

OPEN MEETINGS ADVISORY OPINION NO. 2007-03

Issued On April 5, 2007 By The

**WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS**

OPINION SOUGHT

The Huntington Sanitary Board asks for guidance on whether certain situations constitute meetings subject to the requirements of the Open Meetings Act.

FACTS RELIED UPON BY THE COMMITTEE

Huntington Mayor David Felinton serves as Chairman of the Huntington Sanitary Board. The Board consists of the Mayor and two Board Members appointed by the Huntington City Council.

As an example of a situation where some confusion may exist, the requester has explained that contract negotiations are pending in regard to an expired or expiring collective bargaining agreement with the majority of the Board's employees. The Board may wish to meet with an attorney or the Board's Executive Director to select a negotiator who, in turn, will meet with the employees' bargaining unit representative. Further, the Board will need to communicate its bargaining goals to whomever is chosen to serve as its designated representative for these contract negotiation sessions.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code § 6-9A-2(4) defines "meeting" in pertinent part 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. The term meeting does not include:

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(D) 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(7) defines "quorum" as "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 Huntington Sanitary Board is a governing body of a public agency consisting of three Board Members. Thus, a gathering of any two of these three Board Members constitutes a quorum of the Board's constituent membership sufficient to conduct official agency business.

This Committee has previously concluded that the Open Meetings Act requires notice of any gathering where a quorum of a governing body will be present, and matters requiring official action will be discussed, such as a "work session" to prepare for a regular meeting. On the other hand, our earlier opinions have acknowledged that not every gathering where a quorum of a governing body is present constitutes a "meeting" within the meaning of the Act. The fundamental question when a quorum is present is whether the Board Members are deliberating toward a decision on one or more matters requiring official Board action.

Inasmuch as only two Board Members need be present for the Sanitary Board to conduct official Board business, the Open Meetings Act requires that any conversation among a quorum of the governing body that involves a matter requiring official Board action be deferred until the matter has been properly placed on a meeting agenda. (For detailed guidance on how to comply with the notice and agenda requirements of the Act, see Open Meetings Advisory Opinion 2006-15, issued on January 4, 2007.) Then, the matter may be addressed in the course of a properly noticed public meeting.

While certain personnel matters that are personal to a particular employee, or discussions involving matters that are protected by the attorney-client privilege, may be conducted in an executive session, these executive sessions may only be held in the course of a properly noticed public meeting. In order to proceed into executive session, a member must first move that the governing body meet in executive session to discuss a particular agenda item. The required "authorization" for going into executive session may be provided simply by stating the general subject matter covered by a particular exemption in the Act, such as "a personnel matter involving an employee" or "to discuss pending litigation with the agency's attorney." The statute requires the presiding officer to identify the authorization for convening an executive session. This may be accomplished by the presiding officer either: (1) repeating the authority stated in the motion by a member to convene an executive session; or, (2) stating the authority, while soliciting any of the members to make a motion to convene an executive session. An affirmative majority vote is required to convene an executive session.

Discussions between a public agency and its attorney which are subject to the protection of the attorney-client privilege may take place in executive session when these procedures are followed. Likewise, strategies and guidelines for negotiating a collective bargaining agreement may be discussed in executive session under the exception which authorizes discussion of the expenditure of public funds where publicly conducting such discussions might adversely affect the financial interest of a political subdivision, such as the Huntington Sanitary Board.

A series of meetings between a single Board Member and the Board's attorney or Executive Director, in order to avoid having to convene a meeting subject to the Open Meetings Act, would be inconsistent with the spirit and intent, if not the letter, of the Act. This Committee has previously concluded that a series of phone calls to Board Members does not constitute a proper meeting. Likewise, a series of face-to-face meetings involving less than a quorum of Board Members may not be conducted to avoid holding a properly noticed public meeting.

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