is present. Syl. pt. 5, Peters v. County Commission of Wood County, 205 W. Va. 481, 519 S.E.2d 179 (1999); W. Va. Code § 6-9A-4(b)(11).

law enacted by Illinois.¹⁸ In discussing the confidentiality of minutes and recordings of properly convened Illinois executive sessions, the Illinois Open Meetings Act provides that “unless the public body has made a determination that the verbatim recording no longer requires confidential treatment or otherwise consents to disclosure, the recording shall not be open for public inspection or subject to discovery in any judicial proceeding other than one brought to enforce this Act.” 5 Ill. Comp. Stat. Ann. 120/2.06(e). Illinois clearly articulated a desire to place some limitations upon the discovery of minutes and recordings of Illinois executive sessions.¹⁹ The West Virginia Legislature did not.

3. The OGPA Does Not Impose an Absolute Bar upon the Discovery of Executive Session Communications in Civil Rights Claims.

The Human Rights Commission and Mr. Briggs have not sought access to the recording of the March 11, 2008, executive session meeting under FOIA as members of the general public. The Commission has investigated Mr. Briggs’ complaint of employment discrimination and has determined that probable cause exists to credit his allegation. The Commission and Mr. Briggs seek access to the executive session recording as parties to civil rights litigation.

In most claims of employment discrimination, motive is central to proving liability. In this case, it is the burden of Mr. Briggs and the Commission to prove that the Petitioners’ hiring decision was motivated, at least in part, by Mr. Briggs’ disability.²⁰ Given that the subject matter of the withheld audio recording is the discussion between the 911 Director and the members of the Marshall County Commission about the hiring decision, the recording may be highly probative of the subjective motivations of the decision makers in the underlying litigation. The Commission and Mr. Briggs have a compelling interest in

¹⁸See 5 Ill. Comp. Stat. Ann. 120/1 (2006).

¹⁹At least one federal court determined not to apply this state privilege or any federal equivalent in a federal 1983 action. See Kodish v. Oakbrook Terrace Fire Protection Dist., 235 F.R.D. 447 (N.D. Ill. 2006).

²⁰Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996); Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995); West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 515, 383 S.E.2d 490 (1989).

discovering the audio recording. Moreover, neither the Commission nor Mr. Briggs stand in the same position as a member of the general public who would like to know what occurred in a closed governmental session. They are litigants seeking discovery in furtherance of Mr. Briggs' claim of unlawful discrimination.

The West Virginia Freedom of Information Act, W. Va. Code § 29B-1-1 *et seq.*, is another state statute that seeks to balance the public interest in accessible government with the government's need to conduct business efficiently. FOIA, like the OGPA, seeks to make government accessible and accountable to the public. The purpose of FOIA is to ensure that the public has access to records maintained by public agencies. W. Va. Code § 29B-1-3. The declaration of policy is similar to the declaration in the OGPA:

Pursuant to the fundamental philosophy of the American constitutional form of government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.

W. Va. Code § 29B-1-1.

FOIA contains a provision that exempts certain categories of information maintained by public agencies from public disclosure. Some categories of information exempt from public disclosure include trade secrets, personnel files and records of law enforcement agencies that deal with criminal investigations. W. Va. Code § 29B-1-4.

This Court has determined that the FOIA exemptions do not operate as an evidentiary privilege. Maclay v. Jones, 208 W. Va. 569, 542 S.E.2d 83 (2000). In Maclay, this Court considered whether the Freedom of Information Act, which exempts law enforcement investigatory records from public disclosure, also establishes a privilege that bars discovery of the same records in civil rights cases:

[W]e hold that the provisions of this state's FOIA, which address confidentiality as to the public generally, were not intended to shield law enforcement investigatory materials from a legitimate discovery request when such information is otherwise subject to discovery in the course of civil proceedings.

Maclay, 208 W. Va. at 575, 542 S.E.2d at 89 (footnote omitted).

In reaching this conclusion, this Court specifically considered whether the Freedom of Information Act created a statutory evidentiary privilege for law enforcement records.²¹

Like the FOIA, the OGPA does not establish an evidentiary privilege, nor does it operate as an absolute bar to discovery in a civil rights case.²² The Commission and Mr. Briggs are not seeking access to the executive session recording as members of the general public. As litigants in the underlying civil rights claim, they are not barred from discovering the recording pursuant to either the OGPA or an executive session evidentiary privilege. The ALJ's decision not to adopt an absolute executive session evidentiary privilege is consistent with this Court's analysis in Maclay and is not clearly erroneous as a matter of law.

4. The Executive Session Exemption in the OGPA Establishes Limitations Upon Public Access to Government and Is Not Equivalent in Principle or Purpose to the Attorney-Client Privilege.

Having no statutory authority to support their contention that an evidentiary privilege attaches to executive sessions of public agencies, Petitioners seek to persuade this Court that an executive session is comparable to attorney-client communications. Petition for Writ of Prohibition, pp. 11-12. This false comparison is unpersuasive. The attorney-client privilege was developed to encourage "full and frank" discussions between attorneys and clients to ensure that the attorney is in a position to offer sound legal advice and appropriate advocacy. See State ex rel. Allstate Ins. Co. v. Madden, 215 W. Va. 705, 713, 601 S.E.2d 25, 33 (2004); see also State ex rel. United Hospital Center Inc. v. Bedell, 199 W. Va. 316, 326, 489 S.E.2d 199, 209 (1997). That is not the purpose of the executive session exemption in the OGPA. This exemption is not intended to and does not provide

²¹See pp. 19-20 of the Commission's September 21, 2009, Response for a lengthy quotation of this Court's reasoning in Maclay.

²²While this Court rejected a law enforcement record evidentiary privilege, it did establish some guidelines for when privacy concerns might trigger an *in camera* review of such documents by the court to weigh privacy concerns before disclosure to the requesting party. Maclay, 208 W. Va. at 575, 542 S.E.2d at 89. In the instant case, the ALJ has decided to review the executive session recording *in camera* before determining whether any part of it should be produced in discovery. Moreover, she has indicated that any disclosure of the recording to the Commission would occur subject to a protective order.

immunity to public agencies for wrongdoing which may occur in executive session. In effect, the exemption allows public employers, like private employers, to discuss personnel matters privately. However, just as a private employer is subject to discovery of its personnel discussions in a legal challenge to its hiring decisions, so is a public employer.

In seeking to equate executive sessions to attorney-client communications, the Petitioners assert that “the removal of the executive session from the public domain allows for full and frank discussion of the County Commissioners without fear of reprisal or possibility of litigation regarding preliminary discussions, undue influence from competing interests of the public, and/or coercion through threats of adverse action by members of the public.” Petition for Writ of Prohibition, p. 11.

The ALJ’s discovery ruling should have no impact upon the Marshall County Commission’s ability to engage in robust discussions during executive session. The ruling does not encourage litigation, place the general public in a position to exert undue influence or threaten litigation. Nothing in the ALJ’s discovery ruling places the recording of the March 11, 2008, executive session in the public domain. Pursuant to the OGPA, the recording would remain unavailable to members of the general public. Moreover, the ALJ has already advised the parties that any portion of the recording ultimately provided to the Commission would be subject to a strict protective order.

The reason Petitioners would like to equate executive sessions with attorney-client communication becomes apparent when considering the following excerpt from the Petition:

If the [Marshall County] Commission is hampered by the fear that every comment or tone of discussion that occurs in executive session may be used to obtain financial gain, promote skewed results or for attack by litigants, the government will cease to operate in an efficient manner and will most likely be unable due to the fear of reprisal to act in the best interest of the public.

Petition for Writ of Prohibition, p. 12.

Petitioners seek to cloak all of their executive session discussions in secrecy so that they are not “hampered” by the “fear” that their internal communications related to employment decisions can not be used against them by a litigant. The Petitioners’ proposed evidentiary

privilege would operate to protect a public agency's executive session discussions from discovery, even if such communications provide clear evidence of wrongdoing.²³ Such an approach is inconsistent with the purposes of the OGPA and with the Legislature's intent expressed in the West Virginia Human Rights Act to eliminate discrimination in West Virginia. The open meetings exemptions do not and should not insulate public agencies from accountability for unlawful hiring practices.

5. Allowing Governmental Entities to Shield Discussions That Are Not Otherwise Privileged Behind an Executive Session Evidentiary Privilege Is Inconsistent with the Concept of Open Government and Would Arbitrarily Curtail Discovery in Civil Rights Claims.

This Court has discussed the seriousness of employment discrimination, and has attached a special concern to violations of the West Virginia Human Rights Act perpetrated by public entities:

As we stated in *Allen v. State Human Rights Commission*, 174 W. Va. 139, 149, 324 S.E.2d 99, 109 (1984), "[e]qual opportunity in this State is a fundamental principle" grounded in several provisions of our State Bill of Rights. "[E]very act of unlawful discrimination in employment . . . is akin to an act of treason, undermining the very foundations of our democracy." 174 W. Va. at 148, 324 S.E.2d at 108. The sense of betrayal is even greater when the discriminator is, as alleged in this case, a public servant.

Vest v. Board of Education of County of Nicholas, 193 W. Va. 222, 228, 455 S.E.2d 781, 787 (1995).

If civil rights litigants were completely barred from discovering executive session communications pursuant to an executive session evidentiary privilege, public employers would have more protection against discovery in employment discrimination claims than

²³Consider the hypothetical example of an executive session where a public agency considered whether to fire an African-American employee. During the executive session discussion, suppose that one member of the closed discussion referred to the African-American employee in a racially derogatory way and expressed satisfaction that they were finally getting rid of him, and another member of the meeting voiced support for termination on grounds that there were white members of the local community who could use the job. Under the Petitioners' interpretation of an executive session evidentiary privilege, even this extreme example of motive evidence would be undiscoverable in an employment discrimination claim by the employee.

private employers. Such a privilege would arbitrarily curtail discovery in cases where the employer is a public entity. If Mr. Briggs' claim were against a privately-held company, discussions and any existing recordings of discussions that occurred between the management team, except to the extent such conversations implicate the attorney-client privilege, about hiring decisions and the decisional process would unquestionably be discoverable. The private company could not shield such discussions or recordings from discovery by claiming an evidentiary privilege.

The fact that Mr. Briggs applied for public employment does not make the hiring decision discussions any less relevant or less probative on the issue of motive. Nor should the recording be less available to Mr. Briggs simply because the communications occurred in a nonpublic meeting. A public entity should not have any greater protection from civil discovery in an employment discrimination claim than a private employer. Such a result would create a substantial breach of the public trust, would result in arbitrary and inconsistent discovery rights depending upon whether the employer was public or private, and is inconsistent with the principles of transparent government favored by our Legislature.

6. The ALJ's Discovery Ruling Does Not Constitute a Violation of the Separation of Powers Doctrine.

Petitioners contend that the ALJ's discovery ruling "has essentially eliminated the right granted by the West Virginia Legislature and has violated the separation of powers doctrine."²⁴ Petition for Writ of Prohibition, pp. 22-24. It appears that Petitioners are claiming the ALJ has interfered with the powers of the Legislature by failing to read into the OGPA an evidentiary privilege that is not apparent in the plain text of the statute. Petitioners provide no legal support for this assertion. The Commission and Mr. Briggs submit that the Petitioners' argument, on its face, must fail.

²⁴Petitioners' constitutional challenge to the ALJ's discovery ruling appears last in the Petition. Petition for Writ of Prohibition, p. 23. However, the Commission has elected to respond to this argument out of order, as the issues are directly related to the Petitioners' other arguments concerning executive session privilege and the Open Governmental Proceedings Act.

The ALJ has not eliminated *any* right conferred by the OGPA. Her ruling does not limit the Marshall County Commission's ability to enter into a properly convened executive session. The discovery ruling does not eliminate the Petitioners' "right" to exclude the general public from properly convened executive sessions. The ALJ has not ordered the Marshall County Commission to make the audio recording of the March 11, 2008, executive session available to the general public. She hasn't even ordered the Petitioners to produce the tape to the Commission and Mr. Briggs.

The Petitioners have not established that the ALJ's decision not to adopt an absolute executive session evidentiary privilege is clearly erroneous or an abuse of discretion. They have not established that the discovery ruling violates the separation of powers doctrine. Accordingly, this Court should refuse to issue a writ of prohibition in this matter.

B. ALJ Carter's Discovery Ruling Ordering an *In Camera* Review of the Executive Session Recording Is Not Clearly Erroneous as a Matter of Law.

The ALJ's decision to conduct an *in camera* review of the executive session recording is not clearly erroneous as a matter of law or an abuse of the ALJ's discretion. The ALJ's ruling comports with the procedure established in State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 658 S.E.2d 728 (2008), for evaluating disputed claims of privilege. The ALJ's discovery ruling does not violate the attorney-client privilege. There is no authority in West Virginia law that prohibits an otherwise duly appointed administrative law judge from resolving discovery disputes involving claims of privilege. Finally, the method the ALJ adopted to resolve the discovery dispute is consistent with how other courts have resolved similar discovery disputes involving recorded conversations of executive sessions where claims of attorney-client privilege have been made by public agencies in civil rights cases. Indeed, all of the cases cited by Petitioners support the ALJ's approach to resolving the discovery dispute.

1. **The ALJ's Order Establishing an *In Camera* Review of the Allegedly Privileged Recording Comports with the General Procedure for Resolving Such Disputes Established by This Court.**

The Marshall County Commission and Marshall County Communication 911 allege that the ALJ misapplied West Virginia law when she ordered an *in camera* review of the executive session meeting recording. They contend that rather than reviewing the recording, the ALJ "should hold a hearing and apply the proper test to determine whether the communications conducted during the meeting were protected by the attorney/client privilege." Petition for Writ of Prohibition, p. 17. In support of this contention, Petitioners cite to three West Virginia cases, none of which prohibit the ALJ from conducting an *in camera* review of the executive session recording.

a. **The ALJ's reference to *Peters v. County Commission of Wood County*, 205 W. Va. 481, 519 S.E.2d 179 (1999), was not clearly erroneous as a matter of law.**

Petitioners incorrectly assert that the ALJ "misinterpreted and misapplied" the case of *Peters v. Commission of Wood County*, 205 W. Va. 481, 519 S.E.2d 179 (1999). Petition for Writ of Prohibition, p. 16. The Petitioners appear to contend that the ALJ improperly relied upon *Peters* because the primary issue in *Peters* was whether a public agency had properly closed certain meetings to the public. Petitioners further assert that it was a misapplication of *Peters* for the ALJ to order an *in camera* review of the executive session recording instead of an *in camera* hearing.²⁵ Finally, Petitioners take umbrage with the fact that the written Order included language from the *Peters* case discussing waiver of the attorney-client privilege.²⁶

²⁵Petitioners ignore the fact that the ALJ did, in fact, hold a hearing prior to ordering the *in camera* review. The Petitioners have had ample opportunity to make their points and arguments to the ALJ.

²⁶The ALJ never asserted or ruled that Petitioners had waived the attorney-client privilege in the instant case.

The ALJ neither misinterpreted nor misapplied the Peters case. In Peters, two Wood County, West Virginia citizens brought an action seeking injunctive and other relief against the Wood County Commission for alleged violations of the Open Governmental Proceedings Act. The citizens contended that on three occasions in the summer and fall of 1997, the County Commission improperly met in unnoticed, closed session meetings. The County Commission claimed that the meetings were for the purpose of seeking legal advice.²⁷ Peters, 205 W. Va. 481, 519 S.E.2d 179 (1999).

This Court reviewed the decision of the Wood County Circuit Court and considered whether the Wood County Commission meetings were properly closed. As an initial matter, the Court noted that the record was undeveloped. The record did not include significant discovery. The circuit court had not conducted an *in camera* hearing to determine the nature of the closed session conversations. Importantly, this Court specifically noted that “no recordings of these closed meetings exist for review.” Peters, 205 W. Va. at 484, 519 S.E.2d at 182 (emphasis supplied).

The Court ultimately held that a public agency may enter executive session to engage in privileged communications with the agency’s counsel as long as the executive session is approved by a majority of the members present, proper notice of the meeting has been provided to the public, and the agency complies with the minutes requirements of the OGPA. Peters, 205 W. Va. at 489, 519 S.E.2d at 187. The Court further noted that the mere presence of an attorney is not sufficient to close a public meeting. Id.

Peters provides insight into how courts should evaluate challenged claims of attorney-client privilege by public agencies. “When a public body closes an open meeting on the basis that the matters to be discussed in that meeting are exempt from the Act as a result of the attorney-client privilege and that claim is challenged, the circuit court should review *in camera* whether the communications do indeed fall within that privilege.” Id., 205 W. Va. at 489-490, 519 S.E.2d at 187-188.

²⁷The meeting minutes from the first unnoticed meeting, which occurred on July 24, 1997, do not indicate that the Wood County Commission entered executive session to receive legal advice. Peters, 205 W. Va. at 483, 519 S.E.2d at 181.

In Peters, there were no recordings of the closed meetings. The lack of a recording meant that the only available basis for reviewing the claim of privilege was for the trial judge to conduct an *in camera* hearing where the substance of the communications could be probed. This Court remanded the case back to the circuit court and directed it to hold an *in camera* hearing to determine whether the communications “fall within the limited attorney-client privilege exception enunciated herein.” Id., 205 W. Va. at 489-490, 519 S.E.2d at 187-188.

The ALJ’s Order indicates that Chief ALJ Carter found the rationale of Peters persuasive. The Order noted that “[i]n Peters, an *in camera* review was deemed necessary by the Court to determine whether the conversations at issue fell within the attorney-client privilege and were, therefore, properly closed from the public.” *Order Providing for In Camera Review of Recordings in Dispute in Response to Commission’s Motion to Compel and Respondents’ Motion for Protective Order*, p. 3. The ALJ understood the holding of the Peters case. Her Order clearly articulated the central issues in Peters, as well as the holding. Based upon the direction the ALJ found in Peters “as well as the other authority cited by the [West Virginia Human Rights] Commission which is consistent therewith,” the ALJ determined that “an *in camera* review of the March 11, 2008, recording is necessary to resolve this discovery matter and privilege dispute.” *Order Providing for In Camera Review of Recordings in Dispute in Response to Commission’s Motion to Compel and Respondents’ Motion for Protective Order*, p. 4.

Petitioners suggest that because Peters involved the determination of whether a public agency properly closed a meeting to the public,²⁸ the Court’s opinion is devoid of

²⁸Petitioners claim that “there is absolutely no dispute that MCC properly closed the executive session to discuss the employment of an employee for the MCC.” *Petition for Writ of Prohibition*, p. 16. While the Petitioners’ contention is not dispositive of the Petition before the Court since this discovery issue does not turn on whether the Marshall County Commission properly followed the O GPA, the West Virginia Human Rights Commission and Mr. Briggs note that it is unclear whether the March 11, 2008, meeting was, in fact, properly noticed and convened.

The Open Governmental Meetings Act, W. Va. Code § 6-9A-1 *et seq.*, requires public agencies to provide proper notice of all meetings. The March 11, 2008, Marshall County Commission meeting was a special session meeting. To properly notice a special session meeting, an agency must publicly notice the date, time place and purpose of the special session. W. Va. Code § 6-9A-3.

valuable guidance for the instant case. Petition for Writ of Prohibition, pp. 16-17. Peters explains how a court may practically evaluate the validity of a public agency's claim that certain executive session communications are protected by the attorney-client privilege. Given the similarity between this analysis and the discovery dispute before the ALJ, there are clear parallels that the ALJ properly recognized and favorably referenced.

Contrary to Petitioners' assertions, Peters does not mandate an *in camera* hearing instead of an *in camera* inspection of the allegedly privileged material. Nor does Peters prohibit a judge from conducting an *in camera* review of allegedly privileged documents or recordings. In Peters, the Court took specific note of the fact that there were no recordings available for review. Peters, 205 W. Va. at 484, 519 S.E.2d at 182. When the Court revisited the Peters matter after the trial court failed to conduct a proper inquiry into the specific substance of the challenged meetings, the Court again noted that there were no recordings of the meeting and directed the trial court to hold an *in camera* hearing to discern the particulars of the closed meeting communications. Peters v. County Commission of Wood County, 209 W. Va. 94, 98, 543 S.E.2d. 651, 655 (2000). Nothing in either of the Peters cases prohibits the ALJ from reviewing the executive session recording *in camera*.

The minutes of the March 11, 2008, special session incorporate the text of the public notice, but do not indicate whether a separate agenda was also published:

The County Commission of Marshall County, West Virginia will meet in Special Session at the Courthouse thereof, on Tuesday, March 11, 2008, at 9:30 A.M. for the following purposes, that is to say:

To Audit Claims

To Act Upon Rebates

To consider any other matters

Which may properly come before The Commission.

Called by the President of the Commission with the Concurrence of the other two members.

September 21, 2009, Response of the West Virginia Human Rights Commission to Petition for Writ of Prohibition, Exhibit A, p. 1.

Unless a separate agenda was publicly posted two business days prior to the March 11, 2008, meeting, the Marshall County Commission did not give proper public notice that it would meet with Larry Newell or consider any personnel or hiring matters at that meeting.

Finally, Petitioners contend that “[t]he ALJ committed further error by relying on language contained within the Peters case and the case of State ex rel. United States Fidelity & Guarantee Company v. Canady, 194 W.Va. 431, 460 S.E.2d 677 (1995), wherein the Court held that, ‘a party may waive the attorney/client privilege by asserting claims or defenses that put his or her attorney’s advice in issue.’” Petition for Writ of Prohibition, p. 20. In explaining the result and rationale of Peters, the May 2009 Order incorporates two direct quotations from the text of the decision. One quotation details the holding of the case. *Order Providing for In Camera Review of Recordings in Dispute in Response to Commission’s Motion to Compel and Respondents’ Motion for Protective Order*, pp. 3-4. The second quotation recounts the circumstances under which the attorney-client privilege can be waived by certain claims or defenses raised during litigation. When a claim or a defense places legal advice in issue, waiver of the attorney-client privilege may occur. The quoted passage explains that litigants place legal advice in issue only when actually disclosing or describing the legal advice as part of a claim or defense. See Order Providing for In Camera Review of Recordings in Dispute in Response to Commission’s Motion to Compel and Respondents’ Motion for Protective Order, p. 4 (quoting Peters, 205 W. Va. at 490, 519 S.E.2d at 188).

Petitioners assert that they have not placed their legal advice in issue during this litigation and therefore there is no waiver of the attorney-client privilege. They claim that since the articulated waiver provision does not apply in the instant case, the ALJ’s “reliance” on that particular portion of the Peters case is improper and erroneous. Petition for Writ of Prohibition, pp. 20-21. Implicit in this argument is the suggestion that the ALJ has found that the Petitioners have waived the attorney-client privilege.

Petitioners misunderstand the ALJ’s Order. The ALJ never ruled, explicitly or implicitly, that the Petitioners waived the attorney-client privilege. Indeed, had Chief ALJ Carter determined that the Petitioners waived the attorney-client privilege, there would have been no need for an *in camera* review of the recording in the first instance, and the ALJ could have ordered the Petitioners to produce a copy of the recording to the Commission and Mr. Briggs without first reviewing the recording.

The ALJ's discovery ruling was made in the context of Petitioners' claim that the March 11, 2008, executive session involved the communication of legal advice received by Larry Newell to the Marshall County Commissioners. Petitioners asserted that they sought legal advice prior to making the hiring decision because they were concerned that their hiring decision would result in litigation. *Order Providing for In Camera Review of Recordings in Dispute in Response to Commission's Motion to Compel and Respondents' Motion for Protective Order*, p. 2. In light of the context, it was reasonable and appropriate for the ALJ to both identify when placing legal advice in issue can result in waiver of the attorney-client privilege and decline to conclude that waiver occurred in this case. Even if the ALJ's inclusion of the Peters waiver discussion was extraneous to the resolution of the discovery dispute, it was certainly benign and does not provided a basis to conclude that the ALJ's discovery ruling involves an abuse of discretion or is clearly erroneous as a matter of law.

The ALJ's ruling is absolutely consistent with the review process as articulated in Peters. In the instant case, however, the ALJ does not have to resort to the recollection of the meeting participants. An actual recording of the executive meeting exists. It was reasonable and appropriate, given Larry Newell's complete lack of recall regarding the specifics of his communications with the Marshall County Commissioners at the March 11, 2008, meeting, for the ALJ to order an *in camera* review of the recording.

b. The ALJ's discovery ruling is consistent with the guidance provided by this Court in *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W. Va. 37, 658 S.E.2d 728 (2008).

Petitioners contend that the cases of State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 658 S.E.2d 728 (2008), and State ex rel. Wausau Bus. Ins. Co. v. Madden, 216 W. Va. 776, 613 S.E.2d 924 (2005), require the ALJ to hold an *in camera* hearing as opposed to an *in camera* review of the recording. These cases do not stand for the propositions attributed to them by the Petitioners. They are entirely consistent with the ALJ's discovery ruling.

Contrary to the assertion of Petitioners, the case of State ex rel. Nationwide Mut. Ins. Co. v. Kaufman does not support their position that the ALJ should have set another hearing rather than conducting an *in camera* review of the executive session recording. This is a misunderstanding of Kaufman. Kaufman does not bar a judge from conducting an *in camera* review of allegedly privileged documents or communications. To the contrary, Kaufman expressly ratifies this process.

In Kaufman, the insured defendant in a personal injury case objected to certain discovery requests filed by the plaintiff and claimed that some of the responsive documents were subject to the attorney-client privilege and the work product doctrine. The parties filed motions related to the discovery dispute. After consideration of the motions, the trial court ultimately ordered the defendant “to produce to the court the documents sought under Request No. 16, along with a privilege log, for an *in camera* review.” State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 40, 658 S.E.2d 728, 731 (2008). The order expressly required the defendant to make available to the trial court the documents for which privilege was asserted. This is exactly what the ALJ has ordered in the instant case.

In Kaufman, this Court refused to issue a writ of prohibition to prevent enforcement of the trial court’s discovery order. Id., 222 W. Va. at 44, 658 S.E.2d at 735. Moreover, the Court specifically noted that the trial court “followed the proper procedure and did not abuse its discretion in ordering Mr. Clegg to tender to the Court the information sought under Request No. 16, and to provide a privilege log for information alleged to be protected from disclosure.” Id., 222 W. Va. at 43, 658 S.E.2d at 734. In making this observation, the Court referred to its prior opinion in Feathers v. West Virginia Bd. of Medicine, 211 W. Va. 96, 562 S.E.2d 488 (2001), which concluded that “where a party asserts a privilege, a log of the privileged material should be provided to the [requesting party], and the material should be provided to a court for *in camera* inspection.” Kaufman, 222 W. Va. at 43, 658 S.E.2d at 734 (*quoting* Feathers v. West Virginia Bd. of Medicine, 211 W. Va. 96, 105, 562 S.E.2d 488, 497).

In Kaufman, this Court also revisited the discovery procedure it developed in the context of bad faith litigation in the case of State ex rel. Westfield Ins. Co. v. Madden, 216

W. Va. 16, 602 S.E.2d 459 (2004). The Westfield case established the procedure for the discovery of allegedly privileged materials in the context of bad faith litigation:

In an action for bad faith against an insurer, the general procedure involved with discovery of documents contained in an insurer's litigation or claim file is as follows: (1) The party seeking the documents must do so in accordance with the reasonable particularity requirement of Rule 34(b) of the West Virginia Rules of Civil Procedure; (2) If the responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege; (3) The privilege log should be provided to the requesting party and the trial court; and (4) If the party seeking documents for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an *in camera* proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.

Westfield, at Syl. pt. 2.

Petitioners concede that the Westfield case authorizes a judge to conduct an *in camera* review of allegedly privileged documents to resolve discovery disputes in bad faith litigation,²⁹ but suggest that the application of this standard is very limited. Petition for Writ of Prohibition, pp. 19-20. However, this Court expressly expanded the Westfield approach beyond bad faith claims to encompass all general discovery disputes involving challenged claims of attorney-client privilege:

Although the discovery procedure outlined in *Westfield* is narrowly confined to the context of a bad faith action against an insurer, we believe that this discovery procedure should have a general application to discovery of privileged communication in any context. Therefore, we now hold that the general procedure involved with discovery of allegedly privileged documents is as follows: (1) the party seeking the documents must do so in accordance with the reasonable particularity requirement of Rule 34(b) of the West Virginia Rules of Civil Procedure; (2) if the responding party asserts a privilege to any of the specific documents requested, the responding party shall file a privilege log that identifies the document for which a privilege is claimed by name, date,

²⁹Petitioners incorrectly contend that Westfield represents one of only two occasions in West Virginia case law authorizing an *in camera* review of materials allegedly protected by the attorney-client privilege. Petition for Writ of Prohibition, pp. 18-19.

custodian, source and the basis for the claim of privilege; (3) the privilege log should be provided to the requesting party and the trial court; and (4) if the party seeking documents for which a privilege is claimed files a motion to compel, or the responding party files a motion for a protective order, the trial court must hold an *in camera* proceeding and make an independent determination of the status of each communication the responding party seeks to shield from discovery.

State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 43, 658 S.E.2d 728, 734 (2008).

The ALJ's discovery ruling is consistent with the standard articulated in Westfield and Kaufman.

The final case Petitioners cite in support of their contention that the ALJ improperly ordered an *in camera* review of the executive session recording is State ex rel. Wausau Bus. Ins. Co. v. Madden, 216 W. Va. 776, 613 S.E.2d 924 (2005). The Wausau case resolves the question of whether a litigant waives the opportunity to raise objections to discovery based upon privilege if such objections were not included in the litigant's preliminary motion for protective order and were not otherwise raised within the thirty day response period established in Rule 34 of the Rules of Civil Procedure. State ex rel. Wausau Bus. Ins. Co. v. Madden, 216 W. Va. 776, 613 S.E.2d 924 (2005).

In Wausau, the defendant insurance company obtained an extension to answer discovery requests from the plaintiffs. Prior to answering the discovery requests, Wausau filed a preliminary motion for protective order seeking protection from providing some of the documents sought in the discovery, including claim and litigation files related to the underlying negligence claim. The trial court denied the motion for protective order. Thereafter, in response to the discovery requests, the defendant raised objections to some of the discovery based upon the attorney-client privilege and work product doctrine. A privilege log accompanied the defendant's responses. The plaintiffs filed a motion to compel claiming that the defendant had waived its right to object to the discovery requests.

The trial court agreed with the plaintiffs and determined that the defendant had waived its objections to the plaintiffs' discovery by failing to raise the objections in association with their motion for protective order. The defendant sought a writ of

prohibition. This Court held that “when a party, who has obtained an extension of time to answer discovery requests, files a motion for a protective order to limit the scope of discovery, the party need not raise all objections to discovery in the motion for a protective order.” Wausau, 216 W. Va. at 781, 613 S.E.2d at 929. The Court issued a writ of prohibition voiding the trial court’s determination that the defendant had waived its right to object to the discovery. The case was remanded back to the trial court for a determination of whether any of the disputed documents are privileged from discovery.

Petitioners cite this case for the proposition that the trial court had to hold a discovery hearing. They suggest that Wausau “does not authorize the ALJ to review and listen to the privileged material thereby violating the sanctity of the attorney/client privilege.” Petition for Writ of Prohibition, p. 17. To the contrary, it is clear that the discovery hearing ordered by the Wausau Court would have involved an *in camera* examination of the allegedly privileged documents. Prior to the trial court hearing on the plaintiff’s motion to compel, the defendant “forwarded unredacted copies of the documents listed on the privilege log for *in camera* review.” Id., 216 W. Va. at 779, 613 S.E.2d at 927. In its order granting the motion to compel, the trial court indicated that since it had concluded that privilege had been waived, “it is not necessary for the Court to examine the documents delivered to the Court for an *in camera* review.” Id., 216 W. Va. at 779-780, 613 S.E.2d at 927-928. Clearly the discovery hearing ordered by this Court would have encompassed a review of the provided, unredacted documents.

Petitioners misstate the law and propose an unworkable approach to the discovery dispute resolution process. In this case, the ALJ did hold a hearing. On May 11, 2009, after receiving lengthy written submissions from the parties, the ALJ gave counsel the opportunity to provide additional argument during a telephonic hearing. The Petitioners had the opportunity to provide specific details concerning their claim of attorney-client privilege. They did not do so. Nor did they provide, or offer to provide, a privilege log of the specific communications in the recording for which they claimed attorney-client privilege. Rather,

the Petitioners sought to maintain a blanket claim of privilege.³⁰ Moreover, at no time during this hearing did the Petitioners seek a subsequent hearing or ask to be present for the ALJ's review of the audio recording. The only resolution proposed by the Petitioners was blind acceptance that the entire recording was universally protected and privileged from any disclosure, even though Petitioners concede that the entire recording is not protected by the attorney-client privilege.

The record in this matter is clear. Chief ALJ Carter was called upon by the parties to resolve a discovery dispute involving blanket claims of privilege. It is undisputed that the recording contains discussion about the telecommunicator hiring decision between non-lawyers and the Marshall County Commissioners. It is also undisputed that the Petitioners' counsel did not participate in the meeting. Petitioners claim that some, but not all, of the executive session discussion involved the communication of legal advice about the hiring decision. This assertion may be accurate. It may be inaccurate. Regardless, Petitioners' general claim of privilege is insufficient to resolve this discovery dispute.

To resolve the discovery dispute, the ALJ ordered the Petitioners to produce a copy of the recorded communications for an *in camera* review. It is impossible for the ALJ to determine if portions of the recording are protected without access to the recording. Her discovery ruling is consistent with this Court's articulated approach to resolving claims of privilege in the discovery context, does not involve an abuse of discretion, and is not clearly erroneous as a matter of law.

2. An *In Camera* Review of Allegedly Privileged Materials by an Administrative Law Judge of the West Virginia Human Rights Commission Does Not Violate the Asserted Privilege.

Petitioners contend that "[t]he ALJ in this matter has ordered an improper violation of the attorney/client privilege by ordering that she as the finder of fact review the privileged communication to make a determination as to its privilege." Petition for Writ of Prohibition,

³⁰This Court has cautioned against presuming that discovery may be prevented by simply asserting privilege: "[i]f we allowed such a position to be the law, no party would ever obtain information during discovery because parties would invoke an unreviewable claim of privilege. Obviously this is not, and has never been the law." Kaufman, 222 W. Va. at 42, 658 S.E.2d at 733.

p. 21. Courts routinely utilize the *in camera* review process to resolve disputes concerning confidentiality and privilege. Sometimes, as in the instant matter, an *in camera* review is the only practical way to resolve discovery disputes. The act of producing allegedly privileged materials to a tribunal for a determination upon the claim of privilege does not violate or waive the asserted privilege. "We begin our analysis by recognizing that disclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege." United States v. Zolin, 491 U.S. 554, 568-569 (1989). See also Matter of Bevill, Bresler & Schulman Asset Mgt. Corp., 805 F.2d. 120, 125 n.2 (3d Cir 1986) (rejecting claim that the *in camera* review of allegedly privileged documents violates the attorney-client privilege "because *in camera* review is frequently the only way to resolve whether in fact the privilege asserted applies"). An *in camera* review of the Marshall County Commission executive session recording by Chief ALJ Carter would not violate the attorney-client privilege.

The Petitioners have not offered a single legal authority to support their contention that it is improper for an administrative law judge to resolve discovery disputes involving claims of privilege by conducting an *in camera* proceeding to review the allegedly privileged materials.³¹ Nor have they offered any legal basis that suggests, in even the most marginal way, that Chief ALJ Carter's *in camera* review of the March 11, 2008, recording would violate the attorney-client privilege. No such authority exists.

West Virginia Human Rights Commission ALJs "determine all questions of fact and law presented during the hearing and [to] render a final decision on the merits of the complaint, subject to the review of the commission[.]" W. Va. Code § 5-11-8(d)(3). This is similar to a circuit judge presiding over a bench trial. Commission ALJs are specifically authorized to direct the scope of discovery and to entertain motions to compel and motions

³¹Petitioners characterize the *in camera* review as "forced production" of the privileged material. Petition for Writ of Prohibition, p. 20. In reality, the ALJ's Order protects the Petitioners from producing the executive session recording to the Commission and Mr. Briggs while the ALJ evaluates Petitioners' claim of privilege.

for protective order.³² W. Va. Code R. §§ 77-2-7.18. and § 77-2-7.27. The regulations contain no limitation upon the ALJ's ability to resolve discovery disputes, and do not restrict administrative law judges from conducting *in camera* reviews to resolve such disputes.

This Court has noted that the West Virginia Human Rights Commission is required to provide parties a fair and impartial hearing and that Commission ALJs have been imbued with the all powers necessary to conduct fair and impartial hearings. Heeter Construction Co. v. West Virginia Human Rights Commission, 217 W. Va. 583, 588-589, 618 S.E.2d 592, 597-598 (2005). In order to conduct a fair and impartial hearing, the process leading up to the hearing must also comport with these ideals. The discovery process before the West Virginia Human Rights Commission would be saddled with a substantial due process problem if, as Petitioners suggest, Commission ALJs were restricted from utilizing the critical tool of *in camera* review to resolve discovery disputes involving allegations of privilege. As this Court sagely recognized in Kaufman, "no party would ever obtain information during discovery because parties would invoke an unreviewable claim of privilege." Kaufman, 222 W. Va. at 42, 658 S.E.2d at 733.

This Court should be unpersuaded by Petitioners' claim that an *in camera* review of allegedly privileged material by the ALJ is "equivalent to the publication of privileged material to a jury[.]" Petition for Writ of Prohibition, p. 21. This assertion is patently absurd and disregards the proper role and responsibility of a finder of fact and law. Like circuit judges conducting bench trials, administrative law judges are routinely required to rule on discovery and evidentiary matters. Often, these discovery and evidentiary matters make the judge aware of non-discoverable and/or inadmissible information. In any given proceeding, an ALJ may be asked to rule upon the discovery or admissibility of specific medical records, the admissibility of character evidence, the admissibility of a potential witness's criminal record, or the application of privilege to certain evidence or testimony. In these instances, the ALJ necessarily becomes aware of the information that may be considered prejudicial, inflammatory, or otherwise inadmissible and properly disregards the same when rendering a decision.

³²In this case, the ALJ's discovery ruling is in response to the Commission's motion to compel and the Petitioners' response thereto seeking a protective order.

Our judicial system relies on administrative law judges and other finders of fact and law to base their decisions on the merits of the properly admitted evidence in the record. Such reliance is possible because, unlike lay juries, finders of fact and law engage in the process of filtering out inadmissible information and evidence on a regular basis. The Petitioners have failed to identify any legitimate basis upon which this Court may reasonably conclude that Chief ALJ Carter cannot be relied upon to properly evaluate the application of privilege or to base her final decision on the merits of the evidence admitted into the record at the public hearing. Rather, Petitioners have made unfounded assertions and unsupported assumptions that denigrate the integrity of the administrative process.

This Court has approved *in camera* inspections of allegedly privileged records as proper protocol for resolving whether privilege applies. This Court did not limit the application of Kaufman to jury trials, nor has the Court formulated a different method for resolving claims of privilege for jurists conducting bench trials. The Petitioners have not articulated any rational basis for the privilege review process to operate any differently simply because it is being conducted by an administrative law judge. Moreover, Petitioners have no legitimate basis for asserting that West Virginia law prohibits the ALJ from conducting the proposed *in camera* review. The ALJ's discovery ruling does not violate the attorney-client privilege.

3. Other Courts Have Recognized That Public Entities Should Not Be Able to Insulate Themselves from Accountability for Civil Rights Violations by Preventing the Disclosure of Potentially Probative Evidence by Asserting a Blanket Claim of Privilege.

Chief ALJ Carter's discovery ruling is consistent with rulings in similar cases by courts in other jurisdictions. Kodish v. Oakbrook Terrace Fire Protection Dist., 235 F.R.D. 447 (N.D. Ill. 2006), and Wilstein v. San Tropai Condo Master Ass'n, 189 F.R.D. 371 (N.D. Ill. 1999), both involved allegations of discrimination. In each of these cases, the court recognized the need to probe the decisional process and to discover executive session discussions that were not protected by the attorney-client privilege.

In Kodish, the United States District Court for the Northern District of Illinois considered whether an audio tape of a closed session of the Oakbrook Terrace Fire

Protection District [OTFPD] was protected from discovery by the attorney-client privilege in the context of a §1983 claim. In this case, the OTFPD held a closed session meeting with its attorney to discuss terminating Kodish. Kodish, 235 F.R.D. at 453. Kodish sought to discover audio tapes of this closed session. The district court opined that the “attorney-client privilege does not provide blanket protection from discovery.” Id. Specifically, the court noted that “[t]he discussion by members of the Fire District’s board of trustees regarding Plaintiff’s work history . . . [the] reason for moving to terminate Plaintiff, and . . . discussion of what is desirable from an employee are examples of the type of information that is discoverable.” Id. Any information involving counsel’s legal advice was determined to be privileged. Id. at 454. The court determined which portions of the recording to make available to the plaintiff by conducting an *in camera* review. Id.

In Wilstein, the District Court for the Northern District of Illinois determined that “[o]nly the relevant portions of the executive session meeting discussing confidential information disclosed to the attorney or advice from the attorney relating to pending or anticipated litigation are privileged from discovery. Questions pertaining to factual information underlying. . . [a] claim or not involving counsel’s legal advice must be answered.” Wilstein, 189 F.R.D. at 380. The Wilstein court determined that any part of the executive session meeting communications that did not discuss legal advice, litigation strategy, litigation risks and/or legal recommendations should be discoverable. Id.

Like in Kodish and Wilstein, the Commission and Mr. Briggs have sought legitimate discovery into executive session conversations. The ALJ has recognized the Commission’s strong interest in obtaining discovery of the executive session recording. She has also acknowledged the possibility that the recording is protected in whole or in part by the attorney-client privilege. In her effort to balance the Commission’s interest in discovery with the Petitioners’ assertion of privilege, she has properly ordered an *in camera* review of the recording to evaluate to what extent the recorded communications are protected by the attorney-client privilege.

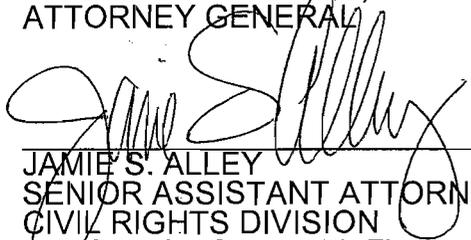
IV. CONCLUSION

Chief Administrative Law Judge Carter was asked to resolve a discovery dispute involving contested assertions of privilege by the Petitioners. Her decision to conduct an *in camera* review of the March 11, 2008, Marshall County Commission executive session audio recording was neither an abuse of discretion nor clearly erroneous as a matter of law. Petitioners have failed to satisfy the rigorous standard for the issuance of a writ of prohibition. For all of the foregoing reasons, the West Virginia Human Rights Commission, on its own behalf and on behalf of the Complainant below, John R. Briggs, asks that this Court decline to issue a writ of prohibition against the West Virginia Human Rights Commission and Chief Administrative Law Judge Phyllis H. Carter.

Respectfully submitted,

WEST VIRGINIA HUMAN
Rights Commission, on behalf
of JOHN R. BRIGGS,
Respondent,
By Counsel.

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BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOHN R. BRIGGS,

Complainant,

v. DOCKET NO.: EDB-466408
EEOC No.: 17J-52008-00329

MARSHALL COUNTY COMMISSION
and MARSHALL COUNTY
COMMUNICATIONS 911,

Respondents.

VOLUME II

The deposition of LARRY DEAN NEWELL was taken pursuant to the West Virginia Rules of Civil Procedure in the above-entitled action, on the 10th day of April, 2009, commencing at 9:12 a.m. and concluding at 4:00 p.m., at the Offices of the Marshall County Commission, 700 Seventh Street, Moundsville, Marshall County, West Virginia, before Nancy McNealy, Certified Verbatim Court Reporter, duly certified by the West Virginia Supreme Court of Appeals and the National Verbatim Reporters Association and Commissioner of West Virginia, pursuant to notice.

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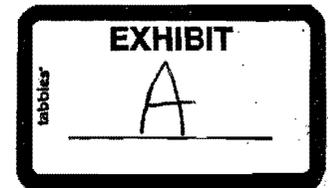
ON BEHALF OF THE RESPONDENTS:

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ALSO PRESENT: JOHN ROBERT BRIGGS, Complainant

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NOTES:



1 Q -- what did you do?
 2 A I contacted the Commission's secretary to
 3 see if there was an open spot on the agenda for the nearest
 4 Tuesday when we made our decision.
 5 Q Okay.
 6 A And I got on the agenda and approached the
 7 County Commission.
 8 Q At anytime prior to your official meeting
 9 with the County Commission, whenever that did occur when
 10 you got put on the agenda, did you have any discussions
 11 prior to that meeting with any of the County Commissioners
 12 regarding your proposed recommendation?
 13 A Not to my knowledge.
 14 Q Okay, what about with Ms. Frohnapfel?
 15 A I do not believe so.
 16 Q Did you contact Ms. Blake and let Ms. Blake
 17 know you were going to recommend her prior to that meeting?
 18 A Without looking at the file if I have a
 19 note written in there or anything, I am not sure.
 20 Q Okay. If you had a note, it would be
 21 written and put in her applicant file?

1 the manner in which you decided who to interview on
 2 February 21st?
 3 A I am not certain. I'd have to -- I mean I
 4 know they would quote stuff, you know, frequently for those
 5 interviews or those personnel part, it's different than
 6 their regular public record.
 7 Q Okay.
 8 A They keep it separate and I'd have to
 9 review it to see if there was anything but I don't offhand
 10 remember anything.
 11 Q So the Marshall County Commission records
 12 the personnel matters discussed in non-public sessions?
 13 A I think so but I'm not 100 percent certain.
 14 I'd have to be checked on.
 15 Q Okay. If it were recorded, do you have any
 16 reason to believe that the recording wouldn't still exist
 17 today?
 18 MR. KEPPLER: Object to the form. You can
 19 answer.
 20 THE WITNESS: Okay. I do not know what their
 21 policy is or how they handle records that are done by them.

1 A Yes, ma'am, yeah.
 2 Q Okay. And you provided the entire
 3 applicant file in discovery?
 4 A Yes, ma'am.
 5 Q Okay. So would it fair to say if I don't
 6 have any notes to that effect, then you probably didn't
 7 have any notes to that effect?
 8 A To the best of my knowledge, yes.
 9 Q Okay. Do you know how long after the
 10 February 21st interviews, how long it took you to come to
 11 the conclusion to recommend Ms. Blake?
 12 A I'm sorry, I do not.
 13 Q Do you have any recollection as to whether
 14 the decision was made that day or on another day?
 15 A I am not 100 percent certain as to when.
 16 Q Okay. Do you recall if Ms. Blake was at
 17 the Commission meeting when your recommendation of her was
 18 discussed?
 19 A No, she was not.
 20 Q When you went to the Commission meeting and
 21 recommended Ms. Blake for hire, did you discuss with them

1 I have no idea.
 2 BY MS. ALLEY:
 3 Q Do you remember anything about your meeting
 4 with the Marshall County Commission; the meeting where you
 5 recommended Ms. Blake, do you remember anything that you
 6 discussed?
 7 A Nothing significant or out of the ordinary
 8 comes to mind.
 9 Q Does anything significant or ordinary come
 10 to mind?
 11 A No. No, I mean it just seemed the normal
 12 course.
 13 Q Do you recall any questions that you were
 14 asked by the Commission during that session?
 15 A That's what I'd have to check, you know,
 16 the files and --
 17 Q Where would you --
 18 A -- from the Commission's files not from my
 19 files.
 20 Q You would check whatever record would exist
 21 of that session to determine what was asked?

NOTES:

1 BY MS. ALLEY:
 2 Q Earlier, I asked you if you remember who
 3 else you interviewed on the second round and you told me
 4 you couldn't recall; do you remember that?
 5 MR. KEPPLER: It was Briggs and Ware on the
 6 second one, right?
 7 MS. ALLEY: Ms. Ware was interviewed two
 8 times.
 9 MR. KEPPLER: Right.
 10 MS. ALLEY: Okay. The only person who wasn't
 11 interviewed on the 21st that you interviewed in the second
 12 round was Mr. Briggs, right?
 13 THE WITNESS: Yes.
 14 BY MS. ALLEY:
 15 Q Okay. So there weren't any other people
 16 that you added to the interview list for your second round
 17 except for Mr. Briggs?
 18 A I believe that's correct.
 19 Q Okay. Mr. Briggs and Ms. Ware were the
 20 only candidates that were interviewed for the second
 21 position?

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1 A I believe so.
 2 Q When did you decide who to recommend for
 3 the second position?
 4 A When did I?
 5 Q Yes.
 6 A I'm not sure as to the exact time frame or
 7 the date that it was.
 8 Q Okay. You indicated that after the first
 9 round of interviews that you met and discussed the
 10 interviews and the hiring decision with Ms. Gongola and Mr.
 11 Farley. Did you have similar discussions after the Briggs
 12 and Ware interviews?
 13 A I believe so, I believe so.
 14 MS. ALLEY: I'm going to hand you what's been
 15 marked as Deposition Exhibit No. 16.
 16 (WHEREUPON, the Marshall County
 17 Commission March 11, 2008 Meeting
 18 Minutes was marked for
 19 identification as Exhibit No. 16,
 20 and a copy is hereto attached and
 21 made a part hereof.)

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1 BY MS. ALLEY:
 2 Q And I'll represent to you that these were
 3 provided to me through discovery by your attorneys and they
 4 purport to be the Marshall County Commission Meeting
 5 Minutes from March 11th, 2008. Is that what they look like
 6 to you?
 7 A Yes, ma'am.
 8 Q Okay. If you'll look at the second page
 9 towards the bottom, there's a section "E-911 - New
 10 Employee". Do you see that part?
 11 A Yes, ma'am.
 12 Q "Larry Newell, E-911 Director, appeared
 13 before the Commission requesting authorization to hire a
 14 new dispatcher. Mr. Newell submitted the name of Barbara
 15 J. Ware for the position. Ms. Ware has experience as a
 16 dispatcher and would begin the last week in March at the
 17 starting salary of \$18,500." Do you see that?
 18 A Yes, ma'am.
 19 Q Do you recall the meeting where you made
 20 this recommendation to the County Commission?
 21 A Not specifically, no, ma'am.

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1 Q Do you recall if there was any discussion
 2 of the relative merits of Ms. Ware versus Mr. Briggs in
 3 that meeting?
 4 A With not having the notes or the tape or --
 5 of what the Commission has, I do not recollect.
 6 Q Okay. Do you recall why you preferred Ms.
 7 Ware as a candidate over Mr. Briggs?
 8 A Not at this point, no.
 9 MR. KEPPLER: Would documents assist you to
 10 answer that question?
 11 THE WITNESS: Yes, they would. I think they
 12 would.
 13 BY MS. ALLEY:
 14 Q But as we sit here today based upon your
 15 recollection, you cannot tell me why you preferred Ms. Ware
 16 to Mr. Briggs?
 17 A Not without looking at the notes or what I
 18 had in the files.
 19 Q Okay. Before the Commission, the Human
 20 Rights Commission sent out the questions for you to answer
 21 that you -- I gave you a copy of those answers; it's

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NOTES:

NO. 35272

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARSHALL COUNTY COMMISSION and
MARSHALL COUNTY COMMUNICATION 911,

Petitioners,

v.

JOHN R. BRIGGS and the WEST
VIRGINIA HUMAN RIGHTS COMMISSION,

Respondents.

CERTIFICATE OF SERVICE

I, Jamie S. Alley, Senior Assistant Attorney General of the State of West Virginia, do hereby certify that a true copy of the foregoing **Response of the West Virginia Human Rights Commission to Petition for Writ of Prohibition** was served upon the following, by depositing a true copy thereof in the United States mail, first class postage prepaid, on the 2nd day of November 2009, addressed as follows:

To: Thomas E. Buck, Esq.
Jason P. Pockl, Esq.
Bailey & Wyant, PLLC
1219 Chapline Street
Wheeling, West Virginia 25326-1789
Counsel for Petitioners

The original and nine copies were hand delivered this date to:

The Honorable Rory L. Perry II, Clerk
West Virginia Supreme Court of Appeals
State Capitol, Room E-317
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305


JAMIE S. ALLEY