

OPEN MEETINGS ADVISORY OPINION NO. 2011-04

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WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

A Member of the West Virginia Industrial Council asks whether a procedural rule requiring the chairperson to call a meeting upon the request of at least three members of the council conflicts with the Open Meetings Act.

FACTS RELIED UPON BY THE COMMITTEE

The West Virginia Industrial Council is a statutory created board. W.Va. Code § 23-2C-5. It is housed within the Office of the Insurance Commissioner. The Council is required, in consultation with the Insurance Commissioner, to establish guidelines and policies to ensure the effective administration of the workers' compensation insurance market in West Virginia.

The Governor, with the advice and consent of the Senate, appoints five voting members to the Industrial Council. In addition to the voting members, the Governor appoints two members of the West Virginia Senate and two members of the West Virginia House of Delegates to serve as advisory non-voting members of the Board. No more than three of the legislative members may be of the same political party.

The Council's enabling legislation and procedural rule state that a quorum consists of three voting members. W.Va. Code § 23-2C-5(b)(2)(D) and W.V.C.S.R. § 85-13-4. The council shall hold meetings at the request of the chairperson or at the request of at least three of the members of the council. The procedural rule defines a "member" as a voting member. W.V.C.S.R. § 85-13-3.7. The procedural rule also states that meetings shall be governed by the most recent edition of Robert's Rules of Order. W.V.C.S.R. § 85-13-4.8.

The Requester states that if three members direct the chairperson to call a meeting, "logic would suggest that they at least discussed the reasons or asked why, a special meeting request was necessary before making the demand of the chairperson." The Requester then inquires if such a discussion would violate the Open Meetings Act or if it would fall within the "logistical" discussion exception of the Open Meetings Act.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(3) defines "governing body" in pertinent part as "[T]he members of any public agency having the authority to make decisions for or recommendations to

a public agency on policy or administration, the membership of a governing body consists of two or more members. . . .”

W. Va. Code § 6-9A-2(4) defines “meeting” as follows:

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

* * *

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

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

W. Va. Code § 6-9A-2(5) defines “official action” as “[A]ction which is taken by virtue of power granted by law, ordinance, policy, rule or by virtue of the office held.”

W. Va. Code § 6-9A-2(7) defines “quorum” as “[T]he gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.”

ADVISORY OPINION

The question presented is one of first impression. The Requester recognizes that discussions among a quorum of a governing body on matters requiring official action held outside a properly noticed meeting may violate the Open Meetings Act. See O.M.A.O.s 2011-02 and 2011-03. Yet, the Requester’s board has a procedure wherein a quorum of the board may direct the chairperson to call a special meeting.

Based upon information and belief, these provisions are common. For example, Robert’s Rules of Order state that a board’s by-laws should contain a provision that a special meeting may either be called by the Chair or by a specific number of members. Robert’s Rules of Order Newly Revised (10th Ed.), p. 89. Historically, this procedural practice was probably implemented to guard against a presiding officer bringing the business of a governing body to a standstill by refusing to call a meeting; however, that is not the situation presented here. See *also* W.Va. Code § 18-5-4(b) which provides that school board meetings may either be called by the president or any three members.

The Open Meetings Act allows a governing body to discuss, outside the course of a public meeting, the logistical and procedural methods to schedule a meeting. W.Va. Code § 6-9A-4(E). The Council's procedural rule creates a quandary. From a practical standpoint, in determining whether a special meeting should be called on a particular matter, the discussions may stray from logistics into the merits of the matter. Such discussions, either in-person, in writing or via email communications, could arguably constitute a prohibited discussion among a quorum of a governing body on the merits of a matter requiring official action. See O.M.A.O. 2011-03. See *also* O.M.A.O.s 2001-34 and 2005-12 (Members of a governing body may not deliberate the merits of matters or take official action through serial telephone or electronic mail communications.) Still, common sense, and the rules of statutory construction, dictate that when a governing body's enabling statute provides that the power to call a special meeting lies, not only with the chairperson, but members of the governing body, the members of the governing body should have the right to invoke this procedure.

The Open Meetings Committee finds that a provision in the West Virginia Code permitting a designated number of members of the body to call a special meeting does not violate the Open Meetings Act. This conclusion is based upon the rule of statutory interpretation that:

A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it was intended to form a part; it being **presumed** that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, **statutory** or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Kessel v. Monongalia County General Hospital Company, 648 S.E.2d 366 (W.Va. 2007). This conclusion is further based upon the exception in the Open Meetings Act which excludes from the definition of meeting “[D]iscussions on logistical and procedural methods to schedule and regulate a meeting.” W. Va. Code § 6-9A-2(4)(D)

In regard to the Industrial Council, this mechanism for calling a Special Meeting is set forth in code. For governing bodies which do not have a similar provision in their enabling statutes, this Committee finds that adopting or relying on a procedural rule providing that a special meeting may be called by a quorum of the members of the governing body does not violate the Open Meetings Act.

While such a provision does not violate the Open Meetings Act, steps must be taken to ensure that when utilizing this procedure to call a special meeting, the spirit, intent and

plain language of the Open Meetings Act are not violated.¹ To comply with the Open Meetings Act, the Committee finds that when communicating a request to a quorum of a governing body to call a special meeting, the communication, and all discussions related thereto, must be limited to the stated purpose for calling the special meeting, and why the item to be addressed requires action at a special meeting as opposed to waiting to place the item for consideration on the agenda for the next regular meeting.²

The Committee takes this opportunity to remind governing bodies that special meetings must be noticed in accordance with provisions of the Open Meetings Act. For State Agencies, regardless if a meeting is designated a regular or special meeting, the notice must be filed in the State Register five calendar days before the meeting.³ For local governing bodies, notice of a special meeting must be posted two calendar days before the meeting.⁴

The Open Meeting Committee has previously ruled that notice of a special meeting must include the date, time and place of the meeting, as well as explain the “purpose” of the meeting. The “purpose” of a special meeting is considered synonymous with the agenda for that meeting. If only one or two matters will be dealt with at a special meeting, those matters may be described in the meeting notice, and no separate agenda will be necessary. However, if the special meeting will deal with several matters, a separate agenda may be prepared and made available at the same time and in the same manner as the meeting notice. See O.M.A.O. 2006-15.

This advisory opinion is limited to questions arising under the Open Governmental Proceedings Act, W. Va. Code §§ 6-9A-1, *et seq.*, and does not purport to interpret other laws or rules. Pursuant to W. Va. Code § 6-9A-11, a governing body or member thereof that acts in good faith reliance on this advisory opinion has an absolute defense to any civil suit or criminal prosecution for any action taken based upon this opinion, so long as the underlying facts and circumstances surrounding the action are the same or substantially the same as those being addressed in this opinion, unless and until it is amended or revoked.

S/S

Jack L. Buckalew, Acting Chairperson

¹ Of course it is not necessary to follow this procedure if the person requesting a special meeting calls the chairperson, makes his or her request, and the chairperson, in accordance with his or her powers as the presiding officer, grants the request and calls a meeting.

² Governing bodies may elect to adopt a rule requiring requests for special meetings, and responses thereto, to be in writing. Other states, through statutory provisions, impose this requirement. Kansas, K.S.A. 15-106; N.J.S.A. 40:48-24302, and Pa. Code § 47.3-308.

³ The day of publication counts as one day. All intervening days are likewise counted, including Saturdays, Sundays and legal holidays, but not the day of the meeting, without regard to the time of day when the meeting is scheduled to begin.

⁴ For purposes of noticing their meetings, local governing bodies are not required to file their notices in the State register. In counting business days, the day of the meeting, Saturdays, Sundays and legal holidays are not counted.