



OFFICE OF CORPORATION COUNSEL

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DATE: February 17, 2023

TO: Interested Stakeholders

FROM: Margaret C. Daun, Corporation Counsel

SUBJECT: Advisory Memorandum re Disparate Treatment of Abstentions from Voting under Various Provisions of Chapter 1 of the Milwaukee County Code of General Ordinances

On December 15, 2022, the County Board of Supervisors referred File No. 22-1181 to the Office of Corporation Counsel (“OCC”) to review County legislative history to ascertain why Chapter 1 of the Milwaukee County Code of General Ordinances (“MCGO”) treats abstentions differently depending on circumstance, whereby abstentions in response to certain motions effectively count as “no” votes (i.e., where adoption requires a given threshold of members “present”), but as nonvotes in others (i.e., where adoption requires a threshold of members “present and voting”).¹

Short Answer

There is no explanation in any available legislative history, within the records of OCC, County Clerk, or County Board as to why abstentions effectively count as “no” votes in Milwaukee County (contrary to the general rule under Robert’s Rules of Order and its commentary), nor is there any explanation as to why abstentions are treated as nonvotes only for a limited set of specific motions.

¹ Under Roberts Rules and County Ordinance, for an item to be adopted, it requires a majority vote. MGCO §1.04. But the question is – a majority vote of which set of members (i.e., how are abstentions or members counted in the quorum but failing to vote treated?). Under Robert’s Rules, abstentions or member’s failure to vote are not counted among the set of members to which the required voting proportion is applied to determine whether an action passes. See RONR § 44, p. 389, l. 20 – p. 340, l. 24. However, because MGCO 1.04(a) states that unless specified otherwise, “all questions shall be determined by a majority of the members supervisors present,” abstentions effectively count as “no” votes under County ordinances (as does a mistaken failure to vote, which might occur, for example, if a member does not hear when her name is called during a roll call vote). *See id.*

Recommendation

The OCC generally does not take any position or make any explicit recommendation regarding any pending legislation. An exception to this general approach is warranted here, as the OCC is uniquely suited as legal advisor to the Board, to provide our expert view given our collective extensive background advising and counseling deliberative bodies regarding parliamentary procedures, including the handling of abstentions.

The OCC strongly recommends adoption of File 22-1181 for three reasons: (1) abstentions are commonly understood to be nonvotes and so, Milwaukee County should treat abstentions accordingly; (2) Robert's Rules expressly recommends that abstentions should be treated as nonvotes so that members can actually express a neutral position and so that abstentions do not have an unintended negative impact on potential passage or adoption;² and (3) abstentions should be treated consistently regardless of the type of motion, unless a specific rationale can be articulated for disparate treatment and none can be discerned here, *see infra* pp. 4-5.

Analysis

MCGO Chapter 1 sets forth the rules of the Milwaukee County Board of Supervisors. As a general matter, pursuant to MCGO 1.26, board proceedings are governed by Robert's Rules of Order Newly Revised ("RONR"), except where there are express deviations in the text of Chapter 1 or Robert's Rules are inconsistent with state law.

Robert's Rules do not treat abstentions as "no" votes under any circumstances (*See* RONR (12th ed.) 44:1, 44:3, 44:9(a)). As such, the effective treatment of abstentions as "no" votes under MCGO Chapter 1 represents a deviation from Robert's Rules as contemplated by MCGO 1.26.

MCGO 1.04(a) states: "All questions shall be determined by a majority of the supervisors present." Thus, abstentions by members attending a board meeting are still part of those "present" and count in the overall vote total. This standard applies to generally to board actions (unless a different standard is expressly stated in a particular rule), including:

² Roberts Rules suggests that its approach (i.e., where abstentions are not counted among the set of members to which the required voting proportion is applied, that is, as nonvotes) is preferred:

Voting requirements based on the number of members present ... while possible, are generally undesirable. Since an abstention in such cases has the same effect as a negative vote, these bases deny members the right to maintain a neutral position by abstaining. For the same reason, members present who fail to vote through indifference rather than through deliberate neutrality may affect the result negatively.

See RONR, §44, p. 390, l. 13-24.

- Substantive motions (e.g., to adopt or reject a resolution), MCGO 1.04(a);
- Permission to speak more than twice on any given motion, MCGO 1.05(b);
- Motions for reconsideration, MCGO 1.08(a);
- Suspension of the rules, MCGO 1.08(c);
- Division of a question, MCGO 1.08(d);
- Amendments to amendments, MCGO 1.08(e);
- Motions to reject or place on file, MCGO 1.08(g);
- Motions to refer a file, 1.09(b)(1), MCGO 1.18;
- Changing the order in which committee reports are read, MCGO 1.14(a)(1);
- Motions to lay over a committee report to the next Board meeting a **second** time, MCGO 1.14(b);³ and
- Referring a matter to corporation counsel a **second** time, MCGO 1.15.⁴

By contrast, with respect to the following board actions, abstentions are **not** counted as “no” votes because the ordinances specifically require voting thresholds counting those members “present and voting”:⁵

- Motions to rescind or amend previously adopted resolutions, MCGO 1.08(b);
- Appealing a decision of the chair, MCGO 1.08(f);

³ We note that the first time a committee report is laid over requires an affirmative vote of one-third (1/3) of those members “present and voting.” The inconsistency between the voting standard for first layovers (abstentions do not count as “no” votes) and second layovers (abstentions **do** count as “no” votes) suggests that the differences were unintentional, as there is no apparent reason to treat votes on the same subject matter differently (apart from the required vote threshold). The text of 1.14(b) is as follows: “Committee report laid over on request. Action on the report of any committee as defined in subsection (a) of this section, when it first makes its report, shall be deferred until the next meeting of the county board if one-third (1/3) of the members **present and voting** so request. If the report of said committee is re-referred to said committee or any other committee and thereafter the subject matter is again returned to the county board, action thereon shall not be deferred except as provided by section 1.15 or by a majority vote of the members **present**.” (emphasis added).

⁴ As with laying over committee reports, the first time a matter is referred to OCC can be approved by one-third (1/3) of members “present and voting,” but a second referral requires a majority of the members “present.” Again, there is no apparent reason for this disparate treatment within motions on precisely the same subject matter, except as it relates to required vote thresholds. The text of MCGO 1.15 is as follows: “With affirmative vote of one-third (1/3) of the members **present and voting** at any meeting of the county board, any resolution, ordinance or report shall be referred to the corporation counsel and the written opinion of the latter secured as to the legality of the resolution or ordinance offered, or the recommendation made in any report presented to the county board for adoption. Such opinion shall be rendered to the county board at its next meeting held not less than forty-eight (48) hours after the referral, and copies distributed to all members. The resolution, ordinance or report, shall not be referred again to the corporation counsel for a legal opinion except by a majority vote of the members **present**.” (Emphasis added.)

⁵ Adding the phrase “and voting” means that abstentions are **not** counted in the vote totals. See the OCC opinion dated February 6, 2018, attached hereto as **Exhibit A**.

- Motions to lay over a committee report a **first** time (see also n.1), MCGO 1.14(b); and
- Referral to corporation counsel a **first** time (see also n.2), MCGO 1.15.

Notably, the foregoing four board actions are the only instances in MCGO Chapter 1 in which the “present and voting” standard applies. There is nothing evident in the text of the ordinance to explain why these four procedural motions would require different treatment of abstentions.⁶

In sum, there is no conclusive evidence in the text of the ordinances as to why there is such disparate treatment on the question of whether abstentions count as “no” votes. Nor is there any explanation in the legislative history of Chapter 1 or in the records of OCC, County Clerk, or the County Board that explains why this distinction exists

Historical Evolution of Chapter 1

The current version of MCGO Chapter 1 dates from 1960 (File No. 60-141), when the prior County Board rules were repealed and replaced in their entirety. The Journal of Proceedings from the 1960 board sessions associated with File 60-141 contain both resolutions establishing a committee to prepare and recommend revised rules to the county board and, later in the volume (at pages 359-381), a complete recitation of the entire revised chapter. However, no interim or draft versions are included in the Journal of Proceedings that might illuminate the reasons why rules were drafted as they appear in the final version. Additionally, there are no full versions of the ordinances pre-dating 1960 available in either the Office of the County Clerk or the Milwaukee County Law Library. As such, OCC is unable to determine whether and to what extent the 1960 version of Chapter 1 differed from any prior ordinances, whether on the question of abstentions or otherwise.

Subsequent to its passage in 1960, there appears to have been a significant renumbering and amendment of Chapter 1 in 1973, followed by another in 1978.⁷ However, neither of those legislative actions appears to have changed any of the language regarding voting standards related to abstentions. Individual subsections of Chapter 1 have been amended from time to time since 1978, but again there do not appear to have been substantive changes to the provisions in question.

⁶ One possible intuitive rationale is that under the current approach it is “more difficult” for substantive motions and most other procedural motions to be adopted or passed, but easier for the foregoing list of unique procedural motions to proceed. However, given the inconsistent treatment of layovers and referrals even within the specific motions provided for in MCGO 1.14(b) and 1.15, see supra nn.2-3, belies such a rationale. Moreover, the most efficient and effective way to ensure that it is “more difficult” for certain motions to be adopted or passed, is to alter the proportion of aye votes required (i.e., majority vs. super-majority vs. minority). This is indeed the mechanism employed with MCGO Chapter 1.

⁷ Each chapter of the current online version of the Milwaukee County Code of General Ordinances contains at the end of the page a recitation of the legislative history of the chapter.

In any event, the Journals of Proceedings generally do not contain drafting notes or other explanatory information. Instead, the journals primarily contain the text of resolutions and ordinances and a recitation of motions and votes. As such, even if changes had been made to the voting standards, the Journals of Proceedings are unlikely to provide answers that might explain why certain changes were made.

A final potential source of legislative history available for OCC to review are the drafting records or other materials related to board files that are not contained in the Journals of Proceedings. Unlike the online version of the Journal of Proceedings in use since 2012, which includes within each Legistar file links to supplemental materials such as board reports, exhibits, etc., such supplemental materials for pre-2012 legislation generally would be kept either in the files of individual supervisors or generally in the Board's so-called "Green File."

While individual supervisor records from 1960 have most likely been long-since destroyed, the Office of the County Clerk does retain copies (on microfilm in most cases) of such "Green File" materials. In the interest of thoroughness, OCC requested a copy of the "Green File" related to File No. 60-141. The clerk's office helpfully provided scanned copies of the materials, the two pages of which are attached to this memorandum as **Exhibit B**. Unfortunately, these records do not contain any information that would explain the disparate treatment of voting standards related to abstentions.

Conclusion

Taken together, the available sources of information which include current ordinances, Journals of Proceedings, and the "Green File," do not explain why abstentions are treated differently depending on the pending motion (due to the use of different phrasings, namely, "members present" versus "members present and voting"). Other relevant materials would have been kept (if at all) in the records of individual supervisors charged with drafting the current version of Chapter 1 and, as such, likely destroyed decades ago. For the foregoing reasons detailed above, the OCC strongly endorses File No. 22-1181.

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Exhibit A

Office of Corporation Counsel Advisory Opinion Dated February 6, 2018

See Attached



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TO: Chairman Lipscomb
Supervisor Staskunas
Other Interested Parties

FROM: Margaret C. Daun

DATE: February 6, 2018

RE: Points of Personal Privilege

On December 14, 2017, Supervisor Staskunas emailed the Office of Corporation Counsel, with copy to the County Board Chairman, and requested that the OCC explain the proper use of a “point of personal privilege.” Importantly, the County Ordinances do not address points of personal privilege.

Basics

Where County ordinances are silent as to the protocols for County board or committee meetings, Roberts Rules of Order fills in the gaps. See MCGO § 1.26. But as is the case with virtually every legislative body, the County Board and its committees have developed certain commonly used parliamentary practices over the years that may not be precisely in line with the letter of Robert’s Rules of Order. With that said, the fundamental purpose of Robert’s Rules is to ensure fair debate among members of a body. And in the end, its purpose can be served if all members of the deliberative body share a common understanding of a relatively small basic portion of the Rules. That is best accomplished through consistent application.

When inquired of, as here, the Office of Corporation Counsel is happy to help interpret the “rules of order” and applicable Ordinances to inform how the Chairman (and committee chairs) elect to conduct the meetings, but ultimately, those decisions are often being made on “the fly,” by the Chairman or committee chairs. If a serious parliamentary error occurs but is not discovered until well after the meeting, the Chair, Clerk Christenson, Mr. Cady and myself would need to meet to determine how to proceed. Of course, the Chair can entertain a motion to recess at almost any time since it is a motion that takes precedence over all other motions other than motions to adjourn, *see* RONR (10th ed.), Chart for Determining Precedence, page 4, so that a discussion can be had about a pending motion/vote outcome, etc. where necessary.

Also, it is the more traditional course for the Clerk of the body to be the “final word” on all questions of parliamentary procedures. But again, the OCC is always available to assist.

Recent Example: A Majority of What Set of Members?

A very important question arose during the last Parks Committee meeting regarding whether the committee's vote on the County Executive's appointee as Parks Director would be construed before the full Board as a recommendation to confirm, no recommendation (neutral), or a recommendation to reject. Although Supervisor Stanskunas did not formally pose this question to the OCC on December 14, since this parliamentary issue was recently of critical importance, the OCC also takes this opportunity to answer it clearly here.

Under Roberts Rules and County Ordinance, for an item to be adopted, it requires a majority vote. MGCO §1.04. But the question is – a majority vote of which set of members (i.e., how are abstentions or members counted in the quorum but failing to vote treated?). Under Robert's Rules, abstentions or member's failure to vote are not counted among the set of members to which the required voting proportion is applied to determine whether an action passes. See RONR § 44, p. 389, l. 20 – p. 340, l. 24.

However, because MGCO 1.04(a) states that “all questions shall be determined by a majority of the members supervisors present,” abstentions actually count as “no” votes under County ordinances (as does a mistaken failure to vote, which might occur, for example, if a member does not hear when her name is called during a roll call vote). *See id.*

The last Parks Committee meeting provides an excellent example of the implications of MGCO § 1.04(a). At that meeting, the vote on the resolution to confirm the nominee was 2 ayes, 1 nay, and 2 abstentions. Under MGCO § 1.04(a), this was a recommendation of the committee to ***reject*** the nominee, because the abstentions are counted among the total votes cast, thus resulting in a vote to confirm the nominee of only 2 of 5 (i.e., less than the required majority of 3). In contrast, under standard Robert's Rules, this same exact vote would have been a recommendation to ***confirm*** the nominee, because the 2 abstentions would not be counted among the number to which the required majority proportion is applied, thus resulting in a vote to confirm the nominee of 2 of 3 (i.e., equal to the required majority of 2).

Roberts Rules suggests that its approach (i.e., where abstentions are not counted among the set of members to which the required voting proportion is applied) is preferred:

Voting requirements based on the number of members present ... while possible, are generally undesirable. Since an abstention in such cases has the same effect as a negative vote, these bases deny members the right to maintain a neutral position by abstaining. For the same reason, members present who fail to vote through indifference rather than through deliberate neutrality may affect the result negatively.

See RONR, §44, p. 390, l. 13-24. Please note that elsewhere in ordinances, the regular Robert's Rules construction applies (i.e., where abstentions or persons that fail to vote even if present are not part of the count to determine whether an action passes). *See* MGCO § 1.08(b) (motion to rescind), § 1.08(f) (appeal a decision of the chair), § 1.14(b) (to lay over a committee report to the

next Board meeting), and § 1.15 (referral to corporation counsel). I will note that the County's current approach makes it more difficult for substantive motions to be adopted/passed, but easier for the foregoing list of procedural motions to proceed. If that is not the desired approach, a change to MGCO § 1.04(a) might be considered.

Does a Point of Personal Privilege Permit a Member to Speak on Any Topic at Any Time?

No. According to Robert's Rules of Order, a point of personal privilege does not permit a member to talk about any topic s/he desires at any time. See RONR § 19, p. 216, l. 30 - p. 222, l. 27.

Generally, there are 2 types of questions of privilege – one relates to the rights and privileges of the assembly as a whole and one relates to the rights or privileges of an individual member. A “point of *personal* privilege” is the latter. Importantly these points or “questions” can interrupt a speaker and can be made at any time, and require an immediate ruling by the Chair as to whether it is an actual question of privilege and whether it merits interruption of the current business before the body.

So what are “points of personal privilege”? They are, per RONR, p. 219-220, questions “which seldom arise in ordinary societies and even more rarely justify interruption of pending business [and] may relate[], for example, to an incorrect record of a member's participation in a meeting contained in minutes approved in his absence or [formal] charges circulated against a member's character.” Often the two types of “points of privilege” are confused.

Many points of privilege (on behalf of the assembly) will be environmental in nature. Here is an example:

Member: Chair, I rise to a question of privilege [affecting the assembly].

Chair: The lady will state her question.

Member: Mr. Chair, unless a window is closed, I do not believe we're going to be able to hear.

Chair: Will the usher/sergeant at arms/clerk please close the windows.

A more unlikely, but more important example could arise related to the logistics of a meeting's order/agenda. Assume that, to hear a prominent speaker, an association has opened one of its meetings to the public. Because of the speaker's commitments later that hour, his address was given first, ahead of the business of the meeting, and his remarks were expected to be brief and routine. However, Member X surprised the meeting by introducing an unrelated resolution of extreme sensitivity before the speaker has begun his remarks. Member Y, sensing that the resolution needs to be taken in closed session, makes a “point of privilege” to excuse the public and their guest and to reconvene in closed session. This motion would need a second and then a full vote and if assented to, the public and the guest speaker would be excused, and the meeting reconvened in closed session, where Member X would take the floor on his motion. [For purposes of this example, the issue of open meetings notice is not considered for simplicity's sake. However, this example does illustrate how “points of privilege” could be used to interrupt action on the floor if there was a key logistical or notice/open meetings issue.]

Other Motions

Other motions that are commonly misunderstood and misused include (*see* RONR § 33):

- Point of order: used if there is a breach of the rules of the body to fix an error or to avoid a mistake of the rules
- Point of parliamentary inquiry: used to ask the chair a question about parliamentary rules
- Point of information: used to direct a request to the chair or another member for information relevant to the business at hand (but not about parliamentary procedure); typically, succinct

One typical parliamentary mistake that occurs with some regularity is for a member to shout out during debate “Call the question!” in an attempt to immediately halt debate, cut a speaking member off, and move directly to a vote on the pending question without voting on the motion to close debate. This is not something permitted by Robert’s Rules. There is a motion to end debate that is technically a “motion to call the previous question.” *See* RONR §16. But such a motion *must be voted on and requires a two-thirds vote*. Also, this motion is not allowed in committees.

Exhibit B

Contents of “Green File” for File No. 60-141

See Attached

EXHIBIT NO. 80

FILE NO. 60-141

BY SUPERVISOR JOHN DOYNE:

WHEREAS it is customary for the Board of Supervisors at the first meeting after each regular election, to which members are elected for full terms, to adopt rules of procedure for the conduct of meetings, the transaction of business, the appointment of committees, etc., and

WHEREAS the election of members for full terms will be held on April 5, 1960, and

WHEREAS it appears advisable that a committee consisting of members of the board be appointed for the purpose of preparing rules of procedure to be presented to the board at the first meeting following the election,

NOW THEREFORE, BE IT RESOLVED that a committee on rules is hereby created to consist of five (5) members of the board appointed by the Chairman, the duties of which will be to draft rules of procedure for the conduct of meetings and the transaction of business by the Board, which set of rules are to be submitted to the Board for its consideration at the first meeting following the election on April 5, 1960.

This resolution will not require an appropriation of funds or increase or decrease anticipated revenues during the current of subsequent fiscal year.

3/2/60

RPR

Final with

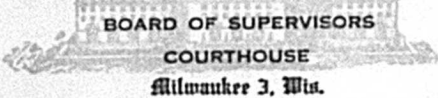
EXHIBIT 2

File

FILE 60-41

JOHN L. DOYNE
CHAIRMAN

County of Milwaukee

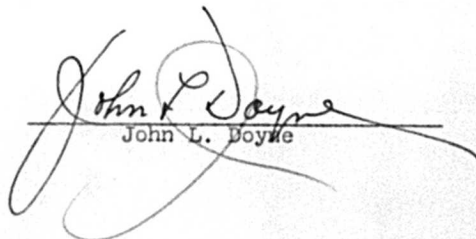


BR. 6-5800
EXT. 232

March 14, 1960

From: Chairman, County Board of Supervisors
Subject: Appointment of Committee to Revise County Board Rules

Effective this date, I have appointed Supervisors White, Wedemeyer, Pohl, Murphy and Duffey to draft rules of procedure for the conduct of meetings and transaction of business by the board, pursuant to a resolution, File No. 60-41, adopted by the board on March 9, 1960.


John L. Doyne

