

OPEN MEETINGS ADVISORY OPINION NO. 2006-13

Issued On November 2, 2006 By The

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

OPINION SOUGHT

James Piccirillo, a member of the City of Follansbee Water Board, seeks guidance regarding meeting in executive session and adding items to the agenda.

FACTS RELIED UPON BY THE COMMITTEE

The requester asks when it is appropriate to add additional items to a meeting agenda in the course of a meeting, including items which may be authorized for discussion in an executive session. He further asks how specific a governing body must be in stating the reason for going into executive session.

The requester also seeks guidance on when personnel policy may be discussed in executive session. It is his understanding that personnel matters regarding particular employees may be discussed in executive session but general personnel policies must be discussed in public.

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.

W. Va. Code § 6-9A-4 provides:

(a) The governing body of a public agency 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 governing body shall **identify the authorization under this section** for holding the executive session and present it to the governing body and to the general public, but no decision may be made in the executive session.

(b) 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:

* * *

(2) To consider:

(A) 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 or prospective public officer or employee requests an open meeting; or

(B) For the purpose of conducting a hearing on a complaint, charge or grievance against a public officer or employee, unless the public officer or employee requests an open meeting. **General 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 [sic], resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting.

ADVISORY OPINION

The Open Meetings Act generally requires governing bodies of public agencies to discuss matters requiring official action in the course of a properly noticed meeting which is open to the public and the media. However, the Act contains certain specified exceptions in § 6-9A-4 which allow a governing body to hold an executive session from which the general public and news media are excluded.

The requester asks if a governing body may meet in executive session to discuss a matter that was not included on the meeting agenda and the matter to be discussed does not constitute an emergency requiring immediate official action. Ordinarily, a governing body may only go into executive session to discuss a matter which does not involve an emergency, and which was not included on the meeting agenda a reasonable time in advance of the meeting, under the following narrowly limited circumstances:

First, the item to be discussed must involve a matter which is authorized for discussion under one of the exceptions contained in § 6-9A-4 of the Act, or must otherwise be exempt from the requirements of the Act;

Second, a majority of the governing body must vote to go into executive session;

Third, the discussion must be limited to logistical matters (such as whether the matter requires official action, when the governing body can meet to consider or decide the matter, who should be in attendance at the subsequent meeting, and what information or documentation needs to be available at the subsequent meeting); and,

Fourth, no official action may be taken until the item appears on the agenda for a properly noticed meeting.

The requester also seeks guidance on what information needs to be conveyed to the public and media present at an open meeting before convening an executive session. The Act specifically requires each governing body to “identify the authorization under this section” for holding an executive session. This Committee believes the Legislature included this requirement in the Act so that persons attending a meeting would be informed of the reason or reasons for excluding the public and media in order to convene in executive session.

In order to proceed into executive session, a member must first move that the governing body meet in executive session to discuss a particular agenda item. The required “authorization” for going into executive session may be provided simply by stating the general subject matter covered by a particular exemption in the Act, such as “a personnel matter involving an employee” or “to discuss

pending litigation with the agency's attorney." The statute requires the presiding officer to identify the authorization for convening an executive session. This may be accomplished by the presiding officer either repeating the authority stated in a motion by a member to convene an executive session, or by stating the authority while soliciting a majority of the members to make a motion to convene an executive session. An affirmative majority vote is required to convene an executive session.

Although stating that an executive session is proposed "under the exemption provided in W. Va. Code § 6-9A-4(b)(2)(A)" would also identify the authorization for discussing a personnel matter involving an employee, most members of the public are likely to be more confused than enlightened by a reference to a numbered Code section. Accordingly, this Committee holds that a governing body may comply with the requirement for stating the authorization for holding an executive session regarding an item on the meeting agenda by describing the subject for which a particular exemption in the Act authorizes an executive session, such as "a personnel matter involving discipline of an employee" or "to consider an official investigation," rather than including a reference to a numbered Code section.

The requester has also requested guidance on discussing general personnel policies in executive session. As previously noted, the Act allows a governing body to go into executive session and exclude the public "only when a closed session is required" for one of the reasons listed in W. Va. Code § 6-9A-4. Subsection(2)(A) lists various personnel matters concerning a current or prospective public officer or employee which may be considered in executive session. However, the Act further provides in Subsection (2)(B) that: "General personnel policy issues may not be discussed or considered in a closed meeting."

The requester has provided an example: an employee is challenging a personnel policy regarding hiring practices for certain positions. The governing body may wish to discuss revising or rescinding the policy, thereby resolving the dispute. May the governing body meet in executive session to consider the challenged policy?

The plain language of the Open Meetings Act indicates that it was the Legislature's intent to distinguish between personnel matters that are personal to an individual employee or public servant (such as whether a person is best qualified to fill a position or hold office, awarding a merit raise to an employee for exceptional performance, or whether to reprimand an employee for misconduct), and general personnel policy issues (such as what duties should be performed by a particular employee classification, what knowledge, skills and abilities should any applicant for a particular position have in order to qualify for that position or whether incumbent employees should be given preference over outside applicants when positions become open within the agency). Therefore, a governing body of a public agency may not rely on the "personnel" exemption in § 6-9A-4(b)(2) to invoke an executive session to discuss general personnel policy issues, such as a hiring policy applicable to all employees or a class or category of employees.

This Committee recognizes that there may be circumstances where a general personnel policy may properly be discussed in executive session pursuant to one or more of the other exceptions in the Act. However, in the absence of a particular set of facts and circumstances presented by the requester, this Committee is unable to provide definitive guidance on the applicability of any other exceptions, such as security or the attorney-client privilege.

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, November 2, 2006 _____
Chairman