

OPEN MEETINGS ADVISORY OPINION NO. 2009-01

Issued On July 9, 2009 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The **Mercer County Board of Education** asks whether the Open Meetings Act requires it to include in the meeting minutes the name of an employee the Board has disciplined.

FACTS RELIED UPON BY THE COMMITTEE

The Mercer County Board of Education has disciplined one or more of its employees at a public meeting, following a discussion in executive session. At least one Board member has expressed concern about employees' right to privacy. The Board seeks clarification regarding whether the Open Meetings Act requires that the minutes list the employee's name, since the minutes become a matter of public record.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-5 reads:

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

- (1) The date, time and place of the meeting;
- (2) The name of each member of the governing body present and absent;
- (3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and
- (4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

ADVISORY OPINION

As early as 1999, Boards of Education have sought this Committee's guidance on compliance with the Open Meetings Act in the context of employee disciplinary matters. In Open Meetings Advisory Opinion 99-10, this Committee allowed a Board of

Education to omit from the meeting agenda the name of an employee whose conduct would be discussed in executive session. The Committee stated:

Because the statute on grievance procedures for Board of Education employees specifically dictates that a Level III grievance hearing or conference be conducted in private, the Open Governmental Proceedings Act does not mandate that the agenda released to the public contain the name of the grievant, unless the grievant has requested in advance that the proceedings be conducted in an open meeting.

The Committee concluded, "It is sufficient to refer to the matter on the agenda and for purposes of making a final decision as a 'Level III grievance'." The Committee further noted, however, that W. Va. Code § 6-9A-4(b)(2) requires that final decisions regarding employees should be taken in an open meeting.

Similarly, in Open Meetings Advisory Opinion 2000-12, in response to a request for guidance from another Board of Education, the Committee wrote:

In the case of a disciplinary matter, such as dismissal or suspension for cause, which may be discussed in executive session as provided in W. Va. Code § 6-9A-4(b), the meeting agenda provided the public may exclude the person's name... unless the employee requests an open meeting. However, the Open Meetings Act requires that, following any discussion in executive session, the name of the person being considered for discipline must be announced in open session before the board takes action to impose discipline.

The Committee further noted that the Open Meetings Act "specifically prohibits voting by reference to a letter, number, or any other designation, unless (1) expressly provided by law; or (2) the public has access to an agenda 'sufficiently worded to enable the public to understand what is being deliberated, voted or acted upon'."

In Open Meetings Advisory Opinion 2008-17, the Committee reviewed a governing body's practice of resolving personnel matters in executive session. The Committee stated, "The Act does not bar the members from reaching a consensus in an executive session but any required vote to approve official action should take place in an open meeting." The opinion recognized that, by contrast, **student** disciplinary matters may be decided or voted upon in executive session. See W. Va. Code § 6-9A-4(b)(3). The Committee is not aware of any statutory provision which provides a corollary exemption to protect the privacy rights of school employees, and finds that if the Legislature had intended to exclude the identity of employees from disclosure, it would have done so. Only the Legislature may bestow an exemption from disclosure. Unless and until the Legislature statutorily establishes such an exemption, this Committee is powerless to read one into the Open Meetings Act.

Although the Open Meetings Act authorizes the Board to meet in executive session to consider disciplining an employee, the statutory exception does not provide a basis for the Board to avoid identifying the employee when, upon the Board's return to open session, it votes thereon. The Open Meetings Act requires that the minutes include, at least, all motions, their disposition, and results of all votes. W. Va. Code § 6-9A-5. Thus, in order to comply with the Act's recordkeeping requirements, the minutes of the open session must, therefore, include the name of the employee being disciplined.

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.


Drema Radford, Chairperson