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.
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> 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.

Signed by James E. Shepherd, II, Chairman, September 7, 2006