

OPEN MEETINGS ADVISORY OPINION NO. 2006-07

Issued On September 7, 2006 By The

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

OPINION SOUGHT

The West Virginia Board of Respiratory Care asks that its procedural rules be reviewed for compliance with the Open Meetings Act.

FACTS RELIED UPON BY THE COMMITTEE

The Board's procedural rule requires that notice of the date, time and location of each regular or special meeting be provided to the Secretary of State, as well as appropriate professional associations, state agencies and those persons or organizations who request information, at least five business days in advance of the meeting. Agendas for regular meetings are to be posted or otherwise made available during regular business hours in the Board's office no later than three business days in advance of the meeting. Agendas for special meetings are included as part of the meeting notice.

The rule provides for convening an emergency meeting when the Board is required to take immediate official action on a matter. The rule provides for written notice to the Secretary of State stating the time, place and purpose of the meeting as well as the circumstances of the emergency.

The rule contains additional provisions pertaining to convening in an executive session, meeting by telephone or video teleconference, and preparing minutes of each meeting. A complete copy of the Board's proposed rule is attached to this advisory opinion as Appendix A.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

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.

Each governing body of the executive branch of the state shall file a notice of any meeting with the secretary of state for publication in the state register. Each notice shall state the date, time, place and purpose of the meeting. Each notice shall be filed in a manner to allow each notice to appear in the state register at least five days prior to the date of the meeting.

ADVISORY OPINION

The Open Meetings Act generally requires governing bodies of public agencies to make certain information available to the public and news media in advance of a meeting, including: (1) the date, time, place and agenda of all regularly scheduled meetings; and (2) the date, time, place and purpose of all special meetings. The Act specifically requires State executive branch agencies to publish notice of any special or regular meeting in the State Register at least five days before the meeting. Otherwise, the Act does not comprehensively describe when and how this information should be disseminated.

As an agency in the executive branch of State government, the Board of Respiratory Care must publish notice of its meetings in the State Register. There is no specific time for submitting the notice to the Secretary of State for publication, so long as it is submitted in time to allow publication "at least five days prior to the date of the meeting." However, the Board's proposed rule only calls for submitting this notice to the Secretary of State five business days in advance of the meeting. The rule must be modified to provide that notice of regular and special meetings will be submitted to allow publication five days in advance of the meeting.

Further, consistent with the historic application of the Open Meetings Act by the Secretary of State, the Committee finds that this publication in the State Register must take place at least five *calendar* days before the meeting. For these purposes, the day of publication counts as one day. All intervening days are likewise counted, including Saturdays, Sundays and legal holidays, but not the day of the meeting, without regard to the time of day when the meeting is scheduled to begin.

The Board's proposed rule also requires submitting notice of an emergency meeting, in the event of a matter requiring immediate official action by the Board, to the Secretary of State for publication in the State Register. This is fully consistent with the Act. However, in most emergency situations, the meeting will have already been held by the time this notice is published. The Board's proposed rule additionally provides that the nature of the emergency requiring immediate official action will be included in the meeting notice. This Committee finds that, in order to fully comply with the purposes of the Act, the Board's rule should be revised to provide that this same explanation will be included in the minutes of any emergency meeting.

Once the Board has properly submitted notice of a regular or special meeting for publication in the State Register, it must also make available to the public and the news media an agenda for each regular meeting, unless the agenda was incorporated in the State Register notice. An agenda is a document which states the matters which will be dealt with at the meeting. An agenda must also be made available for each special meeting, unless the "purpose" of the meeting, as published in the State Register, reasonably describes each matter requiring official action by the Board.

The Act does not specify how far in advance of the meeting an agenda must be made available. This Committee finds that the Legislature intended each governing body of a public agency to make its agenda available a reasonable time in advance of a regular or special meeting.

The Board's proposed rule generally calls for issuing a meeting agenda no later than three business days in advance, not counting Saturdays, Sundays, legal holidays or the day of the meeting. The agenda will be posted or otherwise readily available to the public during the Board's regular business hours at the Board's office. The rule also provides that once an agenda has been issued, it may only be amended to add additional items up to two business days in advance of the meeting, unless the additional agenda item involves an emergency requiring immediate official action.

This Committee agrees that the proposed rule makes the meeting agenda for the Board's regular meetings available a reasonable time in advance of the meeting in compliance with the Act.

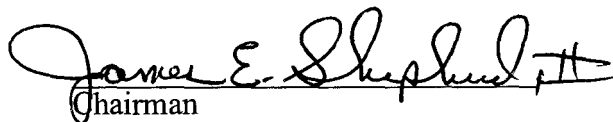
The proposed rule properly requires publication of a notice for each special meeting in the State Register at least five calendar days in advance of the meeting. While this five calendar day time frame governs the meeting notice period for both special and regular meetings of an executive branch agency of state government, a meeting agenda for a special meeting only needs to be made available two business days in advance of the meeting.

The Board's proposed rule provides for more advance notice of the meeting agenda than the minimum time this Committee has recognized as providing "reasonable" notice. As the proposed time frame is more liberal than the minimum required, it is clear that it complies with the Act.

In addition to describing meeting notice and agenda procedures, governing bodies may elect to include other provisions governing meeting procedures in their rules. Consistent with its legislative mandate to consider whether a proposed course of action violates any provision in the Open Meetings Act, this Committee will review additional provisions in a governing body's procedural rules. However, this Committee's opinion, and the immunity which this opinion conveys, will be limited to whether these additional rules are inconsistent with the Act. The opinion will not address discretionary application of a rule to a specific situation, unless the requester provides a proposed set of facts describing that situation.

Having noted the limited scope of this opinion as it relates to these additional provisions, this Committee finds that no such proposed provisions are inconsistent with the Act.

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.


Chairman

PROCEDURAL RULE
WEST VIRGINIA BOARD OF RESPIRATORY CARE
PROCEDURAL RULE – SERIES 8
OPEN MEETINGS

§30-8-1. General

1.1 Scope — As required in W. VA. Code §6-9A-3, this rule sets forth the means by which the time, place, and agenda of all regular and special meetings are made available in advance to the public and the news media, except in the event of an emergency requiring immediate official action.

1.2. Authority — WV Code §30-34-4 and §6-9A-1 through 12.

1.3 Filing Date —

1.4 Effective Date —

§30-8-2. Application and Enforcement

This rule applies to the board and any and all individuals desiring to attend or to address the West Virginia Board of Respiratory Care.

§30-8-3. Definitions

3.1 Board — The West Virginia Board of Respiratory.

3.2 Meeting — the convening of the governing body of the West Virginia Board of Respiratory Care for which a quorum is required.

3.3 Quorum — a simple majority of the constituent membership of the board.

3.4 Decision — any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present.

3.5 Governing body - means the members of the board having the authority to make decisions for or recommendations on policy or administration.

3.6 Executive session — means any meeting or part of a meeting of a governing body which is closed to the public.

§30-8-4. Regular Meetings

4.1 The board meets in regular session during the months of April and October. The length of the meeting is determined by the amount of business to be addressed by the board.

4.2 Meeting dates are determined for one (1) year in advance beginning July 1, and ending on June 30. A majority of the board members shall agree upon specific meeting dates.

4.3 The executive secretary shall provide notice of the date, time, location and purpose of each regular meeting to the Secretary of State, appropriate professional associations and state agencies, as well as persons and organizations who request information, at least five (5) business days in advance of a regularly scheduled meeting.

4.4 The board shall convene all regular meetings at 11:00 o'clock a.m. unless otherwise changed by a majority vote of those members present and voting.

4.5 The board shall convene all regular meetings at the board office unless otherwise changed by a majority vote of those board members present and voting.

4.6 In the event the meeting room cannot accommodate all members of the public who wish to attend, the board may move the meeting to another location, provided another suitable location is readily available, and the public arriving at the original meeting location are given appropriate directions to the new meeting location.

4.7 The board shall issue a meeting agenda no later than three business days in advance of each regular meeting, not counting Saturdays, Sundays, legal holidays or the day of the meeting. The meeting agenda shall be posted or otherwise readily available to the public during regular business hours at the board office. After an agenda has been issued, it can only be amended to add additional items of business up to two business days in advance of the meeting, unless the additional agenda item involves an emergency requiring immediate official action by the board. In case of emergency the amended agenda is to explain the nature of the emergency which caused the board to add the item to the agenda and this explanation is to be included in the meeting minutes.

4.8 Board members may submit agenda items at any time prior to mailing of the agenda.

4.9 Individuals may submit items for board consideration. The items should be submitted not less than thirty (30) days prior to the date of the regularly scheduled meeting. The Chairperson makes the final determination on whether an item submitted less than thirty (30) days in advance shall be considered.

4.10 The Chairperson may cancel a meeting if a quorum cannot be convened or if there are no items of business to be conducted by the board.

4.11 Individuals who desire to address the board during a regularly scheduled meeting may do so by making their wish known to the Chairperson at any time prior to the call to order.

§ 30-8-5. Special Meetings

5.1 The Chairperson, the Secretary, or any two (2) members of the board may call a special meeting.

5.2 The executive secretary shall send a written notice setting forth the time, place and agenda to be considered to each member of the board, Secretary of

State, appropriate professional associations and state agencies, as well as persons and organizations who request the information, at least five (5) business days in advance of a special meeting.

§30-8-6. Emergency Meetings

6.1 The Chairperson may call a meeting in the event of an emergency requiring immediate official action by the board.

6.2 The executive secretary shall notify members by telephone or other expedient method.

6.3 The executive secretary shall file a written notice containing the time, place, and purpose of the meeting and facts and circumstances of the emergency prior to the meeting, with the Secretary of State.

§30-8-7 Exceptions

7.1 The governing body of the West Virginia Board of Respiratory Care may hold an executive session during a regular, special or emergency meeting, in accordance with the provisions of this section. During the open portion of the meeting, prior to convening an executive session, the presiding officer of the board shall identify the authorization under this section for holding the executive session and present it to the members of the board and to the public.

7.2 An executive session may be held only upon a majority affirmative vote of the members present of the governing body of a public agency. A public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions:

- a. To consider acts of war, threatened attack from a foreign power, civil insurrection or riot;
- b. To consider personnel or employee matters;
- c. To issue, effect, deny, suspend or revoke a license, under the laws of this state or any political subdivision, unless the person seeking the license, whose

license was denied, suspended, or revoked requests an open meeting;

d. To consider the physical or mental health of any person, unless the person requests an open meeting;

e. To discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;

f. To plan or consider an official investigation or matter relating to crime prevention or law enforcement;

g. To development security personnel or devices;

It To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public might adversely affect the financial or other interest of the state or any political subdivision;

i. To avoid the premature disclosure of an honorary degree, scholarship, prize or similar award;

j. Nothing in this article permits the board to close a meeting that otherwise would be open merely because an agency attorney is a participant. If the board has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of that settlement shall be reported by the board and entered into its minutes within a reasonable time after the settlement is concluded.

k. To discuss any matter which, by express provision of federal law or state statute or rule of the court is rendered

confidential, or which is not considered a public record within the freedom of information act as set forth in article one,

7.3 No decision or vote may be made during an executive or closed session.

§30-8-9. Minutes

9.1 The board shall provide written minutes of all of its meetings. Subject to the exceptions for executive session set forth in section four (4) of this article, minutes of all meetings except minutes of executive sessions, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

a. The date, time and place of the meeting

b. The name of each member of the board present and absent;

c. All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition;

d. The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the board for recording roll call votes, the vote of each member, by name.

§30-8-9. Meeting by Conference Call.

9.1 Occasions may arise when one or more board members are not available to attend a meeting in person. On such occasions, members may attend and participate in the meeting by telephone or video teleconference to the same extent as if physically present. A speakerphone or other audio/video device shall be used at the meeting site to enable those present, including the public, to hear/see the members who are attending and participating by telephone or video/ teleconference.