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ATTORNEY GENERAL OPINION NO. 81- 71

The Honorable August Bogina, Jr. P.E.
State Senator, Tenth District
State Capitol, Room 143-N
Topeka, Kansas 66612

Re: Elections -- Sufficiency of Petitions --
Sufficiency of Petitions Demanding Election on
Charter Ordinance.

Synopsis: A county election officer has no authority to determine the sufficiency of the question stated in the petition for elections but such officer may find a petition insufficient for failure to include an individual date line for each petitioner signing. Cited herein: K.S.A. 25-3601, K.S.A. 1980 Supp. 25-3602, Kan. Const., Art. 12, §5.

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Dear Senator Bogina:

You request our opinion regarding the validity and sufficiency of a petition which was presented to the Johnson County Election Commissioner in an attempt to require that an election be held regarding the passage of Charter Ordinance No. 14 by the City of Lenexa. The election commissioner, after consulting with the county counselor, determined that the petition did not sufficiently comply with K.S.A. 1980 Supp. 25-3602(b)(3), because the question on the petition was not adequately stated and the date of signing by each person was not shown.

The petition is authorized by the Home Rule Amendment of the Kansas Constitution, found in Art. 12, §5(b)(3) thereof, which states:

"No charter ordinance shall take effect until sixty days after its final publication. If within sixty days of its final publication a

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petition signed by a number of electors of the city equal to not less than ten percent of the number of electors who voted at the last preceding regular city election shall be filed in the office of the clerk of such city demanding that such ordinance be submitted to a vote of the electors, it shall not take effect until submitted to a referendum and approved by a majority of the electors voting thereon. An election, if called, shall be called within thirty days and held within ninety days after the filing of the petition. The governing body shall pass an ordinance calling the election and fixing the date, which ordinance shall be published once each week for three consecutive weeks in the official city newspaper or, if there be none, in a newspaper of general circulation in the city, and the election shall be conducted as elections for officers and by the officers handling such elections. The proposition shall be: 'Shall charter ordinance No. _____, entitled (title of ordinance) take effect?' The governing body may submit any charter ordinance to a referendum without petition by the same publication of the charter ordinance and the same publication of the ordinance calling the election as for ordinances upon petition and such charter ordinance shall then become effective when approved by a majority of the electors voting thereon. Each charter ordinance becoming effective shall be recorded by the clerk in a book maintained for that purpose with a statement of the manner of adoption and a certified copy shall be filed with the secretary of state, who shall keep an index of the same."

The amendment itself provides the procedures to be followed to submit the ordinance to a vote of the electors within sixty days, requiring only that the petition be signed by not less than 10% of the number of electors who voted in the most recent, regular city election.

K.S.A. 25-3601 states:

"Whenever under the laws of this state a petition is required or authorized as a part of

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the procedure applicable to any county, city, school district or other municipality, or part thereof, the provisions of this act shall apply, except as is otherwise specifically provided in the statute providing for such petition. The sufficiency of each signature and the number thereof on any such petition shall be determined in accordance with the provisions of this act by the county election officer or such other official as designated in the applicable statute." (Emphasis added.)

There is a question as to whether this statute applies to a petition arising under the constitution. "[U]nder the laws of this state" clearly can be interpreted to refer to constitutional, as well as statutory laws. However, K.S.A. 25-3601 refers more specifically to "the statute providing for such petition" and "in the applicable statute" (emphasis added), thereby indicating that the statute applies only to petitions which are authorized by a statutory source, not a constitutional one.

Assuming, arguendo, that K.S.A. 25-3601 et seq. do apply, there is nothing in these statutes which would give the county election officer the authority to determine the sufficiency of the question stated in the petition. The statute provides authority to such officer only to determine the sufficiency of each signature and the number of signatures on the petition. While this provision has been interpreted to permit a county election official to decide that a petition was insufficient for failing to have a recital or to be verified as required by K.S.A. 1980 Supp. 25-3602 (See Attorney General Opinion No. 78-40), such determinations can be viewed as mere ministerial duties involving no discretionary judgment. Apart from these ministerial duties, it has long been the law in Kansas that the governing body of the municipality is the proper party to determine the sufficiency of the petition itself, not an election official. In State v. City of Hutchinson, 137 Kan. 231 (1933), the Kansas Supreme Court, in discussing whether a referendum petition had been properly found to be insufficient stated:

"While the [city] commissioners may rightly call to their aid the services of the clerk and of others to make an examination of the petition and the election rolls in order to ascertain the number of qualified electors

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and to find whether those signing the petition were qualified electors, the decision is ultimately with the commissioners." Id. at 234.

This view was accepted in State, ex rel. v. City of Walnut, 165 Kan. 209 (1948) and Graham v. Corporon, 196 Kan. 565 (1966). Thus, since the adequacy of the question stated in the petition in issue was not within the statutory scope of authority, the election commissioner may not decide this matter.

However, the petition also was found to be insufficient because a space for the date of signing for each petitioner was not on the petition. K.S.A. 1980 Supp. 25-3602 requires petitions to contain a space for the signature of each petitioner, residence address "and date of signing for each person signing such petition." The absence of the space for the date of signing and, as a consequence, the complete absence of any date of signing by each petitioner, affected the sufficiency of the signatures and is a matter which properly lies with the election official. For a signature to be sufficient on a petition, it is necessary for the election official to know when each petitioner signed so that he or she might determine whether the signer was a properly registered voter at the time of signing as required by K.S.A. 1980 Supp. 25-3602. If the signer was not registered until after he signed the petition, his signature would not be that of an elector as required by Kan. Const., Art. 12, §5, and would, therefore, be invalid. We must presume that the use of the term "elector" in Art. 12, §5 and "registered elector" in K.S.A. 1980 Supp. 25-3602 are synonymous for purposes of determining petition sufficiency.

Our presumption is founded on case law from this and other jurisdictions establishing the meaning of the words "elector" or "qualified elector." In State ex rel., v. Dunn, 118 Kan. 184 (1925), the Kansas Supreme Court resolved a similar issue involving a question submitted election required by submission of a petition. There the Court observed:

"Plaintiff contends that the petition was sufficient under the statute, and that the city clerk has no authority to check the same as against the registration books, nor to exclude from the counting of legal petitioners the names of the persons who were excluded. The statute provides:

"Such an election shall be called by the governing board upon the presentation of a petition to the governing board of said city,

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signed by not less than twenty-five per cent of the qualified electors of such city, praying for such election.' (R.S. 12-1019.)

"The first question is, Who are 'qualified electors' within the meaning of the statute? It is well settled in this state that the legislature may require registration as a prerequisite to the right to vote. (The State v. Butts, 31 Kan. 537, 2 Pac. 618.) In the cities where registration is required, an elector is a person having the constitutional qualifications of an elector and who is duly and properly registered. (Coney v. City of Topeka, 96 Kan. 46, 149 Pac. 689.) In Clayton v. Hill City, 111 Kan. 595, 207 Pac. 770, the term 'qualified electors' was construed to mean persons entitled to vote. Hence the words 'qualified electors' in this statute means persons who have the constitutional (Const., art. 5, §§1,4) qualifications of an elector and who are duly and properly registered. Other persons are not authorized to petition for such an election. (Emphasis added.)

Leading cases from other states support this conclusion. See Aukamp v. Diehm 8 A.2d 400 (Pa. 1939) and Ahrens v. Kerby 37 P.2d 375 (Ariz. 1934).

Thus, the date of signing becomes crucial for verifying whether the signer was an elector as alleged in the petition. The inclusion of a date for each person signing the petition relates to the sufficiency and number of signatures on a petition, and is properly a matter within the determination of the election official. In addition, even though the date of signing by each signer can be narrowed to the period after the city commission passed the ordinance and before the date the petition was filed, the precise date would still be necessary to determine whether the verification was properly made after all the signatures were obtained. This determination too, would be ministerial, properly with the authority of the election official.

Very truly yours,



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