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HENRY McMASTER
ATTORNEY GENERAL

October 27, 2006

Janie A. Davis, Executive Director
South Carolina Commission on Minority Affairs
6904 North Main Street, Suite 107
Columbia, South Carolina 29203

Dear Ms. Davis:

We received your letter requesting a follow-up opinion to an opinion issued to you dated September 6, 2006. In that opinion, we addressed the question of whether the Commission for Minority Affairs (the "Commission") is a regulatory agency for purposes of 8-13-730 of the South Carolina Code and thus, prohibits a chief of an entity seeking recognition as Native American Indian entity by the Commission from serving on the Commission's board. In that opinion, we determined the Commission is not a regulatory agency under this statute, however, we cautioned you that other conflicts of interest may arise under the South Carolina Ethics Reform Act, which may impact a chief's service on the Commission's board. Thus, we suggested you contact the State Ethics Commission regarding possible conflicts of interest.

According to your letter, you sought and received an opinion from the Ethics Commission concerning possible conflicts of interest. In addition, you included a copy of this opinion with your request. In this opinion, the Ethics Commission determined "if [the chief], an immediate family member, an individual with whom is associated or a business with which he is associated has an economic interest in a matter coming before the Commission for Minority Affairs, then he would have to follow the recusal procedures of Section 8-13-700(B)(3)." Furthermore, the opinion added: "As a voting member of the State Recognition Committee I believe you should recuse from voting on this matter due to the appearance issue." In your letter, you explain that reason for the Ethics Commission's decision with regard to you is based upon "the employer/employee relationship that exists when a member of the Board of the Commission, on behalf of a Native American entity over which he is Chief, seeks State Recognition."

Based on this background information, you now ask, on behalf of the Commission's board, the following questions:

Article 139-108 Membership, Terms and Voting Power of the State Recognition Committee states that the change was to insure that there are at least three people on the State Recognition Committee that are

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not affiliated with the South Carolina Native American Entities. Can we legally vote without three?

Article 139-108(A) states that The State Recognition Committee shall consist of five members. This is emphasized in other sections as well. Can we legally vote without five?

You informed us that the State Recognition Committee (the "Committee") currently has one vacancy, which you state "means that four persons would be voting on two petitions being considered, and in the case where I have a conflict of interest, three would be voting. However, two of the three voting would be of Native American heritage, which brings into question the issue of three persons not affiliated with South Carolina Native American Entities."

Law/Analysis

Chapter 31 of title 1 of the South Carolina Code governs the Commission. 1-31-10 et seq. (2005). Among the Commission's powers and duties, the Legislature afforded it the power to "determine, approve, and acknowledge by certification state recognition for Native American Indian entities . . ." S.C. Code Ann. § 1-31-40(A)(6). In addition, the Legislature gave the Commission the authority to "promulgate those regulations necessary to carry out its duties under this chapter." S.C. Code Ann. § 1-31-50. Regulations pertaining to the Commission's ability to recognize Native American Indian entities can be found in chapter 139 of the South Carolina Code of Regulations. Regulation 139-108 calls for the creation of a five-member State Recognition Committee. 27 S.C. Code Ann. Regs. 139-108 (Supp. 2005).

(A) The State Recognition Committee shall consist of five (5) members:

- (1) The State Archeologist.
- (2) The Executive Director of the Commission for Minority Affairs.
- (3) Two members of the Native American Indian Advisory Committee.
- (4) One notable Native American leader or scholar from across the United States, excluding South Carolina.

Regulation 139-109 of the South Carolina Code of Regulations assigns particular duties to the Committee. These duties include reviewing information submitted by those entities seeking State

recognition and making a recommendation on such recognition to the Commission. 27 S.C. Code Ann. Regs. 139-109.

The Commission's regulations governing the Committee clearly provide that the Committee shall consist of five members. However, the regulations do not specify how many members must be present to transact the business of the Committee. "The minimum number of members who must be present at the meeting of a deliberative assembly for business to be legally transacted is the quorum of the assembly." General Henry M. Robert, Robert's Rules of Order Newly Revised, § 3. "The quorum refers to the number of such members present, not to the number actually voting on a particular question." Id. § 39. In the absence of a quorum, the business transacted by the body is null and void." Id.

We discussed quorum requirements in an opinion of this Office dated August 6, 1979 dealing with the Museum Commission. Op. S.C. Atty. Gen., August 6, 1979. In that opinion, because no statute existed to specify the quorum requirement for the Museum Commission, the common law rule applied. Id. This rule required "[a] simple majority of such a body must be present to constitute a quorum." Id. The nine members of the Museum Commission were required to serve four-year terms. Thus, we concluded that because the members of the Museum Commission cannot vacate their office until their successor is appointed, vacancies on the Museum Commission would not reduce the quorum requirement.

To the contrary, in other opinions, we concluded vacancies can reduce the quorum requirement. In an opinion issued in 1971, then Attorney General Daniel McLeod considered whether the remaining members of a county forestry board could conduct business when vacancies existed in three of its five positions. Op. S.C. Atty. Gen., November 3, 1971. The Attorney General stated: "If the vacancies continue to exist for an appreciable length of time and if no steps are taken to fill the vacancies, it is my opinion that the existing members can act and that two of such members would constitute a quorum for the transaction of business." Id. Furthermore, the Attorney General added: "The business of government cannot stop merely because there is a failure to fill vacancies in office." Id.

Again in 1978, Attorney General McLeod addressed the question of whether five out of the nine members on the South Carolina Consumer Affairs Commission constitute a quorum for conducting that body's business. Op. S.C. Atty. Gen., May 26, 1979. According to the opinion, four of the nine seats on the Commission were vacant. Id. Attorney General McLeod cited Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952), expressing the necessity of the continuance of governmental functions.

A majority of the members of the Commission would normally consist of five members. In the present circumstances, only five members are now serving, and, in my opinion, those five members, being the only acting members of the Commission, are the governing

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body and presently constitute the Commission on Consumer Affairs. It is my further opinion that a majority of those five members will constitute a quorum for the purpose of performing the functions of the Commission.

Id.

A 1986 opinion of this Office again addressed the quorum requirement of a public body. Op. S.C. Atty. Gen., July 11, 1986. In that opinion, we considered the quorum requirement for the Charleston County Legislative Delegation, which at the time had two vacancies. Id. We noted, the courts of this State have not addressed the effect vacancies have on quorum requirements. Id. However, we opined that “the vacancies would not be considered in determining a majority vote.” Id.

In regard to the Committee, assuming no vacancies exist, three members constitute a simple majority and thus, a quorum. However, based on our prior opinions, in some cases this requirement may be reduced due to vacancies. According to your letter, the Committee currently has one vacancy. Thus, even when the vacant seat is excluded, three members still are required to satisfy the quorum requirement. Therefore, under these circumstances, so long as at least three members of the Committee are in attendance, it may transact its business. Furthermore, we do not believe the fact that you may have to recuse yourself from a vote impacts your ability to participate as part of the quorum.

Regulation 139-108 sets forth the membership criteria for the Committee. This regulation specifies that two members are to be members of the Native American Indian Advisory Committee. According to regulation 139-107 of the South Carolina Code of Regulations, members of the Native American Indian Advisory Committee must represent a State recognized tribe or group. However, we note no provision in regulation 139-108 or in the other regulations contained in chapter 139 prohibiting more than two of the Committee’s members from being affiliated with South Carolina Native American entities. Thus, in regard to your first inquiry, even if the three members required to establish a quorum are affiliated with South Carolina Native American Indian entities, we do not believe they are prohibited from transacting the business of the Committee.

Having addressed the quorum requirement, we now address the voting requirements with regard to State recognition. Regulation 139-108 (H), as you mentioned in your letter, states specific voting requirements to recommend an entity for State recognition. This regulation provides:

An entity applying for State Recognition must receive a majority vote or three affirmative votes out of five to be recommended for State Recognition. The absence of a member or failure of a committee member to vote will be counted as an “Abstention” vote. No member may cast a vote for another member.

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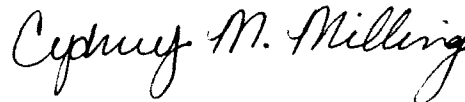
“The words of a statute or regulation ‘must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.’” Sloan v. Greenville County, 356 S.C. 531, 563, 590 S.E.2d 338, 355 (Ct. App. 2003) (quoting Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). This regulation specifies a majority vote or an affirmative vote of three out of the five members is required. The term “majority vote,” when used without qualifications, “means more than half of the votes cast by persons legally entitled to vote, excluding blanks and abstentions.” General Henry M. Robert, Robert’s Rules of Order Newly Revised, § 43. Thus, according to the plain and ordinary meaning of the terms used in this regulation, so long as either more than half of the members entitled to vote or three out of five members vote in favor of recommending a Native American Indian entity, such action is valid under the regulations.

Because you are planning to attend the meeting, but must abstain due to a conflict of interest, you would not be counted in determining the majority. In addition, as we stated in our 1986 opinion, the vacancy would not be considered in determining the majority vote. Op. S.C. Atty. Gen., July 11, 1986. Therefore, presuming the other three members are in attendance, an affirmative vote by two of those members would constitute a majority vote.

Conclusion

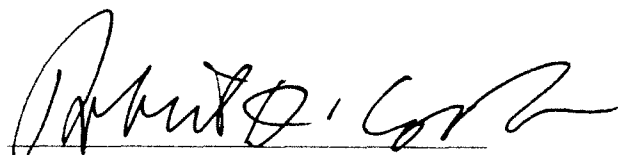
Based on the information you provided to us, at least three members of the Committee must be present at a meeting in order to transact the business of the Committee. Furthermore, we find no specific requirement that the quorum be limited to a certain number of Committee members affiliated with South Carolina Native American entities. Finally, in accordance with regulation 13-108(H), in order for the Committee to recommend an entity for State recognition when three members are voting, two of these three members must vote affirmatively.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General