

OPEN MEETINGS ADVISORY OPINION NO. 2009-02

Issued On July 9, 2009 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Hampshire County Board of Health asks:

- (1) Whether discussions relating to the consolidation of two part-time employment positions into one may be discussed in executive session when this restructuring would result in the elimination of one employee's position?
- (2) Whether discussions concerning furloughs or lay-offs for certain employment positions may be held in executive session?
- (3) Whether the agenda item listings "Combining of Positions" and "Furloughs" adequately describes the matters which the agency will be discussing or deciding, or both.

FACTS RELIED UPON BY THE COMMITTEE

Due to budget restrictions, the Hampshire County Health Department may need to take steps to reduce its personnel service costs. Some potential steps it may take are combining two part-time employment positions into one, furloughs and lay-offs. If the part-time employment positions are combined, then one employee's position will be eliminated.

In regard to the furloughs, they would not be across the board. Instead, the Board would need to consider which positions and/or employees are critical to the day-to-day operations and which may be furloughed without negatively impacting continuity of operations. Similarly, the same discussions would need to be held for purposes of determining whether it may be necessary to lay-off employees.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

The Open Meetings Act states that an executive session may be held for the purpose of:

Matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee, or prospective public officer or employee unless the public officer or employee requests an open meeting.

Any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing authorized by law to exercise some portion of executive or legislative power.

W. Va. Code § 6-9A-4(b)(2)(B).

[G]eneral personnel policy issues may not be discussed or considered in a closed meeting. Final action by a public agency having authority for the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting;

ADVISORY OPINION

In Open Meetings Act Opinion, 2002-07, the Open Meetings Committee was asked to consider whether an agency could go into executive session to discuss eliminating a position that is currently filled. The Committee noted that “[W]here the governing body wants to discuss elimination of a particular position which is currently held by an employee, a decision to eliminate the position would inevitably result in that employee’s transfer or discharge.” The Committee then concluded that, “[T]his discussion involves one of those matters which the Board may discuss in executive session, unless the affected employee requests that the matter be discussed in an open session.”

Based upon the holding in O.M.A.O. 2002-07, and based upon the plain language in the Open Meetings Act, the Committee finds that, as the consolidation of the two positions would result in the dismissal of one part-time employee, this matter may be discussed in Executive Session unless either or the affected employees requests that it be discussed in the open. After discussing this matter in an executive session, the Open Meetings Act requires any vote on this issue to be taken after the Board reconvenes in an open session.

Next, the Committee must consider if the Board may discuss in an executive session which employees, if any, should be furloughed. The Board states that the furloughs would affect some, but not all, employees. The Open Meetings Act states that general personnel policies may not be discussed in executive session. W. Va. Code § 6-9A-4(b)(2)(B). The Committee finds that discussions concerning whether some employees should be furloughed is a matter which may be discussed in executive session. The Committee finds that this specific situation does not constitute general personnel policies but specific actions which constitute “matters arising from the ...employment...or compensation of a public employee...” If the Health Board is considering across-the-board furloughs, then that matter shall be addressed in an open

session. In contrast, where only certain employees will be affected, and the Board is determining which specific ones may be subject to furlough, then this matter may be discussed in executive sessions. Similarly, in regard to potential lay-offs, that is a matter involving the potential termination of an employee and may also be addressed in executive session.

Last, the Committee must consider if the proposed agenda items are sufficient. The Open Meetings Committee has previously held that “[M]atters requiring official action by a governing body should be stated on the agenda in a manner that makes the public aware of the particular matters to be dealt with at a meeting.” O.M.A.O. 2007-10. This Committee finds that the proposed agenda items should be more descriptive.

In regard to the proposed agenda item which reads “Combining of Positions,” it should instead state, “Consider whether part-time positions of [insert name of two affected positions here] should be combined into one full-time position.” In regard to the listing, “Furloughs” this item should instead read, “Consider whether certain employees should be furloughed as a cost reduction measure.” It is not necessary for the Health Board to use verbatim these suggested agenda listings. In fact, the Board of Health is in a better position than the Open Meetings Committee to determine and describe the nature of the items it intends to address. However, the Board should, for purposes of complying with the Open Meetings Act, use more descriptive listings than those presently proposed by the Board.

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

