

OPEN MEETINGS ADVISORY OPINION NO. 2011-02
Issued On May 5, 2011 By The
WEST VIRGINIA ETHICS COMMISSION
COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Raleigh County Commission asks whether a quorum of County Commissioners may attend a staff meeting.

FACTS RELIED UPON BY THE COMMITTEE

The County Commission has a regular weekly staff meeting. Meeting attendees include the County Attorney, County Administrator, Zoning Officer and County Engineer. The County Administrator conducts the meeting. The staff provides updates. The Requester states that no formal decisions are made at the meeting and that no potential decisions are discussed. The County Commission consists of three Commissioners. They are not required to attend these meetings; however, at times, one or more Commissioners may attend. The Requester states that the discussions are of an informal, educational and informative nature. The Requester seeks guidance on whether a quorum of Commissioners may attend these meetings.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code§ 6-9A-2(3) defines "governing body" in pertinent part as "[T]he 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."

W. Va. Code§ 6-9A-2(4) defines "meeting" as follows:

* * * [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.

W. Va. Code§ 6-9A-2(5) defines "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."

W. Va. Code§ 6-9A-2(7) defines "quorum" as "[T]he 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 staff of a government agency are not appointed or elected officials who constitute the membership of a governing body. When staff meets, without members of the governing body present, this gathering does not constitute a meeting for purposes of the Open Meetings Act. Hence, such a meeting is not required to be noticed or open to the public.

A different analysis is required when a quorum of a governing body attends a staff meeting. The Open Meetings Act requires that official action be taken at a properly noticed public meeting. This same rule of law applies to deliberations amongst a quorum of a governing body.

In O.M.A.O. 2007-01, the Open Meetings Committee ruled that a quorum of a governing body may not attend weekly status conferences with staff members for purposes of receiving updates on projects. In rendering its decision it ruled, in relevant part:

[A] progress report which indicates that the project is behind schedule and will need to have certain deadlines extended, or the contractor has encountered unexpected technical problems that will require a contract extension or a price change, would necessarily involve matters that require official action.

Id. at 4. Similarly, in O.M.A.O. 2000-07, the Committee ruled that members of a City Planning Commission may not attend a pre-meeting with other concerned persons such as the mayor and city zoning officer to review plans. These decisions of the Open Meetings Committee are also consistent with the decision of the Supreme Court in *Mccomas v. Board of Education of Fayette*, 475 S.E.2d 280 (W.Va. 1996) wherein the Supreme Court ruled that a quorum of a school board could not meet with the Superintendent outside of a properly noticed public meeting¹. While the Open Meetings Act was amended in 1999 to exclude from the definition of meeting discussions of an informal or educational nature, this Committee declines to construe this exception as applying to staff meetings where a

¹ By contrast, in *Appalachian Power Company v. Public Service Commission*, 253 S.E.2d 377 (W.Va. 1979), the Supreme Court ruled that the Open Meetings Act's definition of meeting does not apply to consultations of members of the Public Service Commission with staff members as part of its quasi-judicial (*emphasis supplied*) decision-making powers.

quorum of a governing body, committee or sub-committees is present.

To comply with the requirements of the Open Meetings Act, under the circumstances described, it would be permissible for the County Commission President or another designated member of the Commission to attend the staff meeting and report back to the Commission during the course of a properly noticed meeting where this item has been placed on the agenda. For example, the agenda may read, "Report of Commissioner "X" regarding staff meeting." This report would occur during the public portion of the meeting, not an executive session unless an aspect of the report involves a matter properly discussed in an executive session in accordance with W.Va. Code § 6-9A-4. Even then, only the portion which falls within the executive session exception may be discussed during executive session. Other portions of the report which do not fall within this exception must be discussed in open session. Another approach is to have staff provide a report during a properly noticed Commission meeting. Once again, this item must be on the agenda and the same rules regarding executive session matters, outlined above, apply.

This decision is not intended to ban all discussions between staff and a quorum of a governing body. As a practical matter, at times, a quorum of a governing body, particularly in the case of a County Commission, may be present in the County Commission offices during the course of a work day. In these situations, every remark made by staff to a quorum of commissioners or members of a governing body is not a prohibited communication. This conclusion is consistent with the Legislative findings in the Open Meetings Act which states:

The Legislature finds, however, that openness, public access to information and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. 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. Still, both the staff and a quorum of Commissioners must exercise caution 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/ Drema Radford, Chair