

OPEN MEETINGS ADVISORY OPINION NO. 2007-11

Issued On November 1, 2007 By The

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners (Board) asks if vacant positions must be counted in determining a quorum.

FACTS RELIED UPON BY THE COMMITTEE

Effective July 1, 2007, the statute establishing the Board was amended to expand the Board's membership from 9 to 11 members. One of the additional members of the Board is required to be a licensed nuclear medicine technologist while the other added position calls for appointment of a licensed magnetic resonance imaging technologist. In addition, one Board Member has resigned.

To date, no members have been appointed to fill these vacancies. If these three vacancies are counted in determining a quorum, the Board would need to have 6 of the 8 currently serving members participate in a meeting to establish a quorum. If the vacant positions are not counted, only 5 participating members will be required to constitute a quorum.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2 provides the following definitions pertinent to this opinion:

(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....

(7) "Quorum" means the gathering of a simple majority of the constituent membership of a governing body, unless applicable law provides for varying the required ratio.

ADVISORY OPINION

The Open Meetings Act defines a "quorum" as "a simple majority of the constituent membership of a governing body." The Act does not further define what is meant by "constituent membership" nor is this term defined elsewhere in the Code.

The Board has requested guidance from this Committee on whether newly-created positions which have not yet been filled, or positions which are vacant due to a member's resignation, must be counted in determining whether a majority of the Board's "constituent membership" are properly gathered to convene a proper meeting.

This Committee finds that a substantially similar question was addressed by our Supreme Court of Appeals in State ex rel. Hatfield v. Farrar, 89 W. Va. 232, 109 S.E. 240 (1921). In the syllabus of its decision, the Court held:

Under a statutory provision saying in general terms a majority of the members of a public tribunal, composed of a prescribed number of officers,

shall be necessary to form a quorum, a majority of its members in office at a given time suffices, and, if there are vacancies, a majority of the whole number elected to membership is not required.

Based upon our Supreme Court's ruling in *Farrar*, the Attorney General has similarly concluded that where 2 members of a 7-member Town Council had been legally disqualified from holding office and their seats were legally vacant, a quorum should be based upon the participation of a majority of the 5 remaining members. 33 W. Va. Op. Att'y Gen. 87 (1929). This Committee finds these opinions to be dispositive of the Board's inquiry.

Accordingly, where one or more authorized positions on a governing body which are ordinarily occupied by a member who is authorized to vote are vacant, such vacant positions are not counted in determining the whole number from which a majority must be calculated to determine a quorum. A position may be vacant for a number of reasons including: (1) the death of a member; (2) the resignation of a member, properly communicated to the appropriate authority and accepted, if required by law; (3) the removal of a member from office through established legal procedures; and (4) no person has yet been duly appointed or elected to fill the position, or such person has not accepted the appointment by being duly sworn. Ex-officio members of a governing body are not ordinarily counted in determining the whole number from which a majority must be established to obtain a quorum.

In regard to this particular inquiry, the Board is not required to count the 2 newly-created positions that have yet to be filled by appointment, nor the position which is vacant as a result of the written resignation of a Board Member, in determining whether it has a quorum to hold a meeting and conduct official business. Board Members whose terms have expired but whose successors have not yet been appointed remain constituent members in accordance with W. Va. Code § 6-5-2, as do those Board Members who are serving unexpired terms. Therefore, the Board currently has 8 constituent members and 5 of those members may establish a quorum under the 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/ James E. Shepherd, II

James Shepherd, II, Chairperson
Open Governmental Meetings Act Committee