

State of California

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Memorandum

Members of the Board

Date: May 30, 1979

Honorable William M. Bennett
Honorable Richard Nevins
Honorable George R. Reilly
Honorable Ernest J. Dronenburg, Jr.
Honorable Kenneth Cory

From: J.J. Delaney

Subject: Participation in a Decision when Board Member was not at the Hearing

There have been several instances, most recently the East Bay MUD hearings, where the question has arisen whether a Board Member may participate in a decision when that Board Member was not present at the hearing.

The general rule is that a member who was not at the hearing may participate in a decision if he has made a reasonable effort to achieve a substantial understanding of the record. The basis for this conclusion is stated in the case of **Morgan v. U.S.**, (1936) 298 US 468, 8 L. Ed. 1288:

“For the weight ascribed by the law to the findings – Their conclusiveness when made within the sphere of the authority conferred – rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. There must be a hearing in a substantial sense and to give the substance of a hearing which is for the purpose of making determination upon evidence, the officer who makes the determination must consider and appraise the evidence which justifies them.” 298 U.S. at page 481, 8 L. Ed. at page 1295.

Although this case made the statement that “the one who decides must hear” it is obvious that it approves a substitute for being physically present at the hearing. In **Morgan** the court overturned the administrative order because the official neither heard nor read the evidence.

The California law is in accord with the **Morgan** case. **Cooper v. State Board of Medical Examiners**, (1950) 35 Cal. 2d 247, states at page 246:

“We conclude here that participation in a decision by a Board member who has read and considered the evidence, or a transcript thereof, even though he was not physically present when the evidence was produced, does not violate the requirements of due process.”

In **Allied Compensation Insurance Co. v. Industrial Accident Commission**, (1961) 57 Cal. 2d 115, the California Supreme Court stated:

“The requirement of a hearing may be satisfied even though members of the commission do not actually hear, or even read **all** of the evidence. The obligation of the panel member was to achieve a substantial understanding of the record by any reasonable means....”
57 Cal. 2d at pages 119-120.

Given this conclusion, there is a related rule of law that, in general, prohibits the questioning of an administrative official’s decision-making process. There is a strong presumption that official duties are regularly performed (Evidence Code Section 664). Although this is a disputable presumption (**Le Strange v. City of Berkeley**, (1968) 21 Cal. App. 2d 313), it would be very difficult outside of the record to prove that an official had not acquainted himself with the evidence. This presumption takes on almost a conclusive nature because of the difficulty of proof.

One case which did authorize the questioning of the basis for decision was **Citizens to Preserve Overton Park v. Volpe**, (1971) 401 US 402, 8 L. Ed. 2d 136, 91 S. Ct. 814. However, this case involved the situation where no findings were issued and held that possibly the only way to get at the reasons for decision was to question the official. The court stated:

“Where there are administrative findings that were made at the same time as the decision... There must be a strong showing of bad faith or improper behavior before such inquiry may be made.” 401 US at 420.

Here again the burden of proof seems to be substantial assuming that inquiry may be made at all. This may be still an open question.

Another issue was brought up by the parties in the EBMUD hearing. The parties did not seem to consent to participation by an absent member. Although such lack of consent may be given serious consideration by a Board Member from a practical standpoint, it has no significant legal effect. The participation of the absent Board Member is an issue of law, due process, and the parties cannot agree among themselves what due process requires.

Another question which has arisen is the applicable law when a Member's disqualification results in the inability of the Board, or any commission, to act. The rule in California is that when a quorum is present and in the absence of governmental regulation to the contrary, it is the majority of the number of members necessary to constitute a quorum and not the majority of the total number present that is required to carry a decision or action. When a quorum is not present that is required to carry a decision on action. When a quorum is not present, the only action which can be taken is: to obtain a quorum; to fix the time to which to adjourn; or take a recess.

Section 5001 of the Board's Hearing Procedures Regulations provides that any three members of the Board shall constitute a quorum. A majority vote of the quorum is required for all decisions or actions of the Board. (Cal. Admin. Code, title 18, S 5001.) Thus, with four members present, one abstaining, two voting "Aye" and one voting "No" the motion would be carried. Similarly, with three members present, two voting "Aye" and one abstaining, the motion would be carried. (Cf. Robert's Rules of Order S 48.) In the case of **Martin v. Ballinger**, 25 Cal. App. 2d 435 (1938) involving an action taken by the council of a general municipal corporation, the court stated:

(W)here there is a quorum present, and a majority of the quorum votes in favor of a proposition, it is carried, notwithstanding an equal number of refuse or fail to vote; that in the absence of governmental regulation to the contrary ...it is not the majority of the whole number of members present that is required, but only a majority of the number of members necessary to constitute a quorum. (**Martin v. Ballinger**, supra at 437.)

This decision was followed by the Attorney General in a 1969 opinion involving an action of the city council of a general law city:

Consent by resolution requires the affirmative vote of a majority of those present and voting or, if members who are present and voting or, if members who are present abstain from voting, a majority of the number necessary to constitute a quorum assuming that, in either instance, a quorum is present. (52 Ops. Cal. Atty. Gen. 56)

General principles of parliamentary procedures provide that, in the absence of a quorum, the only business that can be transacted is to take measures to obtain a quorum, to fix the time to which to adjourn, to adjourn, or to take a recess (Robert's Rules of Order 5 64).

JJD: fr

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