

OPEN MEETINGS ADVISORY OPINION NO. 2005-10

Issued On June 2, 2005 By The

**WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS**

OPINION SOUGHT

The Huntington City Council asks for guidance in complying with the requirements of the Open Meetings Act. The Council seeks to verify whether a subordinate board can meet to discuss the qualifications of applicants for employment without giving notice of their meeting. Further, the Council wants to know what steps are required to rectify a situation where a governing body conducts a meeting that does not conform to the requirements of the Act but, nonetheless, official action needs to be taken on matters that were previously addressed during such meeting.

FACTS RELIED UPON BY THE COMMITTEE

The Council request explains that the governing body of a subordinate municipal agency went into executive session at a regularly scheduled meeting to discuss the hiring of a new employee. The meeting adjourned after the conclusion of the executive session without a vote being taken or a decision made.

The board members subsequently gathered in a private office at another location where they continued to discuss the qualifications of the applicants for an available position. During this subsequent gathering, the participants reached a consensus on the best applicant and submitted their recommendation to the Mayor and Council without conducting a properly noticed open meeting.

Pursuant to guidance from the City Attorney that the private meeting was not in compliance with the Open Meetings Act, the governing body met again in a properly noticed meeting where the employment question was discussed. Following public discussion on this matter, the board voted to make the same personnel recommendation.

The City Council asks for guidance on what steps are necessary to correct an apparent violation of the Open Meetings Act.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-3 provides, in pertinent part, as follows:

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, all meetings of any governing body shall be open to the public. . . . Upon petition by any adversely affected party any court of competent jurisdiction may invalidate any action taken at any meeting for which notice did not comply with the requirements of this section.

In addition, W. Va. Code § 6-9A-6 states, in pertinent part:

The circuit court in the county where the public agency regularly meets has jurisdiction to enforce this article The court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article. An injunction may also order that subsequent actions be taken or decisions be made in conformity with the provisions of this article. . . . In addition to or in conjunction with any other acts or omissions which may be determined to be in violation of this article, it is a violation of this article for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.

W. Va. Code § 6-9A-7 further provides:

(a) Any person who is a member of a public or governmental body required to conduct open meetings in compliance with the provisions of this article and who willfully and knowingly violates the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars: Provided, That a person who is convicted of a second or subsequent offense under this subsection is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars.

(b) A public agency whose governing body is adjudged in a civil action to have conducted a meeting in violation of the provisions of this article may be liable to a prevailing party for fees and other expenses incurred by that party in connection with litigating the issue of whether the governing body acted in violation of this article, unless the court finds that the position of the public agency was substantially justified or that special circumstances make an award of fees and other expenses unjust.

ADVISORY OPINION

The Open Meetings Act generally requires that governing bodies of public agencies provide reasonable advance notice to the public and media of any meeting where a quorum of the governing body will be present and where matters requiring official action will be decided or discussed. Personnel matters, such as determining the best applicant to fill a vacant position, may be discussed in executive session, but each such session must be initiated and concluded in the context of a properly noticed open meeting.

Members of a governing body who knowingly and intentionally conduct a meeting in violation of the Act are subject to criminal prosecution. Any violation of the Act, even an inadvertent failure to issue an agenda for a regularly scheduled meeting, may generate a legal action requiring rescission of official action taken by the governing body.

The Act contains no guidance on "curing" a violation of the Act that was not knowingly and willfully committed, and this Committee has not previously addressed this issue. However, this Committee finds that a violation of the Act can be rectified, if a governing body takes reasonable remedial measures over and above ceremonial and perfunctory ratification of the official action previously taken. In particular, the following actions should be taken:

(1) At least three business days' notice of the meeting where the matter or matters will be reconsidered shall be made available in the same manner as notice of any regular or special meeting of the governing body. The meeting notice will include a description of the matters being reconsidered or a description of those matters may be included in a meeting agenda issued at the same time as the meeting notice. For purposes of this guidance, "business days" does not include Saturdays, Sundays, legal holidays or the day of the meeting.

(2) The matter being reconsidered shall be open for free and full discussion by the voting members of the governing body. In addition, before any decision is made or vote taken, there shall be an opportunity for public comment on the matter being reconsidered.

(3) The governing body shall, as a minimum, make an audio recording of the open portion of the meeting where the reconsideration occurs, and maintain that recording as a public record for six months.



Chairman