

**OPEN MEETINGS ADVISORY OPINION NO. 2013-03**

**Issued On October 3, 2013 By The**

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

**OPINION SOUGHT**

The Nicholas County Solid Waste Authority asks that its bylaws be reviewed for compliance with the Open Meetings Act.

**FACTS RELIED UPON BY THE COMMITTEE**

The Nicholas County Solid Waste Authority (NCSWA) recently adopted amended bylaws. The Executive Director now asks if any part of the newly-adopted bylaws violates the Open Meetings Act (the Act). The Open Meetings Committee has reviewed the proposed bylaws in their entirety.

The Act does not require this Committee to recite each provision of the bylaws in rendering an opinion as to whether they comply with the Act. Nevertheless, this Committee elects to provide comment in regard to the provisions listed below.

A complete copy of the NCSWA bylaws is [NOT] attached to this advisory opinion.

**CODE PROVISIONS RELIED UPON BY THE COMMITTEE**

W. Va. Code § 6-9A-3 provides in relevant part:

Except as expressly and specifically otherwise provided by law ... [and] except as provided in section four of this article, all meetings of any governing body shall be open to the public. Any governing body may make and enforce reasonable rules for attendance when there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised: *Provided*, That persons who desire to address the governing body may not be required to register to address the body more than fifteen minutes prior to time the scheduled meeting is to commence.

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.

W. Va. Code § 6-9A-5 explains:

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

- (1) The date, time and place of the meeting;
- (2) The name of each member of the governing body present and absent;
- (3) All motions, proposals, resolutions, orders, ordinances, and measures<sup>•1</sup> proposed, the name of the person proposing the same and their disposition; and
- (4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

### **ADVISORY OPINION**

The Open Meetings Act generally requires governing bodies of public agencies to promulgate rules setting forth the notice and agenda requirements for regular and special meetings. W. Va. Code § 6-9A-3. In addition to those requirements, governing bodies may elect to adopt other rules governing meeting procedures so long as the provisions are not in conflict with the Act.

Consistent with its legislative mandate to determine whether any proposed course of action would violate any provision in the Act, this Committee will review such additional provisions. Nevertheless, the Committee's opinion, and any immunity which flows from this opinion, will be limited to whether any provision in the proposed bylaws is inconsistent with the Act.

The Committee finds that the majority of the bylaws comply with the Open Meeting Act, but most would benefit from modification or clarification in order to clearly satisfy the Act. The analysis will be limited to the subsection labeled "Article VI" and will proceed by paragraph and subject matter.

### **Introduction**

The statement in paragraph one (1) reads:

All meetings of the Nicholas County Solid Waste Authority, a public agency, shall be held in accordance with WV Code 6-9A, the Open Governmental Proceedings Act.

This Committee finds that the words, "and any committees or subcommittees thereof," should be inserted after "Authority" and before "a public agency." This statement tracks

language later in the bylaws and reinforces the idea that all NCSWA meetings, not just regular meetings, must conform to the requirements of the Act.

### **Notice of Regular Meetings**

The statement in paragraph three (3) reads:

Notice of regular meetings shall be given to each Board member at least five days prior to the meeting. Public notice of all regular meetings shall include the date, time, and place and be posted or published three days in advance of the regularly scheduled meeting. Agendas for such meetings will be available to the public three days in advance at the Landfill office.  
WV Code 6-9A-3[.]

This statement is not quite symmetrical with the Open Meetings Act. Although it indicates where agendas are available, it does not say where notices will be posted. Further, it fails to specify that the agendas must be made available three **business** days in advance of any meeting.

In order to ensure strict compliance with the Act, this Committee recommends redrafting the second sentence of the paragraph to read, "Public notice of all regular meetings shall include the date, time, and place, and shall be posted at the Landfill office three business days in advance of the regularly scheduled meeting."

### **Notice of Special/Emergency Meetings**

Paragraph four (4) states:

Notice of special meetings shall be given to each Board member two days prior to the meeting. Public notice of the special meeting shall include the date, time, place, and purpose and be posted or published two days in advance of the meeting.

This Committee recommends replacing the second sentence of paragraph four (4) with, "Public notice of the special meeting shall include the date, time, place and purpose of the meeting, and shall be posted at the Landfill office two business days in advance."

Paragraph five (5) reads:

In the event of an emergency requiring immediate official action, an emergency meeting may be held with notice given as soon as possible prior to the meeting and delivered to each member of the Board.

This Committee recognizes the NCSWA's attempt to track the Open Meetings Act's definition of "emergency." Unfortunately, this definition is no longer correct. The

Legislature recently amended the Open Governmental Meetings Act to contain a statutory definition of "emergency," codified at W. Va. Code§ 6-9A-2(2). It reads:

(2) "Emergency meeting" means any meeting called by a governing body for the purpose of addressing an unexpected event which requires immediate attention because it poses:

(A) An imminent threat to public health or safety;

(B) An imminent threat of damage to public or private property; or

(C) An imminent material financial loss or other imminent substantial harm to a public agency, its employees or the members of the public which it serves.

Accordingly, the bylaws should reflect this new definition. This Committee recommends changing the first sentence of paragraph five (5) to the following phrase: "In the event of an emergency as defined in W. Va. Code§ 6-9A-2(2), an emergency meeting may be held. The NCSWA shall post public notice at the Landfill office as soon as practicable prior to the meeting. Notice must also be delivered to each member of the board."

### **Subcommittees**

Paragraph seven (7) states:

All committees (sic) meetings shall provide public notice and be open to the public in the same manner as regular meetings and minutes shall be kept.

For clarity's sake, this Committee recommends changing paragraph seven (7) to "All committee and subcommittee meetings shall provide public notice and be open to the public, in the same manner as regular Nicholas County Solid Waste Authority meetings as described above. Minutes shall also be kept at committee and subcommittee meetings, in compliance with the Open Meetings Act."

### **Quorum**

Paragraph eight (8) reads:

The presence of a majority of the Board shall constitute a quorum.

The paragraph also cites to W. Va. Code§ 6-9A-2(7). The actual language of that code section is:

"Quorum" means the gathering of a simple majority of the constituent membership of a governing body ... "

While not in violation of the Act, the citation is somewhat misleading. The statute refers to a "simple majority," which can, in some political contexts, be different from a

"majority." Some other types are "two-thirds majority," "supermajority," and "double majority," all of which fall under the blanket descriptor "majority." The Committee recommends replacing "majority" with "simple majority," accordingly.

### **Manner of Voting**

Paragraph nine (9) states:

The voting on all motions at Board meetings shall be by a roll call vote. The result of the vote will be recorded in the minutes. Any member abstaining from a vote must note for the record the reason for the abstention. In the event that a quorum is not present, members shall either be allowed to participate and vote via telephone or other telecommunication systems or those present may adjourn the meeting to a later date.

This paragraph cites W. Va. Code§ 6-9A-5 and§ 22C-4-23(4). The reference to the Open Meetings Act authority is incorrect. (This Committee is not authorized to rule on the citation to W. Va. Code§ 22C-4-23(4), but that provision does not appear to address the voting procedure prevented either.) Although the substantive language of that provision of the bylaws complies with the Ethics Act, the Requester should remove the erroneous citations. Additionally, the phrase, "other telecommunications systems" should be removed. Members are permitted to vote in person or by telephone. Fax or text voting, for example, is prohibited. See Open Meetings Act Opinions 1991-08, 2001-36, and 2009-08.

### **Meeting Procedures**

Paragraph ten (10) reads:

Robert's Rules of Order shall control the transactions of all business conducted at all board meetings.

While seemingly innocuous, Open Meetings Act Opinion 2010-12 gives guidance on the formal adoption of Robert's Rules of Order. It states:

There is nothing in the Open Meetings Act which requires a governing body to adopt a particular rule of parliamentary procedure. To avoid any potential for conflict between [Robert's Rules] and other applicable rules ... the Committee finds that [the Requester should adopt] a provision similar in substance as to that adopted by the City of Glendale which reads:

Except as otherwise provided in the Constitution of the United States and the State of West Virginia, the laws of the State of West Virginia or the Charter of the City of Glen Dale,

all questions of order, the methods of organization and the conduct of business of the municipal council shall be governed by Robert's Rules of Order in all cases to which they are applicable, and in which they are not inconsistent with the governing rules of council.

Accordingly, the Committee recommends that the NCSWA adopt a similar provision instead of the current blanket adoption of Robert's Rules of Order. For example, "[t]o the extent that there is a conflict between Robert's Rules of Order and the Open Meetings Act, the latter prevails," would meet the requirements of the Act.

### **Public Attendance**

Paragraph eleven (11) reads:

The Authority may make and enforce reasonable rules for public attendance at its meetings. The Authority may remove from the meeting any member of the public who is disrupting the meeting ....

This statement appears to be designed to track W. Va. Code§ 6-9A-3, which reads in relevant part:

Any governing body may make and enforce reasonable rules for attendance when there is not room enough for all members of the public who wish to attend. This article does not prohibit the removal from a meeting of any member of the public who is disrupting the meeting to the extent that orderly conduct of the meeting is compromised ....

The notable difference between the statute and these bylaws is that under W. Va. Code § 6-9A-3, the governing body may only make and enforce rules for attendance *when there is not room enough for all members of the public who wish to attend*. Nothing in the Act indicates that the governing body has the power to make "reasonable" rules for public attendance outside this specific situation. Of course, members of the public who are disrupting the meeting may be removed under the Open Meetings Act, whether or not it is in an entity's bylaws.

In fact, since W. Va. Code§ 6-9A-3 indicates that it does not prohibit removal of excessively disruptive persons, it must then prohibit removal of non-disruptive people except in cases of overcrowding. This is the legal principle of *expressio unius est exclusio alterius*, or, the expression of one thing is the exclusion of the other.

Accordingly, the Committee recommends inserting the language "where there is not room enough for all members of the public who wish to attend" at the end of the first sentence. Paragraph eleven (11) of the bylaws, as currently written, creates an improper rule and should be removed.

## **Minutes**

Finally, the entirety of Paragraph 13 reads:

Minutes of all regular, special and emergency meetings of the Board shall be recorded by mechanical means and transcribed.

W. Va. Code § 6-9A-5 reads:

[M] inutes of all meetings except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time after the meeting and shall include, at least, the following information:

- (1) The date, time and place of the meeting;
- (2) The name of each member of the governing body present and absent;
- (3) All motions, proposals, resolutions, orders, ordinances, and measures proposed, the name of the person proposing the same and their disposition; and
- (4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

The Committee recommends tracking the language of the statute and including the statutory requirements for recorded minutes. The NCSWA's compliance with W. Va. Code § 6-9A-5 at every meeting is mandatory. Incorporating the statute into the bylaws in this way creates explicit guidelines within the document for the board to follow.

## **CONCLUSION**

The Committee commends the NCSWA for submitting its bylaws for review. Some caution, however, is necessary in the future regarding citing statutory provisions as authority for bylaw provisions; incorrect citations can be equally or more problematic than omitting citations altogether.

Consistent with its limited authority, this Committee finds that none of the provisions contained in the current bylaws, other than those addressed above, are inconsistent with the Open Meetings Act. In regard to the changes which must be made for purposes of complying with this ruling, the Committee directs the NCSWA to submit the amended bylaws to the Executive Director of the West Virginia Ethics Commission for approval. If the Executive Director finds that the revised bylaws comply with this opinion, then she shall append the revised bylaws and her letter approving the same to this opinion. If necessary, the Executive Director or Commission may submit the revised bylaws to the Open Meetings Committee for further review.

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 Ratford, Chair