

**OPEN MEETINGS ADVISORY OPINION NO. 2010-02 (attachment A is on file in office)
Issued On October 7, 2010 By The**

WEST VIRGINIA ETHICS COMMISSION

COMMITTEE ON OPEN GOVERNMENTAL MEETINGS

OPINION SOUGHT

The Mineral County Commission seeks approval of its procedural rules, including the provisions relating to notice requirements, meeting room size and the adoption of Robert's Rules of Order.

FACTS RELIED UPON BY THE COMMITTEE

The Mineral County Commission is in the process of adopting procedural rules in order to ensure compliance with the Open Meetings Act. The Open Meetings Committee has reviewed the proposed rules in their entirety.

The Open Meetings Act does not require the Committee to recite each provision of the rule in rendering an opinion as to whether they comply with the Open Meetings Act.

However, the Committee elects to provide comment in regard to the following provisions in the rule: (1) Notice requirements; (2) Grounds for determining which citizens may attend when the room size may not be able to accommodate all members of the public who seek to observe the meeting; and, (3) Adoption of Robert's Rules of Order.

A complete copy of the Mineral County Commission's proposed rules is attached to this advisory opinion as Appendix A.

CODE PROVISIONS RELIED UPON BY THE COMMITTEE

W. Va. Code§ 6-9A-3 provides:

Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, 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 and presentation at any meeting where 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.

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 rules relating to notice and agendas provisions, governing bodies may elect to adopt other rules governing meeting procedures so long as the provisions are not in conflict with the Open Meetings 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. However, the Committee's opinion, and any immunity which flows from the opinion, will be limited to whether any provision in the proposed rules is inconsistent with the Act. The opinion will not address discretionary application of a rule to a specific situation, unless the requester provides a proposed set of facts describing that situation.

The Committee finds that the majority of the rules comply with the Open Meeting Act. However, it finds that certain provisions in the rules should be modified. These include:

Time for posting of Agendas for Regular and Special Meetings

The rule contained in numbered paragraph seven (7) provides that for a regular meeting a meeting agenda shall be posted at or near the front entrance of the courthouse and a copy sent to newspapers of general circulation three business

days before the meeting. In regard to Special Meetings, the rule provides that the time, place and purpose of all special meetings shall be posted and sent to the media two business days before the meeting. See numbered paragraph eight (8).

The Committee finds that the proposed rule should contain a provision which states that when counting days, the day of the meeting, Saturdays, Sundays and legal holidays are excluded. See O.M.A.O. 2006-15. Further, to comply with the posting deadline, the agenda must be posted by close of the business day.

The Open Meetings Act does not require a governing body to provide additional notice to the media by sending a notice or agenda to the media. However, this practice is encouraged and nothing in the Open Meetings Act prohibits the Mineral County Commission from including this requirement in its rules. O.M.A.O. 2006-15.

Meeting Room Size

The proposed rule contained in numbered paragraph two (2) reads:

The attendance within the meeting room shall be limited by applicable rules and regulations of the Fire Marshal and of the Commission, and the Commission may limit the number of persons in attendance on a first come first serve basis or upon such other basis as the Commission may from time to time select.

The Open Meetings Act states "Any governing body may make and enforce reasonable rules for attendance and presentation at any meeting where there is not room enough for all members of the public who wish to attend." This provision appears to recognize that it would be impossible to require a room large enough to allow all citizens in the county to attend a particular meeting.

Previously this Committee, in reviewing Rules for the City of Oak Hill, ruled:

This Committee finds that there is no provision in the Open Meetings Act which mandates that a governing body of a public agency change the location of a meeting whenever it either finds or reasonably expects that its regular meeting place will not be able to accommodate all those wishing to attend. However, consistent with the purposes behind the enactment of the Open Meetings Act, this Committee strongly encourages any governing

body which encounters such a situation to make every reasonable effort to accommodate the attendees, if this can be accomplished without undue hardship to the governing body or interfering with its ability to conduct an efficient public meeting. The rule proposed by Oak Hill is consistent with this approach and provides reasonable notice of a change of venue to accommodate public attendance.

O.M.A.O. 2008-15.

The Commission's proposed rule provides that one ground for limiting attendance is "upon such basis as the Commission may from time to time select." The Committee finds that this broad language may lend itself to arbitrary and capricious decision-making in regard to who may attend meetings.

The Committee therefore declines to approve this provision of the rule in its present form. However, it finds that a provision which reads the same or substantially the same as the following would be acceptable:

The attendance within the meeting room shall be limited by applicable rules and regulations of the Fire Marshall. The Commission, when practicable, may change the venue for a meeting in the event that the meeting room is not large enough to accommodate the number of people wishing to attend or speak at the meeting. The change in meeting location shall be posted as soon as practicable in the same location as the meeting notice and agenda, and shall also be posted on the meeting room door. The start of the meeting may be delayed up to 30 minutes to accommodate the relocation effort. When it is not practicable to move the meeting, the attendance shall be permitted on a first come, first serve basis. If it is necessary to allow other persons in the room for purposes of hearing oral presentations or public comments, then the Commission shall ask for volunteers to leave the room. If there are no volunteers, then the Presiding Officer may request that designated persons leave the room so long as the Presiding Officer has a rational basis for this decision and states the basis on the record and directs that it be noted in the meeting minutes.

Adoption of Robert's Rules of Order

Paragraph twelve (12) of the proposed rule states that the Commission hereby adopts Robert's Rules of Order. There is nothing in the Open Meetings Act which

requires a governing body to adopt a particular rule of parliamentary procedure. Most governing bodies in West Virginia appear to have adopted, formally or informally, Robert's Rules.

To avoid any potential for conflict between provisions in Robert's Rules and other applicable rules, the Committee finds that the Commission should incorporate 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 Roberts Rules of Order in all cases to which they are applicable, and in which they are not inconsistent with the governing rules of council.

The Open Meetings Committee approved Glen Dale's rules in O.M.A.O. 2003-06.

Conclusion

Consistent with its limited authority to review additional provisions as previously discussed, this Committee finds that none of the provisions contained in the proposed rule, 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 Commission's attorney or designee to submit the amended rules to the Executive Director of the West Virginia Ethics Commission for her approval. If the Executive Director finds that the revised rule complies with this opinion, then she shall append the revised rule and her letter approving the same to this opinion. If necessary, the Executive Director or Commission may submit the revised rule 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 Radford

Drema Radford, Chairperson