

OPEN MEETINGS ADVISORY OPINION NO. 2004-17

Issued on January 6, 2005 By The

WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Jefferson County Commission (Commission) asks if two of its five commissioners, which is less than a quorum, may meet in private to discuss matters pending before the entire Commission.

FACTS RELIED UPON BY THE COMMITTEE

The Jefferson County Commission consists of five (5) county commissioners. It is the only county in West Virginia with five commissioners. The remaining county commissions have three (3) members.

Two members of the Commission do not constitute a quorum. The Commission wants to know whether two members may meet to discuss matters pending before the entire commission. Members of the public may or may not be included. One of the stated purposes of the meetings would be to work out political strategies and to organize support for a particular outcome.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W.Va. Code 6-9A-2(4) defines the term meeting. It also enumerates specific exceptions to the definition. It reads in relevant part:

[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.

W.Va. Code 6-9A-2(5) defines the term "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."

ADVISORY OPINION

A meeting is defined in relevant part as the convening of a governing body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in official action. Pursuant to this definition, it is clear that if a quorum of a governing body convenes to discuss public business, and there is an intention for the discussions to lead to official action, then the gathering is a meeting. Hence the meeting must comply with the notice requirements and other applicable provisions of the Open Meetings Act (hereinafter referred to as the "Act").

In order to determine whether less than a quorum of a governing body may discuss issues of interest to the public, it is necessary to examine the language and history of the Act. There are no West Virginia Supreme Court decisions directly addressing the issue presented. In the case of McComas v. Board of Educ., 197 W.Va. 188, 475 S.E.2d 280 (1996) the Court held in relevant part that if a quorum of school board members meet with school administrators to discuss matters pending before the board, then the gathering constitutes a meeting. However, the Court did not answer the question posed. Further, subsequent to the McComas opinion, the definition of meeting was amended.

The Legislature amended the Act in 1999. The amendment in part enumerated that certain discussions amongst public officials do not fall within the definition of meeting. One class of discussions excluded from the definition of meetings is, "*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.*" W.Va. Code § 6-9A-2(4)(D).

The Legislature also adopted additional language under its declaration of legislative policy. The new language reads in relevant part:

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 decision making.

W.Va. Code § 6-9A-1.

Based upon the language and history of the Act, it is the opinion of the Committee that less than a quorum of commissioners may engage in discussions amongst themselves in which they express their views on issues of interest to the public, including issues pending before the commission. The Act is not meant to stifle all expression of opinion amongst public officials

outside of a formal meeting. As the West Virginia Supreme Court noted in McComas, “[A]n interpretation of the Sunshine Law that precludes any off-the-record discussion between board members about board business would be both undesirable and unworkable – and possibly unconstitutional.” McComas, 197 W.Va. 188, 198, 475 S.E.2d 280, 290 (1996).

However, there are instances when a series of communications by less than a quorum would violate the Act. For instance, public officials would be in violation of the Act if they use a series of communications with the intended purpose of a majority of the governing body collectively predetermining the outcome on a matter pending before a public body. The Committee finds that this action would constitute a meeting. Further such a practice would violate the spirit and intent of the Act.



Chairman