STATE OF MARYLAND
OPEN MEETINGS COMPLIANCE BOARD

December 3, 2015

James Shalleck, President
Montgomery County Board of Elections
18753 North Frederick Avenue, Suite 210
Gaithersburg, Maryland 20879

Re: Board of Elections, Montgomery County - Open Meetings Act Complaint
Paul M. Bessel, *Complainant*

Dear Mr. Shalleck:

Enclosed please find the Compliance Board's opinion in this matter.

Very truly yours,

Ann MacNeille
Assistant Attorney General
Counsel, Open Meetings Compliance Board

cc: Paul M. Bessel
Kevin Bock Karpinski, Esq.
Open Meetings Compliance Board

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Montgomery County Board of Elections
Paul M. Bessel, Complainant

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Paul M. Bessel, Complainant, alleges that the Montgomery County Board of Elections ("elections board") violated the Open Meetings Act when three of its voting members held a private conference call with the chairman of their party's county central committee to discuss possible early voting sites. Complainant alleges that those three members constitute a majority of the five voting members of this local elections board, that their votes in a subsequent open session determined the elections board's action on the subject, and that the public was deprived of the opportunity to observe their deliberations during the conference call. We have also received letters from individual members of the elections board.

The elections board, through its counsel, responds that the conference call was not subject to the Act. Explaining that the Act only applies when a quorum of the public body's members meets to conduct public business, the response states that the presence of three members did not create a quorum as defined in the elections board's bylaws. Those bylaws, as approved by the State Board of Elections, provide that a quorum is four members, at least one of whom must be a member of the "principal minority party."[1] The bylaws implement § 2-201 of the Elections Article of the Maryland Code ("EL"), under which the local elections boards must include members of both the majority party and the principal minority party. Even without the bylaw, the response states, a quorum would be four, as the majority of this seven-member board, which comprises five voting and two substitute members. Complainant replies that the bylaws do not have the effect of law and that a quorum of this board is a simple majority of the voting members.

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[1] The Elections Article, at § 1-101(dd) and (jj), defines the terms "majority party" as the party of the most-recently elected Governor and the "principal minority party" as the party whose candidate received the second-highest number of votes in that election.

The resolution of this complaint has required a more detailed legal analysis of the Act than we expect the members and staff of public bodies to undertake, especially when, as here, a public body is operating under a clearly-phrased definition in a set of bylaws approved by the agency that directs its work. As explained below, the Act defines the term "quorum" in a way that leads us to conclude that, for purposes of the Act, a quorum of this public body is a majority of its voting members and therefore three. The Act's definition thus differs from the more specialized definition that the elections board, under the State Board's direction, has adopted for purposes of conducting the elections board's business consistently with the policies set forth in the elections laws.

We do not suggest that the elections board's bylaw provision is invalid. To the contrary, we simply advise that although a public body may adopt additional meetings rules to implement its particular controlling statutes, those rules may not diminish the public's opportunity to observe the conduct of public business. In this case, it happens that the quorum bylaw that sets the conditions under which the elections board may take actions does not assure that the public may observe the earlier group consideration of those actions by those who hold the majority vote—and the Open Meetings Act applies to the consideration as well as the transaction of public business. *See, e.g., City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) ("It is . . . the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business.").

After addressing the substantive allegations, we will address the procedural assertion in one of the submissions that responses to Open Meetings Act complaints should be submitted by the public body's members, not its counsel.

Facts

The elections board comprises five regular members and two substitute members. Three regular members and one substitute member are of the "majority party," namely the party of the Governor, and two members and the other substitute member are of the "principal minority party." Md. Code Ann., Elec. Law ("EL") § 2-201(k). A substitute member may only vote when a regular member of the substitute's party is absent. EL § 2-201(b)(3). The Elections Article does not contain a definition of "quorum" for the local boards.

The elections board, like the elections boards for the other counties and Baltimore City ("local boards"), is "subject to the direction and authority of the State Board [of

Elections]." § 2-201(a)(2). Subject to the State Board's approval, each local board may "adopt any regulation it considers necessary to perform its duties under [the Election Article]." EL § 2-202(b)(4). In 2007, the State Board directed the local boards that they should adopt bylaws, and it provided a model set of bylaws, with instructions as to which provisions the local boards variously could, or could not, modify. Among the clauses *not* to be modified was § 3.2 (A), labeled "Quorum." Section 3.2(A) then provided that a quorum "shall consist of a majority of the membership (including substitute members) of the board." Under that definition, a quorum arguably could have been formed by three members of the majority party and the substitute member of that party, such that those four members could have held a meeting in the absence of any member of the minority party, and, arguably, the three voting members could have taken an action at that meeting as a majority of the members present.

As explained by the response, the elections board modified the model definition before adopting its bylaws, and the State Board approved the modification. Under the current definition, a quorum still consists of a majority of the members, including substitute members, but it now must also include "at least one member of each political party represented on the board." The bylaw amendment presumably effects the statutory requirement that elections boards include members of both parties; the elections board cannot take an action unless at least one member of the minority party is present. Nonetheless, the votes of the members of a majority of the members, and thus potentially of the majority party members alone, are still sufficient to adopt a motion.

Discussion

An important purpose of the Act, as explained by the Court of Appeals, is to "prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." *J.P. Delphey Limited P'shp v. Mayor and City of Frederick*, 396 Md. 180, 201 (2006) (internal quotation marks and citations omitted). The Act carries out that purpose by requiring public bodies to "meet" in open session, after having given reasonable advance notice to the public. §§ 3-301, 3-302.[2] The Act defines the verb to "meet" as "to convene a quorum of a public body to consider or transact public business." § 3-101(g); *see also New Carrollton v. Rogers*, 287 Md. at 73 ("The Act . . . covers all meetings at which a quorum of the constituent membership of the public body is convened 'for the purpose of considering or transacting public business.'"). We must interpret the provisions of the Act in such a way as to both effectuate the legislative policy behind the

[2] Except as noted, statutory citations are to the General Provisions Article of the Maryland Annotated Code (2014).

Act and harmonize it with other enactments of the General Assembly. *See Bank of America v. Stine*, 379 Md. 76, 85-86 (2003) (reciting rules of statutory interpretation). When the Act conflicts with another statute, we must apply whichever law is the most stringent. § 3-105.

The issue before us is whether a "quorum" met when three voting members of the elections board gathered by conference call and considered public business. If their presence created a quorum, the Act was violated because the call was not open to the public; if there was not a quorum, the Act did not apply and was not violated. The provision that we must interpret and apply is thus the Act's definition of "quorum."

Under the Act, a "quorum" is "a majority of the members of a public body" or else "the number of members that the law requires." § 3-101(k). That definition tracks the common-law principle that a quorum of a membership entity is a simple majority of its members unless the statute that created the entity provides otherwise. *See Heiskell v. City Council of Baltimore*, 65 Md. 125 (1886) ("[I]n the absence of a statute fixing a quorum, . . . a majority of any body consisting of a definite number is necessary to constitute a quorum."); *see also* 73 Op. Att'y Gen. 6, 9-10 (1988) (explaining the common law). Neither the provisions of the Elections Article nor any other provision of the Maryland Code "requires" a number for the local elections boards' quorums. Further, although the Elections Article generally authorizes the elections board to adopt "regulations," we do not consider the bylaws to have the status of "law" as that term is used in the Act, much less than a law that would operate to override the Act's policy that the public be afforded the opportunity to observe all phases of a public body's consideration of a matter.[3] We will therefore apply the simple-majority prong of § 3-101(k). To do that, we need to know

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[3] The elections board's quorum bylaw is unusual in that its composition of a quorum is different than the number of votes needed to take an action. As explained in *Floyd v. Mayor & City Council of Baltimore*, 407 Md. 461 (2009), quorum provisions in an entity's bylaws generally define the number of members needed to take actions:

> A quorum is defined as "that number of the body which, when assembled in their proper place, will enable them to transact their proper business; or, in other words, that number that makes the lawful body, and gives them the power to pass a law or ordinance." *Heiskell v. City Council of Baltimore*, 65 Md. 125, 149, 4 A. 116, 119 (1886). See also Black's Law Dictionary 1284 (8th ed.2004) (defining "quorum" as "[t]he minimum number of members (usually a majority of all the members) who must be present for a deliberative assembly to legally transact business").

Id. at 465. As explained above, however, the Act applies more broadly to provide to the public the opportunity to observe all phases of the public body's consideration of its business. So, as is the result here, the Act may require that the public be allowed to observe a gathering at which the members would not be able to take an action.

whether to count the substitute members, who may not vote unless a voting member of their party is absent.

The Act does not specify whether non-voting members of a public body may be counted for purposes of a quorum. A common law principle fills that gap; only voting members count towards a quorum. *Bd. of Cty. Comm'rs of St. Mary's Cty. v. Guyther*, 40 Md. App. 244, 246 (1978) ("a person present but incompetent to act because of disqualification cannot serve as a constituent part of a quorum"); *Hagerstown Furniture Co. of Washington Cty. v. Baker*, 158 Md. 574, (1930) (holding that a director who is disqualified from voting at a board meeting could not be counted towards a quorum).[4]

The elections board has five voting members, so a simple majority is three voting members.[5] Accordingly, for purposes of the Act, we find that a quorum was created when three voting members gathered by conference call, that the occasion became a "meeting" subject to the Act when they discussed public business, and that the meeting was not held in accordance with the Act. We do not suggest either that the Act's definition of a quorum affects the bylaws provision or that the Act precludes the elections board and the State Board from implementing the election law provisions on bipartisan boards. Likewise, we have not commented on the application of the elections laws and regulations to a gathering of three voting members. We have simply applied the Act's definition of a quorum and concluded that, whatever status that the elections laws might accord to a gathering of a majority of the voting members to discuss public business, such a gathering is subject to the Act.

We turn to the assertion in one of the submissions that responses to Open Meetings Act complaints should be submitted by the public body's members, not its counsel. When an open meetings complaint is submitted to us, our staff routinely transmits it to the public body's chair. Usually, the public body's counsel responds on its behalf, though sometimes the public body's staff responds and, rarely, the chair responds. How that decision is made

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[4] *See, also, e.g., Garner v. Mountainside Bd. of Adjustment*, 212 N.J. Super. 417, 425 (Ch. Div. 1986) ("[I]f a member of the board of adjustment is ineligible to vote under the appropriate statute, then his mere presence at voting time should not be counted for either quorum purposes or as part of the required votes necessary to form a majority."); *Coles v. Trustees of Vill. of Williamsburgh*, 1833 WL 3183 (N.Y. Sup. Ct. 1833) (excluding from the quorum count the members who "were incompetent to vote by the act"); XXV Kan. Op. Atty. Gen. 28 (Kan. A.G. 1991) (noting the common law that "[m]embers disqualified from voting may not be counted when determining whether a quorum is present").

[5] Under the Act's definition of a quorum, a substitute member would only count toward a quorum when the member is standing in for a regular voting member of the same party.

is not a question for us. What *is* important to us is that we receive a response that provides us with the necessary documents, briefly explains any pertinent circumstances, identifies the provisions of Act deemed controlling, and omits unnecessary rhetoric. The papers that the elections board's counsel submitted on its behalf did all of those things. If a public body's member, on reading a response, sees that counsel has gotten a relevant fact wrong, someone should submit a correction. We do not understand that to be the case here.

Conclusion

We have concluded that three voting members, a majority of the voting members of the elections board, constitute a "quorum" for purposes of the Act such that a conference call among three voting members constituted a meeting subject to the Act. We have recognized that applying the Act's quorum definition to the elections board is complicated, and this matter posed the unusual circumstance in which the public body's own definition, when applied, did not secure the public's right to observe every stage of the public body's consideration of public business. Although we can see that the board members might reasonably have relied on the bylaws provision when they conducted the board's business among themselves, we nonetheless find that the conference call violated the Act. We therefore direct the elections board to the acknowledgment requirement in § 3-211. We have not commented on how the elections board must transact business under the elections laws.

We have also addressed a question about whether responses to Open Meetings Act complaints must come from the public body's members, as opposed to its counsel.

Open Meetings Compliance Board

Jonathan A. Hodgson, Esq.
April C. Ishak, Esq.