

MEMORANDUM

To: Jeremy Gunn
From: Dennis Quinn
CC: David Marwell
Date: June 1, 1995

Subj: Quorum and Voting Requirements of the Board

File : 3.____

Issue: Whether the APA or any other Federal law establishes procedural requirements that affect Board voting.

Answer: No

Discussion:

The Administrative Procedures Act, 5 U.S.C. secs. 551-559, provides no guidance on the establishment or definition of a quorum.

Generally speaking, the agency's enabling legislation will address this issue. In the absence of a statutory provision, the agency may determine how its quorum requirements will be satisfied. See, *State of Idaho v. ICC*, 939 F.2d 784 (9th Cir. 1991). Most agencies work under a "fifty percent plus one" rule.

Multi-member agencies like the Review Board generally follow the "majority-of-the-quorum" rule. This means that a quorum is necessary before the agency can take action, but only a majority *of the quorum* is needed to act. For example, if an agency's enabling legislation calls for five members and its regulations state that three will constitute a quorum, the agency may take action by a 2-1 vote. In this case, a minority of the Board's membership can take action.

The Review Board can issue an interpretive regulation codifying these procedures pursuant to section 7(n) of the JFK Act. Under section 553(b) (3)(A) of the APA, such a regulation could be exempted from the standard notice and comments requirements since it would deal with ". . . rules of agency organization, procedure or practice." 5 U.S.C. sect. 553(b)(3)(A). Additionally, the Board could rely on section (b)(3)(B), which provides:

When the agency for good cause finds (and incorporates the finding

and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The Board could find that due to the time constraints placed upon it by the JFK Act, and the public interest involved in acting promptly, a 30-day notice and comment period is “impracticable” and “contrary to the public interest.” We could publish the regulation as adopted, citing the two provisions above, and still invite public comments, stating that all comments will be considered and the adopted regulation will be amended if the Board sees fit.

Recommendation:

1. Prepare a draft regulation for Board consideration and adoption that defines a quorum as “three members” being present, and that a majority vote of a quorum is sufficient to enact agency business, e.g., release or postpone records.
2. The regulation as adopted should be published in the *Federal Register*, pursuant to sections 553(b)(3)(A) and (B), inviting comments after the fact.