



STATE OF KANSAS

Office of the Attorney General

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December 15, 1977

ATTORNEY GENERAL OPINION NO. 77-391

Virgil E. Boatwright, Ed.D.
Superintendent
Kaw Valley Unified District No. 321
Post Office Box 160
St. Marys, Kansas 66536

Re: Schools--Votes--Abstentions

Synopsis: K.S.A. 72-8205 requires that "the vote of a majority of the full membership of the board" shall be required to constitute board action. Unless and until the statute is construed more broadly by an appellate Kansas court, board action may not be taken except by such a vote, and an abstention should not be recorded and counted as acquiescence in the will of the majority voting upon an item of business. When a tie vote is cast, an abstention should not be regarded as a vote either for or against the question being passed upon.

* * *

Dear Dr. Boatwright:

We have your letter of November 15, 1977, requesting an opinion of the Attorney General regarding the method of recording and counting abstentions at a meeting of the board of education. You indicate that due to some recent disagreement among board members in the case of a tie vote and apparently one abstention, the board agrees that a method should be decided upon as a consistent method of treating abstentions in the future. As a result, the board has adopted a rule that "an abstained vote will be counted with the majority unless there is a tie vote, then the abstained vote will be counted in favor of the motion." The question is raised whether this manner of regarding abstentions is legally permissible.

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Under the common law, a majority of a body, such as a municipal council or, in this instance, a board of education, constitute a quorum, and the vote of a majority of those present, providing they comprise a quorum, is legally sufficient to constitute valid action by the body. In several early cases, the courts were confronted with situations in which it appeared that a member sought to block the passage of a particular matter by abstaining, when the member could not do so by a negative vote. As a result, the courts adopted the general rule that, assuming a quorum was present, the votes of a majority of those voting would be sufficient to constitute action by the body, even though, as a result of one or more abstentions, the total number of votes cast was less than the number required to constitute a quorum. In a number of these cases, the courts were called upon to go further, to consider how an abstention itself should be treated. In cases where the common law requirement of a majority of a quorum was in effect, the rule evolved that abstention from voting by a member of the body would generally be regarded as acquiescence in action which is favored by a majority of those who do vote with respect to the matter.

The common law rule that a majority of a quorum may take action for the board has been displaced in Kansas regarding boards of education. K.S.A. 72-8205 states in pertinent part thus:

"A majority of the full membership of the board shall constitute a quorum for the purpose of conducting any business of the school district, and the vote of a majority of the full membership of the board shall be required for the passage of any motion or resolution."

In those instances where action by the full membership, rather than by a majority of a quorum, is required to constitute action by the body, the courts have differed as to the effect of an abstention. The cases on this question are reviewed in an annotation found at 63 A.L.R.2d 1072 at 1091. The greater number of the cases discussed on this question, in § 7 of the annotation, hold that where, as here, a statute requires that action be taken by a vote of the full membership, an abstention will not be regarded as acquiescence in the will of the majority; thus, if the votes cast for or against a particular item of business are fewer in number than a majority of the entire membership, an abstention will not be regarded as an affirmative vote aligned with the majority. K.S.A. 72-8205 requires the "vote of a majority of the full membership of the board" for passage of any motion or

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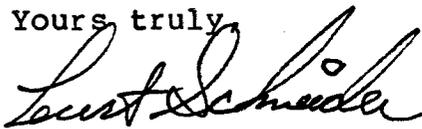
resolution; an abstention is not a vote, and hence, under this view, may not be regarded as a vote assenting to the will of the majority of those who did vote. The annotation discusses ten cases which follow this rule, and three cases which follow a contrary rule in such situations, regarding an abstention as tantamount in law to a vote with the majority.

So far as our research discloses, the question has not been decided by the Kansas Supreme Court. So far as we may venture to predict the view which the court might follow if it were presented with the question, it is reasonable to anticipate that the court might find the weight of authority more persuasive than the apparent minority position, and follow the view that an abstention is no vote at all, and may not, thus, be regarded as an acquiescence. Even if the court were to follow the apparent minority view, that even though the statute requires the "vote of the full membership of the board to constitute board action," an abstention shall be regarded and treated as a vote in favor of the position taken by a majority of those voting, there would not, even in that instance, be any basis for regarding an abstention as a "yes" vote in the instance of a tie.

It is my view that, unless and until the statute is interpreted by the Kansas Supreme Court more broadly, the policy of the board should adhere strictly to the express language of K.S.A. 72-8205, i.e., that board action may not be taken except by "the vote of a majority of the full membership of the board." An abstention is not a vote, and is thus not recorded and counted as acquiescence in the vote of the majority casting votes on an item of business. In addition, when a tie vote is cast, an abstention may not be regarded as a vote either for or against the question being passed upon.

I hope this clarification and counsel will be helpful to the board. If further questions remain, please feel free to call upon us.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj