

OPEN MEETINGS ADVISORY OPINION NO. 2008-08

Issued On June 5, 2008 By The

WEST VIRGINIA ETHICS COMMISSION

COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Board of Funeral Service Examiners asks if the Open Meetings Act requires it to publish notice of public hearings regarding disciplinary matters in certain newspapers.

FACTS RELIED UPON BY THE COMMITTEE

The Board of Funeral Service Examiners (hereinafter Board) is one of several boards which govern various professions in West Virginia. The Board regulates those persons who practice embalming, funeral directing and cremation.

In addition to regulating these related professions through a licensing and registration process, the Board has authority to investigate and resolve complaints against licensees and registrants. The process which the Board has adopted for deciding contested cases involving a denial, suspension or revocation of a license or certificate of registration includes a public hearing conducted in accordance with the Administrative Procedures Act, W. Va. Code § 29A-1-1, *et seq.*

The hearing procedures adopted by the Board and promulgated in a Legislative Rule, W. Va. C.S.R. § 6-4-1, *et seq.*, require personal service of a hearing notice upon the demanding party or "complainant." In addition, the Board's written procedures for conducting these hearings provides:

The hearing will be open to the public and notice of the hearing must be given to the general public as well as publication on the Secretary of State's notice web page. Copies of the charges and notice should be sent to the local newspapers and to newspapers in the area where the funeral home/funeral director is located.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

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

(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; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

(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;

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ADVISORY OPINION

Ordinarily, governing bodies of public agencies must give reasonable notice of the date, time, place and agenda of their regular and special meetings. A governing body of the executive branch of the State, such as the Board of Funeral Service Examiners, must publish such notice in the State Register at least five calendar days in advance, not counting the day of the meeting.

However, the Open Meetings Act explicitly excludes from the definition of "meeting" those quasi-judicial or administrative proceedings which are conducted for the purpose of making an adjudicatory decision. Thus, 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.

Although governing bodies of public agencies subject to the Act are free to adopt additional procedures to give notice in situations where the Act does not otherwise require public notice, this Committee has no authority to interpret or enforce any such additional requirements.

There is no provision in the Open Meetings Act which prohibits the Board from amending or rescinding its rules requiring that notice of public hearings be published in the State Register or provided to certain newspapers. Such hearings constitute adjudicatory sessions, not "meetings" as defined by the Act.

The Act does not address the amount or manner of notice for an adjudicatory session. These matters may be governed by the agency's enabling legislation-or procedural rules. Where an agency's hearings are normally open to the public, some form of public notice is advisable. The Board may want to consult with its attorney regarding what form of public notice is acceptable or necessary in these circumstances.

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