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## Coates' Canons Blog: Quorum and Members Who Don't Vote: The Court of Appeals Weighs In

By Trey Allen

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In my last blog post, I concluded that all members in attendance at a meeting of a local government board should be deemed present for quorum purposes, even those who for whatever reason decline or aren't permitted to deliberate or vote on the business at hand. At the time I hadn't seen a recent opinion by the North Carolina Court of Appeals in a case that required it to decide whether a state board lost a quorum when several of its members didn't participate in a matter. Was my blog post consistent with the court's ruling? Read on to learn the exciting answer.

The case is *Hershner v. N.C. Dep't of Admin.*, \_\_\_\_ N.C. App. \_\_\_\_, 754 S.E.2d 847 (2014). It arose from the dismissal of an employee in the North Carolina Department of Administration. Pursuant to the State Personnel Act ("the Act"), the employee filed a petition in the Office of Administrative Hearings challenging her termination. An administrative law judge ruled that the dismissal was unwarranted and should be reversed. The Department appealed to the nine-member State Personnel Commission ("SPC"), which issued an order upholding the administrative law judge's decision. (Note: As a result of legislation passed in 2013, the SPC is now referred to as the State Human Resources Commission, and the Act is called the State Human Resources Act.)

Dissatisfied with the SPC's ruling, the Department sought review in Wake County Superior Court. The superior court judge affirmed the decision of the SPC and ordered the Department to reinstate the employee. The Department then appealed to the court of appeals. It argued that the SPC lacked authority to rule on the employee's case because a quorum of its members wasn't present. The Act defined a quorum of the SPC as at least six members (the number has since been reduced to five). See G.S. 126-2(f). Although seven SPC members attended the meeting, concern about potential conflicts apparently prompted two of the seven not to take part in the employee's case. The Department contended that this development left the SPC without a quorum.

The court of appeals rejected the Department's argument, framing the issue as one requiring it to decide "at what time during [SPC] proceedings a quorum should be determined." Although nothing in the Act addresses the issue, the court ruled that "a quorum of the SPC is to be determined at the beginning of a meeting; once the meeting is opened, the SPC may conduct business regardless of subsequent recusals that may reduce the number of members voting on a particular issue below the number required for a quorum." In support of its ruling, the court of appeals cited the quorum statute in the Business Corporation Act, which provides that, once a "share" is represented at a shareholders' meeting, "it is deemed present for quorum purposes for the remainder of the meeting." G.S. 55-7-25(b). The court also referenced the quorum provision in the Nonprofit Corporation Act, which imposes a similar rule on meetings of a nonprofit corporation's members. See G.S. 55A-7-22(a).

I completely agree with the court's holding that the nonparticipation by two SPC members didn't cause the loss of a quorum in the employee's case; however, I question whether the quorum statutes for nonprofit and for-profit corporations actually bolster the court's decision. The statutes don't expressly mention nonparticipation by those still in attendance. My guess is that the General Assembly enacted the statutes to make clear that meetings of corporate shareholders and nonprofit members aren't subject to the general parliamentary principles that (1) the absence of a quorum may be raised at any time during a meeting and (2) an assembly, board, or committee must cease conducting most forms of business once the absence of a quorum has been established. The legislature is unquestionably familiar with these principles, as shown by the procedural rules adopted by North Carolina's House of Representatives and Senate to govern their respective proceedings. The rules for each chamber describe the steps to be followed if a quorum challenge is raised and the methods which may be used to compel the attendance of members sufficient to achieve a quorum.

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Instead of basing its ruling on statutes that depart from standard parliamentary practice, the court of appeals could have relied on one of the commonly accepted principles of parliamentary procedure discussed in my last blog post. As I noted there, the usual rule is that members who attend a meeting are counted present for quorum purposes, even if they don't deliberate or vote. Here is how this principle is stated in three prominent manuals of parliamentary procedure:

- *Robert's Rules of Order Newly Revised* (11th ed.), p. 345, ll. 5-7: "The quorum refers to the number of members *present*, not to the number actually *voting* on a particular question." (emphases added).
- *Mason's Manual of Legislative Procedure*, § 503.1 (2010 ed.): "A quorum is determined by the number of members *present*, not by the number voting. The fact of a quorum is not dependent upon the number who participate in the proceedings and vote. If the number necessary to make a quorum is present, it makes no difference how many or how few actually participate in the discussion." (emphasis added).
- *American Institute of Parliamentarians Standard Code of Parliamentary Procedure*, p. 123 (2012): "A quorum always refers to the number of members *present*, not to the number *voting*. If a quorum is present, a vote is valid even though fewer members than the number specified as present participated in the vote." (emphases in original).

Had it taken the approach suggested by *Robert's*, *Mason's*, and the *Standard Code*, the court of appeals could have simply held that nonparticipation by members plays no role in the SPC's quorum calculations, regardless of when or how often such determinations are made. These manuals don't bind the court, of course, but it has previously cited *Robert's* as persuasive authority and could have done so again without breaking new ground.

My blog post's assertion that a quorum typically isn't affected by members who don't deliberate or vote was consistent with the court of appeals' holding that recusals won't deprive the SPC of a quorum. Nonetheless, I think that general parliamentary principles offered the court a better foundation for the outcome in *Hershner* than the statutes cited in its opinion.

## Links

- [canons.sog.unc.edu/?p=7656](https://canons.sog.unc.edu/?p=7656)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=126-2](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=126-2)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=55-7-25](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=55-7-25)
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