

OPEN MEETINGS ADVISORY OPINION NO. 2007-12

Issued On December 6, 2007 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

Jim Crawford, President of the Kanawha County Board of Education (Board), seeks guidance on Board Members asking questions of the Superintendent, Board staff, and citizens.

FACTS RELIED UPON BY THE COMMITTEE

During its regular meetings, the Board permits citizens to address the Board within time limits that are established by policy. This opportunity for public input is ordinarily listed on the meeting agenda as "Delegations." From time to time, Board Members may have questions for one or more persons who participate in this public comment period.

The Board also has an item on its agenda labeled as "Questions/Answers." This portion of the meeting provides an opportunity for any Board Member to ask questions of the Superintendent and staff regarding any matter related to the operation of the school system. This question and answer period was previously the subject of Open Meetings Advisory Opinion 2004-16, issued to the Kanawha County Board of Education on January 6, 2005.

The Board President wants to verify that Board Members may ask questions of delegations and the staff regarding matters that are not otherwise listed on the meeting agenda without violating the Open Meetings Act. In particular, he seeks guidance on the limits of any resulting dialogue between the Board Members and the person responding to questions, as well as any discussion that may ensue among the Board Members themselves.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code 6-9A-2(4) provides, in pertinent part:

"Meeting" means the 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 a 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; or

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

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

Each governing body shall promulgate rules by which the date, time, place and agenda of all regularly scheduled meetings and the date, time, place and purpose of all special meetings are made available, in advance, to the public and news media, except in the event of an emergency requiring immediate official action.

ADVISORY OPINION

The Open Meetings Act generally requires that government business be conducted in the "sunshine" during an open meeting where the actions of public officials serving on a governing body of a public agency may be observed by the public and the media. In 1999, the Act was amended to require that a meeting agenda be made available in advance of each regular meeting. This agenda should list each matter requiring official action which the governing body expects to address in the course of a particular meeting.

Accordingly, each item requiring official action should be described in the agenda in a manner that makes the public aware of the particular matters that may be dealt with in the course of the meeting. For example, where the agenda contains an item such as "review employee drug testing policy" or "consider employee drug testing," the Board Members may ask specific and probing questions of the School Superintendent and staff, as well as those persons who speak during the "delegations" portion of the meeting, either for or against employee drug testing. Further, the Members may publicly discuss among themselves the merits of the proposed policy, and make a decision to approve, disapprove or amend the policy.

A different situation arises where the meeting agenda makes no mention of employee drug testing and only lists "delegations" and "questions/answers." In this setting, a member of the public who has signed up to speak during the "delegation" portion of the meeting, may ask the Board to adopt a policy testing all employees for illegal drugs. In a similar vein, during the question and answer portion of the meeting, a Board Member may ask the Superintendent whether employees are being tested for illegal drugs. As this Committee stated in Open Meetings Advisory Opinion 2004-16, the Open Meetings Act does not prohibit Board Members from asking questions of the Superintendent and his or her staff in order to obtain information regarding matters within the scope of the school system's operations.

This same general rule applies to Board Members asking questions of citizens, employees or representatives who speak during a public comment period. In certain instances, further questioning may be needed so that the Board Members are able to understand or clarify the speaker's position or otherwise discern the speaker's concerns.

Although the Board Members may ask questions of citizens, the Superintendent, or Board staff, if the questioning involves a subject which is not on the agenda, the Board members are not permitted to deliberate among themselves toward a decision on that matter. Board Members may discuss purely logistical issues such as whether a particular matter which has been raised during a question period requires official action, if it should be placed on the agenda for a future meeting, and when to schedule a meeting. The Board may also discuss what data or documentation needs to be provided by staff or other meeting participants at a future meeting.

Consequently, each member of the governing body must exercise due care to insure that asking questions of staff or speakers does not transition from the domain of obtaining relevant information into a dialogue among the members regarding the merits of a matter on which the Board may reasonably expect to take official action. As the presiding official, the Board President has primary responsibility to maintain the order of business, including insuring that meeting participants do not inadvertently stray into deliberation toward a decision on a matter that is not properly on the agenda for that meeting.

Nothing in this opinion is intended to limit the discretion of any governing body, in the interest of conducting an efficient and effective meeting, from adopting reasonable procedural rules for its members governing such matters as the amount of time expended on asking questions of persons who appear to speak during a public comment period.

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.


James E. Shepherd II, Chairman