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ADMINISTRATIVE PROCEDURE—ACTION BY LESS THAN FULL MEMBERSHIP—IF QUORUM IS PRESENT AND ALL MEMBERS HAD NOTICE OF MEETING AND OPPORTUNITY TO BE PRESENT; SUCH BOARD CANNOT ACT THROUGH A MAJORITY OF SUCH QUORUM.

SYLLABUS:

Where authority has been conferred upon an administrative board of four members such board, in the absence of a statute to the contrary, may act in a particular meeting, through a majority of the membership, provided (1) a quorum consisting of a majority of the membership is present, and (2) all members had notice and opportunity to be present; but such a board in such case is without authority to act through a mere majority of such quorum.

Columbus, Ohio, June 14, 1957

Mr. Robert Koch, Chairman
Board of Liquor Control, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

> "The Supreme Court of Ohio, on April 17, 1957, in the case of *Slavens vs. State Board of Real Estate Examiners,* 166 O. S., 285, XXX Ohio Bar, No. 16, held that two members of a three-member board could proceed to hear a case. In view of such decision the question has arisen as to whether or not when a case before our board is heard by only three members a decision on the issues presented in such case can be made by two of the three sitting."

In the per curiam decision in the Slavens case the following language is found:

> "Where authority has been conferred upon an administrative board consisting of three or more members and where at a particular meeting one or more members of the board are absent, such board, 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. Merchant v. North, 10 Ohio St., 251. See State, *ex rel.* Cline, v. Trustees of Wilkesville Township, 20 Ohio St., 288 * * *." (Emphasis added.)

The precise question here presented is whether the words "consisting of a majority of the members" refers to and modifies the term "quorum," or the entire expression "majority of a quorum."

The rule of the last antecedent would indicate that modification of the term "quorum" was intended, and this being so, it would follow that a majority of a quorum could act and that that quorum, in the absence of a statutory provision to the contrary, may consist of a majority of the members.

In the Slavens case it will be noted that the court was concerned with a board of three members which actually acted through a majority of the membership, *i.e.*, by the assent of *all* members of the quorum. It would seem, therefore, that the court's statement of the rule as applicable to boards of *more* than three members, and its reference to a *quorum,* is *obiter dictum.*

Reference to the North case, cited by the court in support of the statement quoted above, provides no support for the view that fewer than a majority of the membership may act for the board, for there four of six judges joined in the action under attack, *i.e.*, a majority of the membership rather than a mere majority of a quorum.

In the Cline case the court was concerned with the action of a board of three members, two of whom joined in the action, so that here, too, a majority of a quorum was actually a majority of the membership.

The court's statement in the Slavens case referring to boards of "three or *more* members," and to a "majority of a *quorum*," rather strongly suggests a ruling that a majority of the membership constitutes a quorum which is authorized to act for the board, and that action may be taken upon the assent of a majority of that quorum.

Some light is thrown on the matter by the court's citation of the Cline case. In that decision Judge McIlvaine said, page 293:

> "Was the action of two trustees in the absence of the other legal and valid?
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> "By the rule of the common law, where power or authority is delegated to two or more persons to transact business of a private nature, all interested in the power must concur in its due consideration. But in matters of public concern, though it is necessary for all to be present, *yet the majority will conclude the minority* * * *" (Emphasis added.)

The decision in the Cline case actually turned on a statutory provision to the effect that "a majority (of the township trustees) shall be a quorum to do business," and it was not necessary in that case to apply the common law rule referred to above. It is quite evident, however, that the reference to this case in the Slavens decision as supporting the rule therein announced, is indicative of approval of the common law rule, although the rule in the latter case is actually a modification of the common law rule in that notice and opportunity to be present is substituted for actual presence at a meeting.

Because neither the North case nor the Cline case supports the view that a mere majority of a quorum, *i.e.*, a "majority of a majority" of the membership may act for the board, and because the suggestion to that effect in the Slavens case is obviously *obiter dictum*, I am impelled to conclude that what the court actually approved in the latter case is the modified common law rule that in the absence of a controlling statute a majority of the membership may act provided all members have had notice and opportunity to be present at the meeting at which such majority undertakes to act.

In reaching this conclusion I do not consider that I am rejecting a ruling of the Supreme Court but rather that I am bound to heed the oft repeated injunction of the court that the syllabus, or per curiam opinion, of that court must be interpreted with reference to the facts of the case, and cannot be construed as being any broader than the facts of the case warrant. See 14 Ohio Jurisprudence 2d, 683, 684, Section 248; Heater Co. v. Radich, 128 Ohio St., 124. The facts in the Slavens case did not warrant the broad rule which the language used in that decision may be thought to state, and I deem it necessary, therefore, to follow the court's injunction against such broader interpretation.

Accordingly, in specific answer to your inquiry, it is my opinion that where authority has been conferred upon an administrative board of four members such board, in the absence of a statute to the contrary, may act in a particular meeting, through a majority of the membership, provided (1) a quorum consisting of a majority of the membership is present, and (2) all members had notice and opportunity to be present; but such a board in such case is without authority to act through a mere majority of such quorum.

Respectfully,
WILLIAM SAXBE
Attorney General