

MEMORANDUM OF LAW

DATE: June 23, 1998

TO: Civil Service Commission and Rich Snapper, Personnel Director

FROM: City Attorney

SUBJECT: Tie Vote in a Civil Service Commission Hearing

QUESTIONS PRESENTED

1. What is the legal effect of a tie vote by the Civil Service Commission after it has heard and deliberated on the recommendations of the hearing officer after a disciplinary appeal?
2. What is the correct procedure for breaking a tie vote that will ensure compliance with all procedural due process concerns?

SHORT ANSWERS

1. The Civil Service Commission is an administrative body that may act in either a legislative or an adjudicative capacity. In those instances when the Commission is acting in its legislative capacity a tie vote has no legal effect and thus constitutes “no action.” The result of “no action” means the underlying action remains intact. However, when the Commission acts in its adjudicative capacity, a tie vote does not allow the underlying disciplinary action to stand. Rather, when the Commission acts in its adjudicative capacity there must be an affirmative vote to either uphold or overturn the original action.
2. The Civil Service Commission must reconvene to deliberate and vote at a time when all members are present. New deliberations with all members present will satisfy all due process concerns.

BACKGROUND

Civil Service Commission [Commission] rules regarding employee disciplinary actions provide that appeals be heard by a single Commissioner acting as hearing officer. The Appointing Authority is required to prove by a preponderance of the evidence that its proposed recommendation is

appropriate. After receiving the evidence, the hearing officer makes findings of fact and recommendations for discipline based upon those findings. These recommendations may either affirm, overturn, or modify the Appointing Authority's action. Subsequently, a quorum of the Commission meets to hear and deliberate on the recommendations of the hearing officer. The Commission may elect to uphold, overturn, or modify the recommendations of the hearing officer. No rule requires the full Commission to engage in the deliberations. Action by a quorum of the Commission constitutes action by the Commission and is administratively final. Any further action on the disciplinary issue can be pursued only through court action.

The issue addressed in this memorandum arises from the appeals of two City police officers. Each officer was terminated by the Appointing Authority for misconduct. Each appeal was heard by a single Commissioner who, after hearing all the evidence, made recommendations that would allow each of the officers to return to duty. The officers' return to duty was, however, contingent upon satisfactory completion of certain acts by each officer. A motion to accept the hearing officer's recommendations was made and seconded. One Commissioner was absent, leaving four Commissioners to deliberate and vote on the motion. This number constituted a quorum of the Commission and action could lawfully be taken.

After reviewing the findings of fact and recommendations for disciplinary action proposed by the hearing officer, the Commission deliberated upon the recommendations and engaged in a full discussion of the hearing officer's proposal. The Commission was unable to reach a consensus and the vote was split with two Commissioners in favor of the recommendation to reinstate the officers, and two Commissioners in favor of upholding the underlying Appointing Authority's decision to terminate the officers.

You have asked what legal effect a tie vote has under these circumstances, and, more specifically, whether a tie vote affirms the underlying disciplinary action. You have also asked how the infirmity of the vote, if any, may be cured.

DISCUSSION

City employees have a legally enforceable reasonable expectation of continued employment. This "property interest" is protected by the due process provisions of both the state and federal constitutions. *Parker v. City of Fountain Valley*, 127 Cal. App. 3d 99, 106 (1981) (citing *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 207 (1975)). The courts have frequently noted that "[i]t is axiomatic, in disciplinary administrative proceedings, that the burden of proving the charges rests upon the party making the charges." *Id.* at 113. The appropriate burden of proof on the City in disciplinary actions where property interests are at issue is proof by a preponderance of the evidence. *Pipkin v. Board of Supervisors*, 82 Cal. App. 3d 652, 658-59 (1978).

1. Effect of the Tie Vote: A "No Action"

"[A]s a general rule an even division among members of an administrative agency results in no action." *Graves v. Commission on Prof. Conduct*, 63 Cal. App. 3d 970, 976-77 (1976) (citing 2 Am. Jur. 2d, *Administrative Law* 198); see also *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (1996) (holding that a tie vote by an administrative body constitutes "no action"), *cert. denied*, 117 S.

Ct. 1430 (1997); *Anderson v. Pittenger*, 197 Cal. App. 2d 188, 195 (1961) (concluding that, on appeal from a regional commission's decision to issue a development permit, a city council's tie vote on a matter amounted to "no action, and it was not an affirmation of the order of the commission"); Ruth S. Astle, Wilbert E. Bennett, et al., *California Administrative Hearing Practice* 8.16 (CEB 2d ed. Supp. 1997) ("When there is a tie vote, in the absence of a statute the general rule appears to be that no decision has been made"). Similarly, *Robert's Rules of Order Newly Revised*, section 1 (9th ed. 1990), says "[t]he basic principle of a decision in a deliberative assembly is that, to become the act or choice of the body, a proposition must be adopted by a *majority vote*; that is, direct approval . . . must be registered by more than half of the members present and voting on the particular matter."

The *Graves* case involved facts similar to those here. In *Graves*, a terminated employee filed a petition to compel the trial court to set aside his dismissal by a civil service commission. The Education Code required a majority vote by the civil service commission in order to affirm a dismissal of a schoolteacher for cause. The commission voted to dismiss *Graves* by a vote of two to one; however, one member of the commission was not eligible to vote on the date in question because he had already left the commission to take a new position elsewhere. The trial court denied the writ, but the court of appeal reversed. It reasoned that, because the board member's ineligibility created a tie vote, the government had not carried its burden of affirming the dismissal by a majority vote. *Graves*, 63 Cal. App. 3d at 976-77. The court held the tie vote amounted to "no action," and it remanded the case back to the commission for a rehearing. *Id.* at 977.

Like the commission in *Graves*, the City's Commission must affirm a disciplinary action by a majority vote. Moreover, like the commission member in *Graves* whose discounted vote created a deadlock, one of the members of the Commission in this case was absent from the meeting, creating a tie vote. The tie vote in each case constituted "no action." *See id.* at 976-77; *see also Clark*, 48 Cal. App. 4th at 1176; *Anderson*, 197 Cal. App. 2d at 195. Since "no action" has been taken, the Commission retains jurisdiction over the matter until a motion to uphold, overturn, or modify the underlying action is passed by a majority of the members. *See Cooper*, 35 Cal. 2d at 246-52.

There is one important distinction between the facts at issue here and the facts in the *Graves* case: all eligible voters cast their ballots in *Graves*, but only four members of the five-member Commission voted in this case. The "no action" problem in this case can be remedied by having the absent Commissioner cast his vote.

There are certain distinctions among the cited cases and the instant case. In *Graves*, *Clark*, and *Anderson*, some "action"¹ was taken against an individual based upon an even split of an administrative body. In each of those cases, the appellate court remanded the case back to the administrative body where the court ordered the administrative body to provide a fair hearing. *See Graves*, 63 Cal. App. 3d at 976-77 (holding that the trial court should not have reinstated the employee, but simply afforded him a fair hearing); *Clark*, 48 Cal. App. 4th at 1174 (concluding that the trial court erred in reinstating the decision of a zoning committee before it had been ratified by the city council); *Anderson*, 197 Cal. App. 2d at 195. The present case is different in that no "action" - disciplinary or otherwise - has yet been taken by the Commission against these two police officers. Unlike the cited cases, there has yet to be some act by the administrative body that would implicate procedural due process concerns. The process of breaking the tie will, however, trigger procedural due process concerns, and the City should

implement a practice that both accomplishes its goal of resolving the disciplinary matter, while still affording a fair hearing to the officers.

2. Breaking the Tie and Procedural Due Process

Since the Commission's vote constituted "no action," it retains jurisdiction over the matter until the matter is reheard and the tie vote is broken. The rehearing may occur regardless of whether the individual members of the Commission are the same. *See Cooper v. State Bd. of Medical Examiners*, 35 Cal. 2d 242, 246-52 (1950) (concluding that such a practice would not offend principles of procedural due process). However, when *and* how the absent Commissioner reaches his decision raises some procedural due process concerns.

a. Casting the vote now under the "Rule of Necessity"

Counsel for the police officers has suggested the absent Commissioner may cast his vote under the administrative "Rule of Necessity." However, this rule simply permits a decision-maker who is personally embroiled in a controversy, and who would otherwise be precluded from voting on a matter due to a conflict of interest, to vote on the matter in spite of the conflict, thereby defeating a lack of quorum, when he or she is the only person capable of acting on the matter. *See Mennig v. City Council of Culver City*, 86 Cal. App. 3d 341, 352 (1979); *Gonsalves v. City of Daily Valley*, 265 Cal. App. 2d 400, 404-05 (1968). This case presents no issues of conflict of interest, personal embroilment in a controversy, or lack of quorum. Simply because there is a "necessity" that the tie be broken does not allow resort to the administrative "Rule of Necessity" as articulated in *Mennig* and *Gonsalves*.

b. Casting the vote after new deliberations

The absent Commissioner may not cast his vote outside the presence of the other members of the Commission. To do so would be a per se violation of procedural due process requirements. To protect the due process rights of the appellants, the Commission, which has retained jurisdiction due to the lack of action, must reconvene with all members present. *See Cooper*, 35 Cal. 2d at 246-52. Decision-makers need not hear all evidence presented at the appeal in order to be able to provide a fair hearing, as long as they apprise themselves of the evidence through the administrative record. *Cooper*, 35 Cal. 2d at 246. For purposes of deliberation by the Commission, the administrative record consists of the findings of fact and conclusions prepared by the hearing officer. While a decision-maker, here, the absent commissioner, need not hear the entire case, due process requires that he or she participate in the deliberative process with other members of the body.

Participation, however, requires more than simply rendering a decision based upon a review of the record. It demands active participation in the discussion of the case. As the *Cooper* court explained "we conclude 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" (emphasis added). *Id.* If the absent member of the Commission voted now to break a tie without participating in the give and take of the deliberative process with his fellow Commissioners, it is arguable he would not be "participating in a decision" because, due to the current deadlocked status of the matter, the decision would be his alone to make. The Commission should deliberate and take a new vote so that the group can "participate in the decision" as

a whole. *Id.* This procedure would serve the City's goals of achieving finality and determining the appropriate course of discipline, while still affording the appellants appropriate due process protections by providing a fair and complete hearing.

CONCLUSION

A tie vote constitutes "no action" by the Commission, and the Commission does not lose jurisdiction to decide the matter until the vote can be said to constitute some "action" one way or the other. The "Rule of Necessity" is not applicable to this situation because there is no issue pertaining to conflict of interest, personal embroilment in a controversy, or lack of a quorum. So that an appropriate action may be taken, the entire Commission should reconvene, deliberate, and take a new vote so the Commission can "participate in the decision" as a whole.

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