

OPEN MEETINGS ADVISORY OPINION NO. 2008-11
Issued On September 4, 2008 By The
WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

Dr. J.W. Endicott, a member of the Mingo County Board of Education, asks whether the stated order of business on the Board's meeting agenda may be changed without prior notice to the public and the media.

FACTS RELIED UPON BY THE COMMITTEE

The agenda for regular Board of Education meetings normally includes an opportunity for employee and citizen input. Ordinarily, this public comment or delegation period has been set as the final order of business, prior to adjournment, on the Board's meeting agenda. The requester questions whether the Board may move this comment period forward in the order of business, after a meeting has convened, without prior notice. He also questions the benefit of accepting public comments at the beginning of the meeting, before any formal business is conducted.

The Mingo County Board of Education has adopted a policy which states that board meetings shall be conducted in an orderly and efficient manner pursuant to established parliamentary procedures. The policy does not limit public comment to a particular point in the meeting.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code§ 6-9A-3, *Public notice of meetings*, provides in pertinent part:

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four of this article, all meetings of any governing body shall be open to the public. Any governing body may make and enforce reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised: Provided, that persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence.

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.

* * *

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

(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:

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

(5) "Official action" means action which is taken by virtue of power granted by law, ordinance, policy, rule, or by virtue of the office held.

* * *

ADVISORY OPINION

Since 1975, the Open Meetings Act has required governing bodies of public agencies to provide advance notice of the date, time and place of each public meeting. In 1999, the Act was amended to require that a meeting agenda be made available in advance of each meeting.

The Act does not include a definition of "agenda." This Committee has determined that, in order to comply with the Act, the agenda should list each matter requiring official action by the governing body. Ordinarily, an agenda may also include some matters that do not require official action, such as a call to order, recognition of guests, and an opportunity for public comment by citizens or delegations.

Generally, the agenda states the matters to be discussed and decided in the chronological order in which the governing body will take them up during the meeting. However, there is no legal requirement that a governing body take up items in the order listed in the agenda. This Committee finds that governing bodies of public agencies have inherent discretion to set the order of business at the beginning of a meeting, and change the order of business in the course of a meeting as circumstances require, subject to any procedural rules the governing body may have adopted to aid in the efficient conduct of its business such as Robert's Rules of Order.

This discretion to revise the order of business particularly applies to public comment periods. This Committee has previously determined that public comment periods generally do not involve official action. Further, as previously stated in Open Meetings Advisory Opinion 2000-08, a governing body may receive input from a citizen, employee or delegation during a public comment period even though the subject of the speaker's comments has not been included in the meeting agenda. However, any action or decision on such matter must be deferred to a subsequent meeting where the matter has been included on the meeting agenda, unless it involves an emergency requiring immediate official action.

The Act contains only one limitation regarding public comment periods: whenever a public comment period is offered, the governing body may not require participants to sign up more than fifteen minutes before the beginning of the meeting. Each governing body may decide, in its discretion, whether to afford public comment during a meeting. When a governing body elects to provide an opportunity for public comment, the Act does not specify whether these comments are heard at the beginning of the meeting, the end of the meeting, or interspersed between agenda items requiring official action. There may be good public policy arguments why one approach is better than another, but the decision on when to hear public comment is a matter to be determined by each governing body.

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/ James Shepherd, Chair



James E. Shepherd II, Chairman