

## OPEN MEETINGS ADVISORY OPINION NO. 2012-02

Issued On May 3, 2012 By The

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

#### OPINION SOUGHT

The President of Bridgemont Community and Technical College asks:

- (1) Whether its Transportation Engineering Certification Board is subject to the Open Meetings Act.
- (2) Whether its Transportation Engineering Certification Board must make its rules available for public comment.
- (3) Whether its Transportation Engineering Certification Board is permitted to informally discuss certification applications and/or make certification decisions outside of regular meetings and/or a work session.
- (4) Whether the Transportation Engineering Certification Board is required to make certification decisions during regular scheduled meetings.

#### FACTS RELIED UPON BY THE COMMITTEE

Bridgemont Community and Technical College (hereinafter Technical College) is a State Institution of higher education. W.Va. Code § 18B-3C-7a. It is governed by a Board of Governors. W.Va. Code § 18B-2A-1(b).

The Technical College offers workforce development programs through its Workforce Development Division. According to the Workforce Development Division's website, this Division collaborates with local employers to provide training necessary to ensure a competitive advantage in the marketplace. The website states "Our expertise is in technical and leadership training in specialties ranging from sustainability to manufacturing. Located in the Upper Kanawha Valley, Bridgemont Community and Technical College has a long history of partnering with a variety of industries including chemical, mining, and manufacturing to deliver the latest in technical training and professional development."

The Workforce Development Division has a Training Service Agreement with the West Virginia Department of Transportation Division of Highways. Pursuant to this agreement, the Division of Highways pays the Technical College to administer the West Virginia Transportation Engineering Technician Certification Board to oversee the certification program. (hereinafter "Certification Board").

The Certification Program is not created by the West Virginia Code, nor, based upon information and belief, was it created by any Legislative Rule. There is no statute requiring the Division of Highways to administer this program. Instead, it appears the program is an initiative by the Division of Highways to develop its workforce. To accomplish this objective, the Division of Highways at one point contracted with Fairmont University. It then entered into a contract with Bridgemont.

The Certification Program provides a means for Division of Highways employees to obtain different levels of certification as Transportation Engineering Technicians/Technologists. Students who are not employed by the Division of Highways may also, for a fee, seek certification through this program or take classes offered by Bridgemont in connection with this program.

There are five different levels of certification. For example, Level I is a basic certification requiring a high school diploma or GED, and a minimum score on designated math tests, or six (6) months of Certification Board approved technical experience. A person who meets these requirements is certified as a Transportation Engineering Technician Trainee. Each certification level has different requirements. For example, Level III requires, in relevant part, five years of Certification Board approved experience. Persons who obtain this certification level are conferred the designation "Level III Transportation Engineering Technician."

To obtain a certification, a candidate submits an application to the Certification Board which reviews it to determine whether the person meets the certification requirement for that particular level. These certifications may be considered by the West Virginia Division of Highways or the Division of Personnel, or both, in determining whether an employee meets the minimum requirements for a particular job classification. For example, the West Virginia Division of Personnel references the certification as a minimum qualification for a Transportation Engineering Technologist, classification 8348.

The terms of the contract between Bridgemont and the Division of Highways require, in part, that Bridgemont oversee the Certification Board, hold four Board meetings a year and maintain the Board's website. Bridgemont also offers classes which Division of Highways employees or other students may take to receive credits which may be considered for certification purposes. Examples of classes include Written English, Pre-Algebra and Construction Materials.

The Certification Board has internal Rules and Regulations. The Rules provide that the Board of Advisors, i.e. Certification Board Members, shall consist of seven members appointed by Bridgemont, with four nominations from Bridgemont and three nominations from the Division of Highways. The appointments are made by the President of Bridgemont, not its Board of Governors. The Rules require the Board to review all applications which are submitted for certification, and to keep a record of its proceedings. Individuals who are successfully certified are listed on Bridgemont's

website with their corresponding certification level. If a person requests a certification and is denied the same, there is no formal appeal process in place; however, he or she may resubmit an application.

The Board meets periodically to review applications. This task, at times, takes a significant amount of time. The applications are divided among board members. Based upon information and belief, two board members jointly review an application; then, they make their recommendation to the full board. The preliminary reviews are conducted during a gathering which the Certification Board informally designates as a work session. Final decisions are made during the Board's regular meetings. The Board's deliberations on the applications are not conducted in public. Historically, the Board has allowed interested persons to attend the first part of their meetings. Attendees are welcome to pose questions or make suggestions to the Board.

The Certification Board Rules do not provide for compensation for the Board Members for performing their duties. There are several current or former Division of Highways employees on the Board. Those currently employed presumably perform this work as part of their DOH job duties. The Bridgemont Academic representative is paid an additional sum of money by Bridgemont for his responsibilities relating to the Board. There are also members from the private sector.

### **CODE PROVISIONS RELIED UPON BY THE COMMITTEE**

W.Va. Code § 6-9A-2

(3) "Governing body" means the members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members...

(4) "Meeting" means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding;

...

(6) "Public agency" means 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. The term "public agency" does not include courts created

by article eight of the West Virginia constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.

## **ADVISORY OPINION**

### **Is the Transportation Engineering Certification Board subject to the Open Meetings Act?**

A governing body is defined as “[T]he members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members...” W.Va. Code § 6-9A-2(3). A public agency is defined as “[A]ny administrative or legislative unit of state, county or municipal government, including any ... 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.”

The Certification Board is unique. The Certification Program it oversees has primarily been created for the benefit of public employees; however, neither the Board nor the certification is created by the West Virginia Code. Moreover, the Division of Highways is not statutorily required to administer this program, either directly or through a third party provider. Instead, the program is an initiative of the Division of Highways to develop its workforce.

While there is no statutory requirement that certifications be made by an appointed board, it appears that the Division of Highways at some point made a policy decision to have the applications reviewed by an appointed board as opposed to having the applications reviewed by staff, either from the Division of Highways, Division of Personnel, or Bridgemont.

Normally, a governing body which is subject to the Open Meetings Act is a body or board created by statute or executive order, or a committee therein. If the Certification Board was composed exclusively of Division of Highways employees tasked with fulfilling this function, then it would not be subject to the Open Meetings Act. This same conclusion would follow if Bridgemont staff had this responsibility.

However, here, the Board consists of public employees and private sector representatives. While the Open Meetings Committee struggles with the application of the Open Meetings Act to this particular Board, it hereby concludes that meetings of the Certification Board are subject to the Open Meetings Act. It bases this conclusion on the fact the Division of Highways, through its agreement with another public body, i.e. Bridgemont, has essentially created a governing body to oversee the administration of a certification program which has been primarily created for the education and certification of State employees and is primarily funded with public money. See O.M.A.O. 2001-15

wherein the Committee ruled that an authority formed by three cities to develop and operate power facilities was subject to the provisions of the Open Meetings Act.

**Does the Transportation Engineering Certification Board have to make its rules available for public comment?**

The Open Meetings Act contains no provisions governing whether a public agency has to place an internal rule out for public comment. In regard to the application of the Open Meetings Act, as will be discussed below, any deliberations, discussions or votes of the Certification Board regarding its rules or policies must be made during the course of a properly noticed public meeting.

**Is the Transportation Engineering Certification Board permitted to informally discuss certification applications and/or make certification decisions outside of regular meetings and/or a work session?**

In Open Meetings Advisory Opinion 2008-08 regarding the Board of Funeral Service Examiners, this Committee determined that “hearings to find facts and make determinations whether someone should be denied a license or certificate of registration, or have such a license or certificate suspended or revoked, are not meetings subject to the notice requirements of the Act.” This Committee addressed a substantially similar situation in Open Meetings Advisory Opinion 2000-01 regarding the West Virginia Consolidated Public Retirement Board. That matter concerned a Review Committee which met telephonically to review and make recommendations regarding applications for disability retirement benefits. The opinion stated that this activity came under the adjudicatory exemption in W. Va. Code § 6-9A-2(4)(A). See also O.M.A.O. 2008-13.

Based upon the prior opinions of this Committee, and the plain language in the Open Meetings Act, the Committee finds that when members of the Certification Committee meet or confer with each other to determine whether a certification should be granted or denied, the Certification Committee is, in these instances, performing a quasi-judicial function. Hence, the Open Meetings Act does not apply to these separate meetings. Nevertheless, the Open Meetings Committee cautions the Requester that when it is meeting or conferring for purposes of reviewing or approving certifications, its discussions and actions must be limited to this purpose. In these quasi-judicial meetings the Certification Committee may **not** discuss or decide policy matters which are required to be deliberated and acted upon during the course of a properly noticed public meeting.

Instead, it must only notice its meetings, and comply with the other provisions of the Open Meetings Act, when the Certification Board convenes to perform functions such as reviewing, approving or modifying its rules or policies, or taking other action which affects the administration of the program, e.g. changing a course requirement. See O.M.A.O. 2002-15 wherein the Committee ruled that the [Deputy Civil Service]

Commission must comply with the Act when meeting to exercise any general legislative or executive authority. In contrast, it was not required to follow the open meeting requirements when conducting hearings on deputy sheriff disciplinary matters.

**Must the Transportation Engineering Certification Board make certification decisions during regular scheduled meetings?**

As set forth above, the Certification Board does not have to make certification decisions during public/regular meetings as it is performing a quasi-judicial function when it reviews and decides upon whether a person should be certified. In fact, it may violate various privacy laws if the Certification Board votes during a public meeting to grant or deny a Division of Highway employee or student's request for certification. The Open Meetings Committee is not authorized to interpret privacy laws; nevertheless, the program in question relates to a quasi-academic certification which, in the opinion of this committee, is not a matter which is required by the Open Meetings Act to be decided in public. Instead, the decision of whether an applicant should be certified is a quasi-judicial function.

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.

s/s Drema Radford  
Drema Radford, Chairperson