

## **OPEN MEETINGS ADVISORY OPINION NO. 2009-03**

### **Issued On August 6, 2009 By The WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON OPEN GOVERNMENTAL MEETINGS**

#### **OPINION SOUGHT**

The President of the Kanawha County Commission asks whether a gathering of the elected County Clerk, Chairperson of the County Democrat Executive Committee and Chairperson of the County Republican Executive Committee for purposes of discussing or agreeing upon satellite voting locations is a meeting which is subject to the Open Meetings Act.

#### **FACTS RELIED UPON BY THE COMMITTEE**

During the Regular 2009 Legislative Session, the Legislature passed House Bill 2464. The Bill authorizes County Commissions to designate satellite precincts for early voting. Prior to designating such precincts, the County Commission is required to obtain the approval of the elected county clerk or other official charged with the administration of elections. W.Va. Code § 3-3-2a(b). Further, the County Commission is required to obtain the written agreement of the chairpersons of the county executive committees.

The Secretary of State's Office has submitted a proposed Legislative Rule to establish criteria for selecting the satellite precincts. The proposed rule requires the County Clerk to submit to the County Commission a "[D]uly notarized written agreement from the chairperson of the county executive committee of each of the two major political parties." See Proposed Rule, Title 153, Series 13 filed on June 18, 2009. The public comment period has ended on the rule. This rule must still be approved by the Legislature during the 2010 Legislative Session.<sup>1</sup>

The legislation and related efforts to begin considering potential locations for these precincts has raised questions as to whether a meeting between the County Clerk and party chairs constitutes a meeting for the purposes of the Open Meetings Act.

---

<sup>1</sup> The Open Meetings Committee cites the proposed Legislative Rule for purposes of providing an overview of the Bill history and status of the related rule. However, this Rule has not been approved by the Legislature. Hence, the Committee is not relying upon the language in the Rule in making its ruling in this opinion. Notwithstanding, the Committee finds that even if it considered the language in the proposed Rule, it does not alter its opinion.

## **CODE PROVISIONS RELIED UPON BY THE COMMITTEE**

W.Va. Code § 3-3-2a(b) reads: The county commission may, with the approval of the county clerk or other official charged with the administration of elections, and the written agreement of the chairpersons of the county executive committees of the two major political parties, designate additional locations for early voting other than the county courthouse or courthouse annex. The additional locations shall comply with the requirements of this article for early in-person voting and criteria prescribed by the Secretary of State.

The relevant portions of the Open Meetings Act read:

- (1) "Decision" means any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present.
- (2) "Executive session" means any meeting or part of a meeting of a governing body which is closed to the public.
- (3) "Governing body" means the 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...
- (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...
- ...
- (6) "Public agency" means any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power. The term "public agency" does not include courts created by article eight of the West Virginia constitution or the system of family law masters created by article four, chapter forty-eight-a of this code.
- (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.

W.Va. Code § 6-9A-2

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...(emphasis supplied.)

W.Va. Code § 6-9A-3

### **ADVISORY OPINION**

The issue presented is one of first impression. The legislation in question appears unique in that it requires three persons, the elected County Clerk and respective party chairs, to agree upon proposed satellite precincts prior to the County Commission approving the same. While the Legislation does not mandate that these three persons meet or confer, from a practical standpoint, it would appear that in at least some counties these parties would meet in person for purposes of reaching an agreement.

The Open Meetings Committee must determine whether any such gathering is a meeting subject to the Open Meetings Act. The seminal question is whether the County Clerk and respective chairs of the executive committees constitute a governing body as defined by the Act.

A governing body is defined 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(3). A public agency is defined as “[A]ny administrative or legislative unit of state, county or municipal government, including any ... commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power.”

Based upon the plain language in the Open Meetings Act, and the plain language in W.Va. Code § 3-3-2a(b), the Open Meetings Committee finds that the Legislature did not intend to create a new governing body when it set forth that three separate persons, the elected County Clerk and respective chairs of the executive committees, must approve the satellite voting precincts prior to County Commission approval. There is no indication in the statute that the Legislature contemplated that these three persons would constitute a newly formed governing body or public agency.

The County Clerk is an elected official. However, merely because the party chairs may meet or confer with the County Clerk, this meeting of two or more persons does not collectively make them members of a governing body for purposes of the Open Meetings Act.

In contrast, in this same chapter of the West Virginia code, there is language which clearly indicates the intent of the Legislature to create a board of ballot commissioners. Specifically, this code section reads that the currently serving County Clerk and two persons appointed by the County Clerk “shall constitute a board of ballot commissioners.” W.Va. Code § 3-1-19. Based upon this language, the Open Meetings Committee in O.M.A.O. 2008-04 found that a Board of Ballot Commissioners is subject to the Open Meetings Act.

In regard to the Board of Ballot Commissioners, the Legislature expressly created a new governing body under the umbrella of the Office of the Elected County Clerk. In contrast, W.Va. Code § 3-3-2a(b) makes no reference to a new board or commission being created to consider proposed satellite precincts. Moreover, the new Legislation does not require these three individuals to meet. Indeed, each of these persons could separately communicate their proposals on potential sites without conferring.

In this case, it does not appear that the Legislature intended to create a new governing body.<sup>2</sup> In the absence of such expressed intent, the Open Meetings Committee declines to read into the statute a meaning that does not appear to be what the Legislature intended, *i.e.* that there has been a new governing body created. To do so would be overreaching. Instead, if the Legislature intended to create a new governing body or to require that meetings between the County Clerk and respective chairs be open to the public, then the Open Meetings Committee believes that the best means of clarifying this intent is through the Legislative process.<sup>3</sup> As a matter of note, the final decision regarding the selection of satellite voting precincts will be made during a public meeting as this decision must be made by the County Commission, a duly constituted governing body which is subject to the Open Meetings Act.

---

<sup>2</sup> This conclusion is also consistent with the principle of statutory interpretation which states “The Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute of the same subject it uses different language in the same connection, the courts must presume that a change of the law was intended.” Hall v. Baylous, 153 S.E. 293, 296 (W.Va. 1930).<sup>3</sup> The Open Meetings Committee recognizes the importance of transparency. On the other hand, it recognizes that not all gatherings of public officials are subject to the Open Meetings Act. Such a result would be impracticable. In its declaration of policy for the Open Meeting Act, it is stated that “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.” W.Va. Code § 6-9A-1. In this case the Open Meetings Committee takes no position as to whether as a matter of public policy any meetings between the County Clerk and respective chairs should or should not be open to the public. Instead, that is a policy matter best decided by the Legislature.

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

  
Drema Radford, Chairperson