

OPEN MEETINGS ADVISORY OPINION NO. 2008-13

Issued On November 13, 2008 By The WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENT AL MEETINGS

OPINION SOUGHT

The Permanent Total Disability Reviewing Board asks if it is subject to the requirements of the Open Meetings Act when it meets to evaluate claims for permanent total disability under the state's workers' compensation statutes.

FACTS RELIED UPON BY THE COMMITTEE

The Permanent Disability Reviewing Board ("Board") was established within the Offices of the West Virginia Insurance Commissioner pursuant to W. Va. Code § 23-4-6U) which provides as follows:

From a list of names of seven persons submitted to the executive director by the health care advisory panel, the executive director shall appoint an interdisciplinary examining board consisting of five members to evaluate claimants, including by examination if the board elects. The interdisciplinary examining board shall terminate upon termination of the commission and all administrative and adjudicatory functions performed by the interdisciplinary examining board shall be performed by the following reviewing bodies for those claims over which they have administrative jurisdiction: (1) The Insurance Commissioner or his or her designated administrator of each of the funds set forth in this chapter; (2) private carriers; or (3) self-insured employers. The reviewing bodies shall employ or otherwise engage adequate resources, including medical professionals, to perform the functions of the interdisciplinary examining board. The board shall be composed of three qualified physicians with specialties and expertise qualifying them to evaluate medical impairment and two vocational rehabilitation specialists who are qualified to evaluate the ability of a claimant to perform gainful employment with or without retraining. One member of the board shall be designated annually as chairperson by the executive director. The term of office of each member of the board shall be six years and until his or her successor has been appointed and has qualified. Any member of the board may be appointed to any number of terms. Any two physician members and one vocational rehabilitation specialist member shall constitute a quorum for the transaction of business. The executive director, from time to time, shall fix the compensation to be paid to each member of the board, and the members are also entitled to reasonable and necessary traveling and other expenses incurred while actually engaged in the performance of their duties. The board shall perform the duties and responsibilities assigned by the provisions of this chapter, consistent with the administrative policies developed by the executive director with the approval of the board of managers.

The primary purpose of the Board is to review applications for permanent total disability (PTO) under our state's workers' compensation statutes. The Board is required to evaluate the claimant, including a physical examination, if necessary. Ordinarily, the Board reviews all pertinent records regarding the claimant's medical history and reports of examinations.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(3) defines "governing body" as "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 "

W. Va. Code § 6-9A-2(4) defines "meeting" as "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; * * *

W. Va. Code § 6-9A-2(6) defines "public agency" as "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."

ADVISORY OPINION

Ordinarily, governing bodies of public agencies are required to hold their meetings in public, after giving appropriate notice of the date, time, place and agenda or purpose for each meeting. However, the Open Meetings Act specifically exempts certain gatherings from this requirement by excluding certain activities from the definition of a "meeting" subject to the requirements of the Act. One of the specified exclusions encompasses "any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding." W. Va. Code § 6-9A-2(4)(A).

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." Similarly, in Open Meetings Advisory Opinion 2002-15 regarding the Nicholas County Deputy Civil Service Commission, this Committee found that when the Commission met to conduct an administrative hearing on a grievance filed by a deputy sheriff subject to the civil service system, such meeting was a quasi-judicial meeting that falls under the adjudicatory exemption.

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).

This Board's process closely corresponds with the Review Committee's activities described in 2000-01. Therefore, this Committee finds that the role of the Board in administering the state's workers' compensation claims process involves an adjudicatory function. Accordingly, when assembling to perform this activity, the Board's gathering is not a meeting subject to the requirements of the Open Meetings 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.

/s/ Drema Radford, Chair



Drema Radford, Chairwoman