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ATTORNEY-CLIENT PRIVILEGED
August 17, 2023

Catherine J. Motz
Chair, Maryland Higher Education Commission
Nancy S. Grasmick Building
6 N. Liberty St., 10th Floor
Baltimore, Maryland 21201

Dear Ms. Motz:

The Maryland Higher Education Commission (the "Commission") has authority to approve or disapprove new degree programs at Maryland public colleges and universities. Md. Code Ann., Educ. ("ED") §§ 11-206, 11-206.1. The Commission has delegated that authority to the Secretary of Higher Education but retains authority to review and then affirm or reverse the Secretary's decision. COMAR 13B.02.03.04. The Commission's governing statute also states that "[n]o formal action may be taken by the Commission without the approval of a majority of the members of the Commission then serving on the Commission." ED § 11-103(b)(3).

At a recent meeting, the Commission—with seven out of twelve Commissioners present—voted 4–3 to reverse a decision of the Secretary that had disapproved a proposed new program at Towson University.¹ As the new Chair of the Commission, who did not take office until after that meeting, you have requested advice on the legal effectiveness of that vote. You also asked what next steps the Commission is required or permitted to take if the vote had no legal effect.

¹ The Assistant Secretary for Academic Affairs rendered the actual decision on behalf of the agency in this instance and appeared before the Commission at its review meeting. For conciseness, however, I will refer to the decision as the Secretary's decision.

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As explained further below, my view is that a decision by the Commission to affirm or to reverse the Secretary's initial decision on approval (or disapproval) of a new program qualifies as a "formal action" within the meaning of ED § 11-103(b)(3). That means that a decision by the Commission either to affirm or to reverse the Secretary requires a majority of the members serving on the Commission—which will ordinarily be seven, assuming there are no vacancies—to vote in favor of the outcome. Here, because less than a majority of the total Commission members serving at the time voted in favor of reversing the Secretary's decision on Towson's business analytics program, the Commission's vote was of no effect, and the Secretary's decision remains in place, at least for the time being. As to your question about next steps, the answer is somewhat less clear (and the Commission may have some latitude to interpret its own regulations that govern the process), but my view is that the Commission is likely required, by its own regulations, to meet again to attempt to render a decision with the necessary number of votes on Towson's request for review.

I Background

Earlier this year, Towson University ("Towson") submitted a proposal for a new doctoral program in business analytics. That proposal required Commission approval under § 11-206.1 of the Education Article. When a higher education institution seeks to establish a new program under § 11-206.1, another institution may object on certain specified grounds, including, as relevant here, that the new program will create "[u]nreasonable program duplication which would cause demonstrable harm to another institution." ED § 11-206.1(e)(3). Morgan State University ("Morgan") objected to Towson's proposed program, contending that it would unreasonably duplicate Morgan's doctoral program in business administration and, thereby, harm Morgan. After reviewing Towson's proposal and Morgan's objection, the Secretary disapproved Towson's program on the grounds of unreasonable duplication.

Towson requested review by the Commission. *See* COMAR 13B.02.03.28. The Secretary and both universities made presentations at a Commission meeting on June 14. Seven Commissioners, the minimum number necessary for a quorum, were present at that meeting. My understanding is that, after going into a closed executive session, the members of the Commission who were present voted 4–3 to reverse the Secretary and approve Towson's program. The former Chair of the Commission then issued a letter to Towson authorizing it to proceed with the program.

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II Analysis

A. *The Validity of the Commission's June 14 Vote*

Ordinarily, a simple majority vote by a quorum is sufficient for a public body to take action. *See, e.g., 72 Opinions of the Attorney General* 125, 132-33 (1987). However, the Commission's governing statute includes an exception to that general rule: A majority of all the members "then serving on the Commission" must approve "formal action" by the Commission. ED § 11-103(b)(3). The question, then, is whether the Commission's putative reversal of the Secretary's decision was a "formal action" under ED § 11-103(b)(3). As I will explain in more detail below, my view is that "formal action" includes, at a minimum, any final, substantive (as opposed to procedural) decision made by vote of the Commission, such as a decision to affirm or reverse the Secretary's approval or disapproval of a new program.²

Because the meaning of "formal action" under ED § 11-103(b)(3) is a question of statutory interpretation, our goal is to "ascertain and effectuate the real and actual intent of the Legislature." *E.g., Crawford v. County Council of Prince George's County*, 482 Md. 680, 697 (2023) (quoting *Lockshin v. Semsker*, 412 Md. 257, 274-76 (2010)). To do so, it is necessary to start with the ordinary meaning of the words that the Legislature used, but it is also important to consider other indicators of meaning, including "the purpose, aim, or policy of the Legislature in enacting the statute." *Id.* at 698. "In every case, the statute must be given a reasonable interpretation, not one that is absurd, illogical, or incompatible with common sense." *Id.*

I start with the language of the statute. No provision in the Education Article (or any other provision of Maryland law for that matter) explicitly defines "formal action," nor have I found any Maryland case law, official opinions, or written advice from this Office interpreting that phrase. Given the absence of prior guidance in Maryland about the meaning of the term, dictionary definitions can provide a "useful starting point" for determining its ordinary meaning. *Marriott Emps. Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 447 (1997). Here, the word "action" ordinarily means "something done or performed," and "formal" is defined as "made or done in accordance with procedures that ensure validity." *Random House Dictionary of the English Language* (2d ed. 1987). So the ordinary meaning of those words, taken together, would suggest that

² To answer your question, it is not necessary to decide when, if ever, a procedural action by the Commission, such as the approval of minutes, is a "formal action."

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“formal action” generally means something done or performed in accordance with procedures that ensure validity.

Although that statutory text alone does not offer a definitive answer, the context surrounding the original enactment of the statutory language reinforces that the term “formal action” includes, at a minimum, any vote taken on a final, substantive decision by the Commission. The General Assembly established the voting requirement for “formal action” when it created the Commission in 1988, as part of the bill that reorganized the State’s higher education system and formed the University System of Maryland. 1988 Md. Laws, ch. 246. The same legislation added an equivalent rule for the governing boards of the University System of Maryland, Morgan, and St. Mary’s College. *Id.* (enacting ED §§ 12-103, 14-103, 14-202). These “formal action” provisions were not part of the Administration’s original bill but, instead, were added close to the end of the session by a committee amendment in the House of Delegates. Amend. Nos. 10, 19, 24, 25, S.B. 459, 1988 Leg., Reg. Sess. (House Const. & Admin. Law Comm. and House Approps. Comm.).

Nothing in the available legislative history record indicates the reasoning behind the “formal action” provisions, but it is possible to make a reasonable inference as to the Legislature’s purpose. In a 1988 official opinion, this Office considered another commission’s attempt to establish, through its bylaws, a similar requirement that a majority of that other commission’s full membership approve an action. *73 Opinions of the Attorney General 6* (1988) (involving the Chesapeake Bay Critical Area Commission). Although the opinion concluded that the bylaw was not authorized by statute, it acknowledged the policy justification behind the bylaw. Under the default rule, where a quorum is a simple majority of the membership and action may be taken by a simple majority of a quorum, less than a third of the Critical Area Commission’s membership could have taken action on behalf of the commission if its meetings were poorly attended. Attorney General Curran observed that “the [Critical Area] Commission obviously believed that the potential for action by so few members might frustrate the statute’s objective of broad participation in the [Critical Area] Commission’s decisionmaking.” *Id.* at 8.

That opinion was issued after the enactment of ED § 11-103(b)(3) and so could not have directly influenced the General Assembly’s thinking. But the opinion summarizes the purpose behind this sort of voting requirement more generally, and the Legislature presumably had a similar objective when it required the approval of a majority of the members then serving on the Commission for “formal action” by the Commission. That is, the Legislature likely intended to ensure that the action of these governing bodies would be genuinely representative of each body’s full membership, pursuing that goal at the price

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of making it somewhat more difficult for the body to take action. The General Assembly wanted the Commission in particular to represent “all parts of the State,” ED § 11-102(c)(1), and expanded the Commission from eight members (the Governor’s original proposal) to twelve, possibly in response to complaints that the Administration’s original proposal concentrated power in too few hands. *Compare* S.B. 459, 1988 Leg., Reg. Sess. (Senate First Reader), *with id.* (Senate Third Reader); *see* Letter from Fred H. Spigler, Jr., Community College of Baltimore, to Sen. Laurence Levitan, at 3 (Feb. 19, 1988) (in bill file for S.B. 459). A requirement of seven votes for “formal action” (assuming no vacancies) would help ensure that the Commission’s actual decisions, and not just its membership, would be representative of the State’s diversity.

It thus seems likely that the General Assembly intended that, at a minimum, the definition of “formal action” would encompass a vote by the Commission on a final, substantive decision. This interpretation is also consistent with the ordinary meaning of the statutory words discussed above, namely, that the phrase “formal action” would, in ordinary parlance, mean something done or performed in accordance with procedures that ensure validity. After all, an action of a body taken by vote, and at the very least a final decision on a matter of substance (such that the body can be said to have “done or performed” something definitive), is a “formal action” within ordinary usage.

This view also aligns with Attorney General opinions from other states interpreting the phrase “formal action” in the context of laws governing board and commission procedures. Although these authorities adopt varying definitions of “formal action,” they all seem to agree that, at a minimum, “formal action” includes a vote by a body on a final, substantive decision that is within the body’s statutory responsibilities. *See* S.C. Op. Att’y Gen. No. 88-5, 1988 WL 383489, at *2 (Jan. 14, 1988) (explaining that “a determination by a public body to take or refrain from taking a particular course of action would be a ‘decision’ or ‘formal action’ of the public body” and that “the taking of a vote by the body, committing it to a specific course of action, is what appears to be most significant” in the identification of formal action); Ohio Op. Att’y Gen. No. 2012-022, 2012 WL 2522659, at *4 (June 26, 2012) (explaining that “[v]oting by the members of a public body is a formal action” and contrasting formal action with “deliberations or preliminary discussions that have no legal effect”); Colo. Op. Att’y Gen. No. 93-1, 1993 WL 380755, at *1 (Feb. 19, 1993) (“The term ‘formal action’ appears to encompass any official act which a public body might accomplish.”); Pa. Op. Att’y Gen. No. 77-13, 1977 WL 22829, at *4 (July 5, 1977) (equating “formal action” with an official final decision); Utah Op. Att’y Gen., Informal Op. No. 82-53, 1982 WL 176618 (Apr. 27, 1982) (treating a vote to approve employee salaries as a formal action, as contrasted with review and discussion). To be clear, none of these opinions involved a statute (like the one at issue here) providing that a

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certain number of votes is necessary to take a “formal action,” but they provide at least some evidence of a general understanding of what “formal action” means in the context of administrative boards’ procedures.

One might argue, I recognize, that an action should not be considered a “formal action” if it qualifies as an “administrative function” that is outside the scope of the Open Meetings Act. *See* Md. Code Ann., Gen. Prov. § 3-103(a)(1)(i). But I do not see a basis for that view in the statute’s text, purpose, or legislative history. If the core purpose behind § 11-103(b)(3) is indeed to ensure that the Commission’s substantive decisions receive support from more than a minority of the Commission’s total membership, then it is not clear why the distinction between actions taken in open session and “administrative functions” that are excluded from the scope of the Open Meetings Act should matter. Although the administrative function exclusion does cover mere “housekeeping” matters that might not qualify as formal actions, it also covers the administration of existing substantive laws and policies. Thus, even when a public body is not engaged in making *new* policy and is instead performing an administrative function under the Open Meetings Act, the body may be considering substantive matters related to its core statutory function. *See, e.g., 10 Open Meetings Compliance Board Opinions 22, 26 (2016)* (concluding that elections board’s administration of election matters pursuant to existing law was “likely” an administrative function). Similarly, whether a particular function is subject to the Open Meetings Act has little bearing on whether an action is “formal” within the ordinary meaning of that word.

Because the Commission’s decision to reverse the Secretary was a “formal action” that did not receive the necessary number of votes, the Commission’s vote on June 14 was of no legal effect. In other words, because the Commission’s governing statute requires a certain number of votes to take a “formal action,” and the Commission did not achieve that vote threshold here, it has essentially taken no action on the Secretary’s decision. Thus, the former Commission Chair’s letter to Towson, stating that Towson’s program was approved, is void because it was issued without legal authority. *Cf., e.g., 64 Opinions of the Attorney General 98, 98 (1979)* (characterizing an appointment “made without lawful authority” as “void”); *99 Opinions of the Attorney General 242, 243-44 (2014)* (same); *40 Opinions of the Attorney General 95, 96-97 (1955)* (same for a liquor license). In addition, because the Commission has delegated to the Secretary the authority to take action on the Commission’s behalf on new program approval matters, absent a contrary decision by the

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Commission, the Secretary's decision on Towson's request remains the operative decision for the time being. *See* COMAR 13B.02.03.04.³

B. Next Steps

You also asked what steps the Commission is now required, or permitted, to take regarding Towson's request for review of the Secretary's decision, given that the Commission's prior vote was of no legal effect. The answer to that question is less clear, but it appears to turn on the Commission's regulations, as those regulations, rather than the statute, establish the Commission's two-tier system of review for new program requests. Because an agency is entitled to deference in its interpretation of its own regulations, *see, e.g., Kor-Ko Ltd. v. Maryland Dep't of Env't*, 451 Md. 401, 412-13 (2017), the Commission may have some latitude to interpret its regulations based on its own understanding of their meaning so long as that interpretation is reasonable. That said, in order to answer your question, I will provide my view as to what the regulations as written likely require.

The Commission's regulations state that "[i]f the Secretary . . . disapproves . . . a program proposal, the proposing . . . institution[] [is] *entitled*, on request, to have the matter reviewed by the Commission." COMAR 13B.02.03.04B(2) (emphasis added). The Commission's regulations also suggest that the Commission must not only review the Secretary's decision but also make a decision either to affirm or to reverse the Secretary. *See* COMAR 13B.02.03.28(I) (providing that after review, the Commission "shall render a decision that is consistent with the requirements" of its regulations and "shall send a final written decision" to the interested parties). Thus, the regulations seem to contemplate that, once an institution seeks review of a decision by the Secretary, it is entitled to a decision by Commission. And the Commission is, of course, generally required to comply with its own regulations. *See, e.g., Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 503 (2003).

³ This advice letter is intended to address only the Commission's recent putative decision on Towson's business analytics program. It is not intended to call into question any earlier decisions of the Commission to the extent that any of those decisions may have been approved by less than a majority of the members of the Commission then serving. The lapse of time since any such earlier decisions, which would have been taken in good faith and were not objected to on these grounds at the time, means the balance of considerations as to whether any such decisions should be revisited is significantly different and would require a different analysis. My conclusions here, therefore, should not be construed as resolving those distinct issues.

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As of now, the Commission has, in essence, taken no action on Towson's request for review. From a legal standpoint, it is as if the Commission had not yet voted at all. Thus, to comply with the obligation imposed on itself by its regulations, the Commission is likely required to meet again to attempt to reach a decision, one way or the other, with the necessary number of votes. It is my understanding that there are currently 10 members serving on the Commission, with two vacancies. If that continues to be the case, then 6 votes would be necessary to take a "formal action."⁴

This advice is consistent with an official opinion involving a somewhat similar situation, where a liquor board's governing statute required the votes of three out of five members either to grant or to deny a license. 86 *Opinions of the Attorney General* 21 (2001). The question there was what the board should do if it could not muster three votes for either outcome. The opinion stated that the board should postpone the question to another meeting, ideally with more board members present. "Absent members of the [body] might be present at the reconvened meeting, or members who were initially present might have altered their views, so that there would be concurrence of [enough] votes for a particular decision at the subsequent meeting." *Id.* at 29-30. This opinion never suggested that, having met once and failed to make a decision, the board was absolved from considering the matter further. In fact, the opinion indicated that mandamus might be available in case of the board's persistent failure to decide. *Id.* at 31; *see also Maryland Comm'n on Human Relations v. Downey Commc'ns, Inc.*, 110 Md. App. 493, 536 (1996) (noting in dicta that mandamus may be available if an agency "fails to act within an appropriate time").

Of course, Towson would not actually be able to seek mandamus here, because of the general rule that one unit of State government (such as Towson) cannot sue another unit (such as the Commission) absent statutory authority, which does not exist in this context. *See 92 Opinions of the Attorney General* 180, 185, 189 (2007). But the suggestion in this Office's 2001 opinion that mandamus might be available in this type of situation supports the notion that an administrative agency (such as the Commission) does have a

⁴ Since the June 14 meeting, several new Commissioners, including yourself, who were not present for the June 14 meeting and presentations have joined the Commission. Because the Commission's regulations arguably contemplate that the Commission's decision will be based on the presentations, *see* COMAR 13B.02.03.28(I)(2), it may be advisable for the Commission to hear the presentations again for the benefit of the new Commissioners. However, the presentations are not required by statute, and the purpose of the regulations potentially also could be served in another way, such as by having the new Commissioners review the recording of the June 14 meeting. As with other matters involving interpretation of its own regulations, the Commission's decision on this question would merit deference.

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legal duty to make a decision, within some reasonable time, once a matter is before it. *See, e.g., Baltimore County v. Baltimore County Fraternal Order of Police Lodge No. 4*, 439 Md. 547, 578 (2014) (explaining that traditional common-law mandamus is available only to compel performance of a “clear and undisputable legal duty” (internal quotation marks omitted)).

It is true that the Commission’s regulations require, once a request for review is filed, that the Commission meet within 60 days of the Secretary’s decision and issue its own decision within 10 days after that. COMAR 13B.02.03.28(D)(1), (I)(4). Because those time limits have now expired, one might argue that the Commission is no longer able to act on the Secretary’s decision, meaning the Secretary’s decision would be final.⁵ However, the Maryland courts have generally held that deadlines for a court or administrative body to render a decision, at least in the absence of an express penalty in the regulation or statute for failure to meet that deadline, are “directory”—meaning that the failure to comply lacks a legal consequence, such as the default affirmance of the Secretary’s decision. *See, e.g., G&M Ross Enters. v. Board of License Comm’rs*, 111 Md. App. 540, 544 (1996) (holding that liquor board’s deadline to make a decision, imposed on the board by its own regulations, was directory). More generally, although agencies are normally required to comply with their own regulations, an agency action generally will not be vacated for failure to comply with the agency’s self-imposed “internal procedural rules adopted for the orderly transaction of agency business.” *Pollock*, 374 Md. at 503. Because, as I have noted above, the time limit for a Commission decision on review under ED § 11-206.1 appears to originate only from the Commission’s own regulations rather than the statute, and because the rule appears to be in the nature of a procedural rule adopted for the orderly transaction of agency business, I doubt that the expiration of the Commission’s regulatory timeline to act deprives it of authority to make a final decision on review of the Secretary.

⁵ Although a related statute, ED § 11-206, contains a *statutory* deadline for the Commission to act, ED § 11-206.1 contains no such deadline. Because my understanding is that the program request here was made under ED § 11-206.1, there is no need to consider whether the analysis would be different under ED § 11-206. I note, however, that the Commission has apparently interpreted the statutory deadline in § 11-206 to apply to *the Secretary’s* initial decision, rather than the Commission’s decision upon review.

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**III
Conclusion**

In my view, for the reasons explained above, the Commission’s decision to either affirm or reverse the Secretary in reviewing the Secretary’s decision to approve or disapprove an institution’s proposal for a new program is a “formal action” requiring the approval of a majority of the members of the Commission then serving. Because the Commission’s June 14 vote to reverse the Secretary and approve Towson’s proposed program was a “formal action” that did not receive the necessary number of votes, the vote was of no legal effect, and the Secretary’s decision remains in place for the time being. As I read the Commission’s regulations, the Commission is likely required to meet again and attempt to resolve Towson’s request for review, with the requisite number of votes for a decision one way or the other.

Although this is not an official opinion of the Attorney General, I hope it is helpful to you.

Sincerely,



Patrick B. Hughes
Chief Counsel, Opinions & Advice