

OPEN MEETINGS ADVISORY OPINION NO. 2007-08

Issued On September 6, 2007 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

Roy Berger, a member of the Hedgesville Town Council, asks if two or more Council Members may get together without discussing matters relating to town policy or administration, if they are not deliberating toward a decision or recommendation to the Council.

FACTS RELIED UPON BY THE COMMITTEE

The Hedgesville Town Council consists of five Council Members, a Mayor and a Recorder. The Council holds its regular meetings on the first Wednesday of each month.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code§ 6-9A-2(4) defines the term "meeting." It also enumerates specific exceptions to the definition. The definition reads in relevant part:

[T]he 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:

(D) General discussions among members of a governing body on issues of interest to the public when held in planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action.

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

W. Va. Code§ 6-9A-2(5) defines the term "official action" as "[A]ction which is taken by virtue of power granted by law, ordinance, policy, rule or by virtue of the office held."

ADVISORY OPINION

There are essentially two general scenarios where members of a governing body may gather without engaging in a "meeting" which will necessitate compliance with the notice provisions and other requirements of the Open Meetings Act. One scenario involves a gathering where less than a quorum of the governing body is present. The second potential scenario involves a gathering where a quorum of the governing body is present, but the purpose of the meeting does not involve making a decision on a matter requiring official action, and discussion is limited to avoid deliberation toward a decision.

This Committee previously addressed whether a gathering of less than a quorum of a governing body constitutes a meeting subject to the Open Meetings Act in Open Meetings Advisory Opinion 2004-17. In that opinion, it was noted that a "meeting" is defined as the convening of a governing body

for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in official action. Consistent with that definition, we concluded that whenever a quorum of a governing body gathers to discuss public business, and there is an intention for the discussions to lead to official action, such a gathering is a meeting. Accordingly, any such meeting must comply with the notice requirements and other applicable provisions of the Act.

In that same opinion, this Committee considered the only West Virginia Supreme Court decision that has addressed what constitutes a meeting under the Act. In McComas v. Board of Education, 197 W. Va. 188, 475 S.E.2d 280 (1996) the Court held that where a quorum of school board members met with school administrators to discuss matters pending before the board, their gathering constituted a meeting. Unfortunately, the Court did not directly address a gathering involving less than a quorum. Moreover, after the McComas opinion was issued, the Legislature amended the definition of meeting.

The 1999 amendment to the Act clarified that certain discussions among public officials do not fall within the definition of meeting. One class of discussions explicitly excluded from the definition of meetings is, "*General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed **but there is no intention for the discussion to lead to an official action.***" W. Va. Code§ 6-9A-2(4)(D).

The Legislature also adopted additional language under its declaration of legislative policy. The pertinent part of that policy statement provides:

The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body were required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decision making.

W. Va. Code§ 6-9A-1.

Consistent with our earlier opinion, this Committee holds that less than a quorum of Town Council Members may engage in discussions amongst themselves in which they express their views on issues of interest to the public, including issues pending before the Council. As our Supreme Court noted in McComas, "[A]n interpretation of the Sunshine Law that precludes any off-the-record discussion between board members about board business would be both undesirable and unworkable□ and possibly unconstitutional." McComas, 197 W. Va. 188, 198, 475 S.E.2d 280, 290 (1996).

Nonetheless, there are situations where a series of communications by less than a quorum might violate the Act. For instance, public officials could be in violation of the Act if they use a series of communications, whether face-to-face meetings, telephone conversations, or an exchange of electronic mail, with the intent of allowing a majority of the governing body to predetermine the outcome of a particular matter pending before the entity on which they serve. The Committee finds that such a course of conduct would constitute an improper meeting, inconsistent with both the spirit and intent of the Sunshine Law.

This Committee has further recognized that there are situations where a quorum of a governing body may be present without holding a "meeting" under the Act. For example, in Open Meetings Advisory Opinion 2003-02, this Committee determined that a quorum of a governing body may gather to discuss purely logistical matters, such as which items are to be included on the agenda, and what data or documentation needs to be provided by various meeting participants, without violating the Act. Similarly, in Open Meetings Advisory Opinion 2003-01, this Committee found that the Act does not prohibit a quorum of a governing body from gathering for lunch, or attending a banquet, reception or similar social event, so long as the members of the governing body refrain from deliberating among themselves toward a decision on a matter requiring their official action.

In addition, governing bodies may gather to receive training or attend educational presentations as a group, as well as to participate in ceremonial activities, such as a ribbon-cutting or installation ceremony. In each of these situations, no "meeting" will be deemed to take place unless a quorum of the governing body begins deliberating toward a decision on a matter which requires official action.

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 E. Shepherd, II

James Shepherd, II, Chairperson
Open Governmental Meetings Act Committee