

OPEN MEETINGS ADVISORY OPINION NO. 2008-17

Issued On December 4, 2008 By The WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

A member of the Jefferson County Ambulance Authority (Authority) asks for guidance on the requirements for issuing meeting agendas, convening an executive session during a meeting, and addressing matters that are not included on the agenda.

FACTS RELIED UPON BY THE COMMITTEE

The requester presents a scenario where the Authority's meeting agenda includes a listing for "executive session, unresolved personnel issues." Once that agenda item is reached during the meeting, a motion is made to go into executive session to address "unresolved personnel issues." The public is advised that no further business will be conducted once these matters are decided.

The executive session is convened and the personnel issues, two pending employee grievances, are favorably resolved. Before returning from executive session, one or more Board Members initiate a discussion regarding a bill for legal services from an attorney and whether the attorney has been properly authorized to perform certain services for the Authority. This matter is not referenced on the meeting agenda nor is it related to the grievances. Although at least one Board Member questions whether this matter is out of order, the Chair permits the discussion to continue until the members return from executive session.

Immediately following the executive session, there is a statement made on the record that the personnel issues have been resolved. Before adjournment, a Board Member makes a motion that charges for certain legal services not be paid. The motion passes with the Board Member who questioned the propriety of addressing this matter abstaining from the vote.

The requester wants to know whether this scenario describes an executive session that has been properly convened, and whether the billing issue could be discussed in executive session or acted upon during that meeting.

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-3, *Public notice of meetings*, 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.

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-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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ADVISORY OPINION

The Open Meetings Act generally requires governing bodies of public agencies to conduct their business in the "sunshine," where their actions can be observed by the public and the media. When the Open Meetings Act was amended in 1999, the Legislature added a requirement for making a meeting agenda available to the public and the media a reasonable time in advance of each meeting. This agenda requirement comprises an essential element of every regular meeting because a proper agenda facilitates meaningful public participation in the process of open government.

A meeting agenda involves more than simply setting out the order of business that the governing body will follow. A public agency is likely to follow the same order of business at each meeting while the particular matters it addresses change for each meeting. Accordingly, this Committee has previously determined that any matter requiring official action by the governing body should be listed on the agenda, employing language that will reasonably place the public and the media on notice of the particular items that will be considered during each meeting. In this regard, generic descriptions such as "personnel matters" and "old business" are insufficient to satisfy this requirement.

In the scenario provided by the requester, the agenda listing of "unresolved personnel issues" represents a generic agenda item that tells the public nothing more than "old business - personnel." At the minimum, the agenda should state: "consider 2 employee grievances." This gives the public reasonable notice of the particular personnel matters the Authority will be considering. Ordinarily, it is not necessary to identify the employees who are grieving by name.

The agenda language described by the requester indicates that these unresolved personnel issues will be addressed in executive session. Convening an executive session simply involves a procedural device for conducting a portion of a meeting behind closed doors. In terms of parliamentary procedure, it falls into the same category as requesting a roll call vote.

There is no provision in the Open Meetings Act that requires those particular items which might be addressed in executive session to be delineated in the agenda as potential or expected executive session matters. Although it does not violate the Act to designate anticipated executive session matters on the agenda, governing bodies should not decide whether to go into executive session for a particular agenda item until that item is reached on the agenda, and an appropriate motion is made and vote taken, as hereinafter discussed.

The Act requires each governing body to "identify the exemption under this section"

for holding an executive session and approve a motion to convene an executive session by a majority vote. The "personnel" exemption in the Act authorizes a governing body to consider a grievance filed by an employee in executive session. W. Va. Code § 6-9A-4(b)(2)(A)&(B).

The standard procedure for convening an executive session starts with a member of the governing body making a motion to convene an executive session. In stating the motion, the member should identify the authorization in the Open Meetings Act for going into executive session, such as "to address personnel matters involving two employee grievances." Had the agenda properly listed "two employee grievances," a motion to convene an executive session "to consider the next agenda item which involves a personnel matter" would be acceptable, provided that the agenda is available to all members of the public and any media attending the meeting. It is not necessary for the motion to reference the particular numbered section of the Code which authorizes an executive session.

Once the motion to convene an executive session has been made, a majority of the governing body must vote to convene an executive session. (In situations where the governing body consists of only three members, and the motion receives a second, the Chair may elect to treat this as a majority affirmative vote in favor of the motion, unless the parliamentary rules of procedure followed by the governing body mandate a more formal vote.)

Ordinarily, no decisions may be made in executive session. W. Va. Code § 6-9A-4(a). By simply announcing that the grievances have been resolved upon returning from executive session, it appears that the governing body in the requester's scenario failed to formally approve the resolution of the grievances in public. The Act does not bar the members from reaching a consensus in an executive session but any required vote to approve official action should take place in an open meeting. (There are certain specific matters that may be decided or voted upon in executive session, such as student disciplinary matters. The facts presented by this request do not suggest a basis for invoking any of those exemptions.)

This Committee previously determined in Open Meetings Advisory Opinion 2007-10 that a motion to go into executive session may encompass multiple items listed on the agenda, provided that the same exemption, such as a personnel matter that is personal to an individual employee, applies to all of the items. However, the Act does not permit a governing body to discuss the merits of a matter or to deliberate toward a decision on a matter that has not been properly listed on the meeting agenda and which is not encompassed by a motion to convene an executive session. Therefore, discussion of a bill for legal services is not a personnel matter that may be discussed in executive session. Likewise, a billing question, standing alone, does not involve a matter that may be considered in an executive session under any of the other exemptions recognized in the Act.

Finally, this scenario describes a governing body taking official action on a matter that has not been described in the meeting agenda. This Committee has consistently concluded that the Act only allows a governing body to make a decision on a matter that has not been included in the meeting agenda if the matter involves "an emergency requiring immediate official action." This is the specific standard established by the Legislature in W. Va. Code § 6-9A-3.

As this Committee explained in Open Meetings Advisory Opinion 2007-05 regarding the City of Dunbar, an emergency ordinarily involves a sudden event or occurrence of a serious nature, such as an event that threatens public health and safety. This Committee concluded that the situation presented in that request, approving the employment of an attorney or other professional to assist the City Council in examining the town's financial records, did not constitute an "emergency" contemplated by the Act. Similarly, the situation presented in this request, acting on a questionable bill for legal services, does not represent an emergency so as to dispense with the requirement that the matter be described on the agenda that has been made available a reasonable time in advance of the meeting.

When a new matter arises in the course of a meeting, such as the accuracy of a recent bill for legal services, any official action or decision **must** be deferred until a subsequent meeting when the matter has been properly included on the meeting agenda. Members of the governing body may discuss purely logistical issues such as whether a particular matter requires official action, if it should be placed on the agenda for a future meeting, and when to schedule that meeting. The members may also discuss what data or documentation needs to be provided by staff or other interested participants at a future meeting and whether certain persons should be invited to attend the next meeting to provide necessary background information or details needed to reach a decision.

The chair of the governing body has primary responsibility for seeing that a public meeting is conducted in an orderly and legal fashion, including insuring that the members do not stray into deliberating toward a decision on a matter which is not on the meeting agenda, and which does not represent a bona fide emergency. However, all members of a governing body share responsibility for conducting the organization's business within the parameters the Legislature has established for holding open government meetings.

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