

November 7, 1997

Kathleen Haley, Executive Director
Board of Medical Examiners
1500 SW 1st, Suite 620
Portland, OR 97201

Re: Opinion Request OP-1997-6

Dear Ms. Haley:

You have asked for advice regarding Oregon Laws 1997, chapter 792 (Senate Bill 467) and its ramifications on the investigative activity of the Board of Medical Examiners (board). We set forth your questions and our short answers below, followed by a discussion.

1. Does ORS 677.208(2), as amended by Oregon Laws 1997, chapter 792, section 21, change the number of board members who must vote in favor of a particular action in order to authorize that action?

No. Board action will continue to require an affirmative vote of at least six members of the board.

2. What board activities will constitute "participat[ion] in the investigation of licensee" to disqualify members from participating in the final decision of the board following a contested case hearing?

Board members who take a direct role in investigating an applicant or licensee may not participate in the board's final decision following a contested case.

Discussion

1. Voting Requirements for the Board

The board consists of 11 members appointed by the Governor. ORS 677.235(1). The board's statutes do not specify the number of members that constitute a quorum or the number of votes required to take action.

Under Oregon law, when a board's enabling statutes do not dictate a quorum or voting requirement, ORS 174.130 applies. ORS 174.130 provides:

Any authority conferred by law upon three or more persons may be exercised by a majority of them unless expressly otherwise provided by law.

We have previously interpreted this statute to require

a majority of all members of the board, commission or council to concur in order to make a decision. When ORS 174.130 applies, a majority of those present and voting in favor of a particular action is not sufficient to authorize that action unless that majority is more than one-half of the total members of the board, commission or council. For example, in the case of a 13-member board, if only 11 persons were present, six votes for a proposition would be insufficient to authorize any action because six votes would not constitute a majority of the members of that board even though it would constitute a majority of those present.

Oregon Attorney General's Administrative Law Manual, Appendix D, Parliamentary Procedure, Quorums and Voting, p. D-3 (1995) (footnote omitted).

Because the board has 11 members, at least six members must be present for a quorum. In addition, at least six members must vote in favor of a particular action in order for the board to authorize that action.

ORS 677.208(2), as amended, provides in relevant part:

Following a contested case hearing, the members of the board who participated in the investigation of the licensee, except for one public member, shall not participate in the final decision of the board. A meeting of the board to determine what further action, if any, should be taken regarding the licensee or applicant is not part of the investigation. * * *

Under this statute, except for one public member, any board member who participates in the investigation of a licensee is disqualified from participating in the final decision of the board. You ask whether such a disqualification would effectively reduce the number of board members required to constitute a quorum or to vote to take action when the board makes a final decision after a contested case hearing involving a licensee.

The disqualification mandated by ORS 677.208(2) is not unlike that for bias or conflict of interest, where one or more decision-makers are disqualified for having prejudged a matter or for having a pecuniary interest with regard to persons or issues that are the subject of the hearing. Such disqualification does not change a board's quorum requirement or permit the disqualified member to be counted in determining the presence of a legal quorum. See *King v. New Jersey Racing Com'n*, 511 A2d 615, 618 (NJ 1986); 59 Am Jur 2d, *Parliamentary Law*, § 7 (1987). Nor have we found any suggestion that such a disqualification would alter the requirement under ORS 174.130 that the board's authority be exercised by a majority of the entire board.

We have previously advised that unfilled positions on a board, commission or a council have no bearing on the requirements of ORS 174.130. See Letter of Advice dated June 8, 1989, to John F. Hoppe, Acting Executive Director, Board of Police Standards and Training (OP-6322), at 3-4. We believe a similar conclusion would apply to a statutory disqualification of one or more members.

ORS 174.130 refers to "authority conferred by law upon three or more persons" and provides for that authority to be exercised by a majority of them "unless expressly otherwise provided by law." ORS 677.235(1) created the board with 11 members, thus conferring authority to act upon that entire board, which authority may be exercised by a majority of those 11 members, or six members. ORS 677.208(2) does not provide, expressly or otherwise, for the board's authority to be exercised by less than six members of the board. Rather, ORS 677.208(2) merely disqualifies individual board members from deciding a contested case *if* the members participate in an investigation of a licensee that gives rise to a contested case.⁽¹⁾

The fact that particular board members may be disqualified from voting does not change the requirement in ORS 174.130 that a minimum of six board members must concur by vote for the board to act.

2. Board Member Participation in Investigations

ORS 677.320 authorizes the board to investigate complaints of any alleged violations of ORS chapter 677. The specific investigative actions that the board may take are described as follows:

2. In the conduct of investigations, the board or its designated representative may:
 - a. Take evidence;
 - b. Take the depositions of witnesses, including the person charged;

- c. Compel the appearance of witnesses, including the person charged;
- d. Require answers to interrogatories; and
- e. Compel the production of books, papers, accounts, documents and testimony pertaining to the matter under investigation.

ORS 677.320(2). In addition, ORS 677.415(4) authorizes the board to order an "informal interview" with any licensee who, in the opinion of the board, may be medically incompetent, guilty of unprofessional or dishonorable conduct or unable to practice safely because of an impairment. Board members who participate in any of the investigative activities authorized by ORS 677.320(2) or 677.415(4) would be disqualified from participating in the board's final decision of the resulting contested case. ORS 677.208(2), as amended.⁽²⁾

ORS 677.208(2), as amended, provides that "a meeting of the Board to determine what further action, if any, should be taken regarding the licensee or applicant is not part of the investigation." In order to make an informed decision on whether to initiate disciplinary action based upon a complaint against a licensee or applicant, the board would need to review the board's file on the licensee or applicant, including any investigation report and related materials. Accordingly, we believe that not only the meeting itself, but also a board member's review of investigative file materials in conjunction with such a meeting for purposes of determining what further action the board should take would not constitute participating in the investigation.

The concept of active involvement, implicit in the common meaning of "participate," is the distinguishing factor. Board members who take direct part in the investigative activities authorized by ORS 677.320(2) and ORS 677.415(4), except for one public member, will be deemed to have participated in the investigation and thus be disqualified from taking part in the final decision of the board on any given contested case.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

1. Moreover, ORS 677.208(2) does not by itself deprive board members of their authority to decide contested cases. The board members are deprived of their authority to act only if the members by their own actions participate in an investigation. No statute requires board members to participate in an investigation. Rather, ORS 677.280(1) expressly authorizes the board to employ investigators for purposes of securing evidence of violations of chapter 677.

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2. One public member is exempt regardless of that person's investigative involvement in a given case. *Id.*

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