

OPEN MEETINGS ADVISORY OPINION NO. 2008-10

Issued On August 7, 2008 By The

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

OPINION SOUGHT

The Kanawha County Board of Education asks if it is required to go into executive session to establish written goals and objectives for the County Superintendent.

FACTS RELIED UPON BY THE COMMITTEE

The Board of Education annually establishes goals and objectives for the Board and the County Superintendent. At the end of each year, the Board evaluates the Superintendent based, at least in part, on the progress made toward achieving these previously established goals and objectives. The Board seeks to determine whether it is required to conduct that portion of a meeting where these goals and objectives are established in an executive session.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2, *Definitions*, provides in pertinent part:

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(2) "Executive session" means any meeting or part of a meeting of a governing body which is closed to the public.

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W. Va. Code § 6-9A-4, *Exceptions*, provides in pertinent part:

(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:

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(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, resignation, discharge, dismissal or compensation of an individual shall be taken in an open meeting;

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W. Va. Code § 18-4-6, *Evaluation of county superintendent*, provides in pertinent part:

(a) At least annually, the county board shall evaluate the performance of the county superintendent. The evaluation process to be used shall be one authorized by the state board. The West Virginia school board association shall maintain a catalog of evaluation instruments which comply with this section and shall make them available to county boards.

(b) At a minimum, **the evaluation process shall require the county superintendent and county board to establish written goals or objectives for the county superintendent to accomplish within a given period of time.** Additionally, the county board shall evaluate the county superintendent on his or her success in improving student achievement generally across the county and specifically as it relates to the management and administration of low performing schools.

(c) The evaluation also may cover the performance of a county superintendent in the areas of community relations, school finance, personnel relations, curricular standards and programs and overall leadership of the school district as indicated primarily by improvements in student achievement, testing and assessment.

(d) **The evaluation of a county superintendent shall occur in executive session.** At the conclusion of the evaluation, the county board shall make available to the public a general statement about the evaluation process and the overall result. Additional information about the evaluation may be released only by mutual consent of the county superintendent and the county board. . . .

ADVISORY OPINION

The Open Meetings Act permits a governing body of a public agency to convene an executive session and exclude the public and media “only when a closed session is required” for one of the reasons listed in the Act. Included among the authorized reasons for convening an executive session are matters arising from the appointment or employment of a public officer or employee.

This Committee finds that matters relating to the evaluation of the County Superintendent, including establishing written goals and objectives which the County Superintendent is expected to accomplish within a certain time frame, **may** be discussed in executive session as they involve personnel matters relating to a specific individual. The Act requires that before any matter is discussed in executive session, a majority of the governing body must vote to go into executive session. There is no provision in the Open Meetings Act which **requires** any particular matter be addressed in an executive session.

Any determination on whether the Kanawha County Board of Education is **required** to go into executive session to establish written goals and objectives for the County Superintendent is controlled by the provisions of W. Va. Code § 18-4-6. This Committee has no authority to provide definitive guidance on the meaning and application of provisions in the West Virginia Code that are not part of the Open Meetings Act.

Although the Ethics Commission has been specifically authorized to render written advisory opinions on the application of W. Va. Code § 18-5-1a, generally relating to the eligibility of County School Board Members to hold another public office, it has no authority to interpret other school laws and rules. That power rests with the State Superintendent of Schools in accordance with W. Va. Code § 18-3-6. The Board may wish to seek an opinion from the State Superintendent regarding whether it is required to meet in executive session to establish goals and objectives for the County Superintendent.

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.


James E. Shepherd II, Chairman