**OPINION NO. 98-007**

**Syllabus:**

1. In accordance with *Robert's Rules of Order*, actions of the State Teachers Retirement Board are governed by the principle that, when a quorum is present, action may be taken by a majority of the members who vote on a particular matter, excluding those who abstain.
2. When all nine members of the State Teachers Retirement Board are present, and when five members abstain from voting on a particular motion and the remaining four members vote in favor of the motion, the motion is carried.

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**To: Herbert L. Dyer, Executive Director, State Teachers Retirement System of Ohio, Columbus, Ohio**
**By: Betty D. Montgomery, Attorney General, January 29, 1998**

We have received your request for an opinion relating to the legal effect of abstentions. Your specific question is whether, in a meeting of the State Teachers Retirement System Board, a motion carries upon a vote of four yeas and five abstentions, assuming that all nine members of the Board are present.

Your question arose from a meeting at which all nine members of the Board were present. On a particular vote, five members abstained and the remaining four members cast affirmative ballots. It was submitted that the motion did not pass because it did not receive the affirmative vote of a majority of the members present, but that position has since been challenged. The question is whether the four affirmative votes were sufficient to pass the motion, even though they constituted less than a majority of the members present.

In order to address your concerns, let us first look to the provisions of law governing the State Teachers Retirement System. The State Teachers Retirement System is established pursuant to R.C. Chapter 3307. *See* R.C. 3307.03. It is administered and managed by the State Teachers Retirement Board, which is authorized to adopt rules necessary for the fulfillment of its duties and to adopt policies governing the operation of the System. R.C. 3307.04. Pursuant to this grant of authority, the Board has adopted a policy stating that

"Roberts' Rules [*sic*] are observed except where the Board has superseded them." State Teachers Retirement System of Ohio, *Board Policies* 15 (rev. March 1995).

It does not appear that the Board has taken any action to supersede *Robert's Rules* on the matter of determining a voting result. Therefore, we turn to those rules to determine how the vote in question should be construed.

*Robert's Rules* sets forth the general principle that, unless a rule provides otherwise, the basic requirement for approval of an action is a majority vote. Gen. H. Robert, *Robert's Rules of Order, Newly Revised*, 4, 395 (9th ed. 1990). The term "majority vote," when used without qualification, means "more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting at which a quorum ... is present." *Id.* at 395. Under this general rule, if a quorum is present, action can be taken by a majority of the votes cast, excluding blanks or abstentions.

Applying this rule to the situation at issue, we find first that a quorum was present because all nine members were in attendance.[1] We turn then to the number of votes cast by persons legally entitled to vote, excluding abstentions, and find that it was four. A majority vote would thus be more than half of the four votes actually cast—or three votes—so that the affirmative votes of four members would clearly constitute a majority vote and would carry the motion in question.

*Robert's Rules* notes that there may be modifications of the majority vote requirement. Unless otherwise specified, the set of members to which the proportion of votes required applies "is always the number of members *present and voting*." *Id.* at 397. That proportion, however, could be changed by a particular body to require a majority of the members present or of the entire membership. *Id.* at 398.

There is no indication in the instant case that any such modification has been effected with respect to votes of the Board. It appears, further, that such a modification might be undesirable, at least with respect to the regular business of the Board, because it could make it difficult for the Board to transact its ordinary business.

If a majority of the members present must vote for an action in order to pass it, it is impossible for an entity to act if half its members abstain from a particular vote. *Id.* at 398. This result is problematic, especially considering the fact that members are required by ethical principles to refrain from voting on questions in which they have direct personal or pecuniary interests not common to other members of the organization. *Id.* at 402; *see also, e.g.*, R.C. 102.03; R.C. 2921.42; R.C. 2921.43; 1997 Op. Att'y Gen. No. 97-061. A decision to abstain may be the proper exercise of a member's responsibilities, rather than an abdication of the member's duties. *See, e.g., Gogate v. Ohio State Univ.*, 42 Ohio App. 3d 220, 224, 537 N.E.2d 690, 693 (Franklin County 1987) ("[t]he reasons for an abstention are too numerous for speculation"); 1997 Op. Att'y Gen. No. 97-061.

In accordance with *Robert's Rules*, then, actions of the State Teachers Retirement Board are governed by the principle that, when a quorum is present, action may be taken by a majority of the members who vote on a particular matter, excluding those who abstain. Therefore, when all nine members of the Board are present, and when five members abstain

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[1] "A quorum is such a *number* of the members of a body as is competent to transact business in the *absence* of the other members." *State ex rel. Cline v. Trustees of Wilkesville Township*, 20 Ohio St. 288, 294 (1870). By statute, "[a] majority of the members of the state teachers retirement board constitutes a quorum for the transaction of any business." R.C. 3307.09. In the instant case, all nine members of the Board were present so there is no issue concerning the presence of a quorum. *See generally* 1992 Op. Att'y Gen. No. 92-047.

from voting on a particular motion and the remaining four members vote in favor of the motion, the motion is carried.

The determination of a voting result on the basis of votes cast, as described above, has been upheld by Ohio courts in various circumstances. In 1881, the Ohio Supreme Court held, with respect to a city council, that when all members are present, those who refuse to vote in an election are deemed to have acquiesced in the choice of those who do vote, even if the number voting is less than a majority of the members present. *State ex rel. Shinnich v. Green*, 37 Ohio St. 227 (1881). The effect of this ruling is that members cannot, by refusing to vote, defeat the election or divest the body of the power to elect. *Id.*

The *Shinnich* case considered an election and did not apply its general rule to the transaction of business by an entity, stating instead that in such instances the common law required that a majority of those present vote for a transaction. *Id.* at 234. However, the rule that action can be taken by a majority of those who vote has been applied by other courts to votes on matters other than elections. In particular, in *Babyak v. Alten*, the Lorain County Court of Appeals, considering a vote on the enactment of an ordinance, adopted the general rule "that the legal effect of refusing to vote is an acquiescence in the action taken by the majority of those who do vote." *Babyak v. Alten*, 106 Ohio App. 191, 197, 154 N.E.2d 14, 19 (Lorain County 1958); *accord Gogate v. Ohio State Univ.*, 42 Ohio App. 3d at 223, 537 N.E.2d at 692 (considering the vote of a faculty committee on a question of tenure). *See generally* Annotation, *Abstention from Voting of Member of Municipal Council Present at Session as Affecting Requisite Voting Majority*, 63 A.L.R. 3d 1072 (1975).

In 1912, the Hamilton County Court of Common Pleas applied to governmental bodies the rule that, when a quorum is present, action can be taken by a majority of those who vote, stating:

> The general rule applicable to boards, commissions and similar bodies or entities of a definite membership therefore applies, unless the statute otherwise specifically provides, to-wit, that a quorum consists of a majority of its members, and that such quorum, due notice having been given of the time and place of meeting to all members, can exercise the powers of the commission; and further, that a majority of such quorum is the action of the body or commission.
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> If the meeting is held at the proper time and place and after statutory notice has been given, or if the statute does not provide for the notice, then after reasonable notice, and if members refuse to attend, unless their absence makes a quorum impossible, or if they attend or refuse to vote, such *refusal* to attend or *to vote does not preclude the vote of the majority of those voting* upon the motion or resolution *from being the action of the commission*, even though such majority is less than a majority of the members of the entire commission.

*State ex rel. Green v. Edmondson*, 12 Ohio N.P. (n.s.) 577, 588 (C.P. Hamilton County 1912) (citations omitted; emphasis added). In that case, the court considered a seven-member building commission and concluded that, when all members attended and three members refused to vote, the remaining four members "unless they divide equally, which is not alleged" could take action to organize the commission. *Id.* at 589.

Your representative has expressed concern that application of the rule described above may be inconsistent with voting rules adopted in other contexts and particularly with 1957 Op. Att'y Gen. No. 639, p. 213. In that opinion, one of my predecessors declined to adopt the rule that an administrative board may act through the majority of a quorum and concluded, instead, that decisions of the Ohio Supreme Court supported only the more narrow rule that, when all members have received notice and a quorum consisting of a majority of the

membership is in fact present, an administrative board may act through a majority of the membership. That opinion declined to accept as law in Ohio the dictum set forth in *In re Slavens* that an administrative board consisting of three or more members "in the absence of statutes to the contrary, may act through a *majority of a quorum* consisting of a majority of the members, providing all members had notice and an opportunity to be present." *In re Slavens*, 166 Ohio St. 285, 286, 141 N.E.2d 887, 888 (1957) (citations omitted; emphasis added).

This opinion does not reconsider the conclusion reached in 1957 Op. Att'y Gen. No. 639, p. 213 as it was applied to the situation there under consideration.[2] We note, however, that subsequent to the issuance of 1957 Op. Att'y Gen. No. 639, p. 213, the United States Supreme Court cited the *Slavens* case and *State ex rel. Green v. Edmondson* among other authorities in support of the proposition that "[t]he almost universally accepted common-law rule is ... in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body." *Federal Trade Comm'n v. Flotill Products, Inc.*, 389 U.S. 179, 183 (1967) (authorities cited in footnote 6); *see also* 1992 Op. Att'y Gen. No. 92-047; 1978 Op. Att'y Gen. No. 78-047, at 2-109 ("[u]nder general principles of common law, if a body has a limited number of members, a majority of this limited number constitutes a quorum, in the absence of a statute or charter or bylaw provision to the contrary, and a majority of a quorum is empowered to act for the body").

For the reasons set forth above, it is my opinion, and you are advised, as follows:

1. In accordance with *Robert's Rules of Order*, actions of the State Teachers Retirement Board are governed by the principle that, when a quorum is present, action may be taken by a majority of the members who vote on a particular matter, excluding those who abstain.
2. When all nine members of the State Teachers Retirement Board are present, and when five members abstain from voting on a particular motion and the remaining four members vote in favor of the motion, the motion is carried.

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[2] 1957 Op. Att'y Gen. No. 639, p. 213, concerned the Board of Liquor Control, which then consisted of four members. That Board has been succeeded by the Liquor Control Commission, which consists of three members. R.C. 4301.022. Statutory language now states that the Commission may exercise its powers "by the vote of a majority of the commissioners." R.C. 4301.04.