



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87- 152

Mary Beth Mudrick
Executive Director
Kansas Board of Polygraphists
Kansas Judicial Center, 2nd Floor
Topeka, Kansas 66612

Re: State Departments; Public Officers and
Employees--Private Investigation or Security
Operations Polygraphists--Board Meetings; Quorum
and Voting

Synopsis: A quorum must be present before a public body can
conduct business. Quorum for the five-member
Kansas Board of Polygraphists (Board) is a
majority of the total membership, or three
members. Kansas case law provides that persons
disqualified from voting cannot be counted toward
the number necessary for a quorum.

Three positions on the Board have been filled by a
public member who is not a polygraphist and two
privately employed polygraphists. The two
positions for law enforcement representatives are
vacant due to the lack of qualified persons. The
public member of the Board is precluded by law from
voting on "technical" matters. Therefore, it is
our opinion that, while the Board may lawfully meet
and take action on non-technical matters with its
current three members, the Board cannot take action
on technical matters due to lack of quorum. Cited
herein: K.S.A. 1986 Supp. 77-201; 1987 House Bill
No. 2223, L. 1987, ch. 283.

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Dear Ms. Mudrick:

As the Executive Director of the Kansas Board of Polygraphists (Board), you request our opinion concerning the number of persons necessary to constitute a quorum to conduct the Board's business.

The Kansas Board of Polygraphists was created by the 1987 session of the legislature to license and regulate polygraphists. 1987 House Bill No. 2223, L. 1987, ch. 283. Appointed by the Attorney General, the five members of the Board must meet the following qualifications:

"(b) No person shall be eligible for appointment as a member of the board unless such person is a citizen of the United States and is, and has been for a minimum of one year immediately preceding the appointment, a resident of Kansas.

"(c) Four members of the board shall be licensed polygraphists, each of whom shall have personally conducted at least 500 polygraph examinations during the five years immediately preceding the appointment. Of these four board members, two shall be privately employed as polygraphists, and two shall be employed by law enforcement agencies as polygraphists. The first members of the board appointed to these positions shall meet these qualifications, except for their lack of licensure as polygraphists, and shall seek to become licensed as soon as possible after appointment to the board.

"(d) The fifth member of the board shall be a voting public member. Such member shall be a registered voter and a person who is not and never has been a member, nor the spouse of a member, of any profession licensed or regulated under this act; and a person who does not have and never has had a material, financial interest in either the providing of the professional services regulated under this act, or an activity or organization

directly related to any profession
licensed or regulated under this act." L.
1987, ch. 283, §2. (Emphasis added).

The law precludes the public member from voting on "technical" matters:

"The duties of the public member shall not include the determination of the technical requirements to be met for licensure or whether any person meets such technical requirements or of the technical competence or technical judgment of a licensee or a candidate for licensure." L. 1987, ch. 283, §2(d).

The Attorney General has appointed persons to fill the public board member position and the two private polygraphist positions. The two positions for law enforcement representatives remain vacant. At this time no individual has been identified who is currently employed by a law enforcement agency and meets the statutory 500 examinations requirement. Given the two vacancies on the Board, you ask whether the remaining members may adopt rules and regulations, approve the written examination, and vote on the applications for licensure of the two private polygraphist board members.

A quorum of the membership of a public body must be present to conduct the business of that body. Annot., 43 A.L.R.2d 698, §2 (1955); 59 Am.Jur.2d Parliamentary Law §7. The statutes concerning the Board of Polygraphists do not specify the number of members necessary to constitute a quorum. In the absence of such a provision, K.S.A. 1986 Supp. 77-201 Fourth applies to establish the quorum for the Board as the majority of the membership of the entire body. See FTC v. Flotill Products, Inc., 389 U.S. 179, 183-84, 88 S.Ct. 401, 402-03, 19 L.Ed.2d 398 (1967); Wycoff v. Board of County Commissioners, 191 Kan. 658 (1963); Chambers v. Herrick, 172 Kan. 510 (1952); Attorney General Opinion No. 87-132. In previous opinions we have stated that "majority" means the next whole number greater than half the total number of members. Attorney General Opinions No. 87-132, 87-45, 86-110, 83-174. The weight of authority is that a vacancy or vacancies on a board must be counted toward the total number of members from which the quorum is determined. See Annot., 43 A.L.R.2d 698, §5 (1955). See also Rockland Woods, Inc. v. Incorp. Village of Suffern, 340 N.Y.S.2d 513 (1973); State v. Gruber, 373

P.2d 657 (Ore. 1962). Thus, for the five-member Board, three persons constitute a quorum.

Since three members have been appointed, the Board may meet and conduct business as there is a quorum. Problems arise, however, when certain items of business are before the Board. As noted earlier, the public member is precluded from voting on technical matters. Clearly, adopting regulations concerning standards of practice for administering polygraph examinations and establishing educational requirements, and approving the written examination constitutes "the determination of the technical requirements to be met for licensure. . . ." L. 1987, ch. 283, §2(d). Thus, the public member cannot vote on these matters. The question, then, is whether two members of the five-member Board have authority to take binding action in this situation.

Absent a statutory provision, if a quorum is present, a majority of the members in attendance may act to bind a public body. 56 Am.Jur.2d Municipal Corporations, Etc. §170. See Attorney General Opinion No. 86-110 (A "majority of a quorum" is the smallest number of members of a public body that can take official action.); Tacha, "The Kansas Open Meetings Act: Sunshine on the Sunflower State?", 25 U. Kan. L. Rev. 169, 182 (1977). However, the Kansas Supreme Court has stated that a member who is disqualified from voting because of interest or bias in the issue to be voted upon cannot be counted toward the number necessary for quorum. Anderson v. City of Parsons, 209 Kan. 337, 342 (1972). See 56 Am.Jur.2d Municipal Corporations, Etc., §172 (1971); 67A C.J.S. Parliamentary Law §6, (1978); Annot., 43 A.L.R.2d 698, §27 (1955).


The Board's public member is precluded by statute from voting on technical matters. We see no reason to distinguish this situation from the Anderson case in which a member is disqualified from voting because of personal interest or bias. Therefore, the public member cannot be counted in determining quorum when the Board must take action on technical matters. As the Board is presently composed of only two professional members, the Board cannot vote on the regulations, written examination, and other technical matters due to lack of quorum.

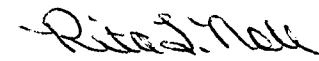
The appointment of one additional member would provide the number necessary for a quorum. The professional board members must be licensed "as soon as possible after appointment to the board." L. 1987, ch. 283, §7(d). Licensure is a technical

determination. Therefore, both vacancies must be filled in order to have a quorum of three to approve the licensure of Board members. Two members do not count towards quorum: the public member is disqualified by statute and the Board member whose application for licensure is under consideration is disqualified because of personal interest.

In summary, a quorum must be present before a public body can conduct business. Quorum for the five-member Kansas Board of Polygraphists (Board) is a majority of the total membership, or three members. Kansas case law provides that persons disqualified from voting cannot be counted toward the number necessary for a quorum. Three positions on the Board have been filled, the public member and two representatives from the private sector. The two positions for law enforcement representatives are vacant due to the lack of qualified persons. The public member of the Board is precluded by law from voting on "technical" matters. Therefore, it is our opinion that while the Board may lawfully meet and take action on non-technical matters with its current three members, the Board cannot take action on technical matters due to lack of quorum.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Rita L. Noll
Assistant Attorney General

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