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ATTORNEY GENERAL OPINION NO. 81-230

Ms. Alma Walker
Pratt County Clerk
P. O. Box 885
Pratt, Kansas 67124

Re: Elections -- Sufficiency of Petitions -- Verification of Signatures

Synopsis: The requirements of K.S.A. 1980 Supp. 25-3602 prescribing the content of petitions governed by K.S.A. 25-3601 et seq. are mandatory. Thus, a petition is invalid if it does not comply with the requirements of K.S.A. 1980 Supp. 25-3602(c) that the petition contain a verification by the petitioner's circulator, to the effect that such circulator personally witnessed the signing of the petition by each person whose name appears thereon.

Once such petition has been filed with the county election officer or other statutorily-designated official, it may not be amended by the filing of additional documents pertaining thereto, nor may such petition be withdrawn, amended and then re-filed. Cited herein: K.S.A. 1980 Supp. 12-184, K.S.A. 25-3601, K.S.A. 1980 Supp. 25-3602.

* * *

Dear Ms. Walker:

You have inquired whether petitions filed with your office are in proper form. Such petitions are for the purpose of calling an election on the question of whether the City of Pratt should change from the commission-manager to the mayor-commissioner form of city government. Although you did not specify the particular aspect of the petitions that is in question, we also have received an opinion request regarding this petition from Jack H. Brier, Secretary of State.

Secretary Brier's request is submitted on behalf of the Pratt County Counselor, and it is clear from his request that the question has been raised as to whether the petition documents have been properly verified.

The petitioners are proceeding under the provisions of K.S.A. 1980 Supp. 12-184, which requires that the petition "conform to the requirements of article 36 of chapter 25 of the Kansas Statutes Annotated." K.S.A. 1980 Supp. 25-3602 prescribes the form and content of petitions which are subject to its provisions, and subsection (c) thereof states:

"Any such petition shall contain, at the end of each set of documents carried by each circulator, a verification, signed by the circulator, to the effect that such circulator personally witnessed the signing of the petition by each person whose name appears thereon."
(Emphasis added.)

It is our understanding that, at the end of each set of documents constituting the petition, there was contained the following statement: "The undersigned hereby certified the above signatures to be valid, authentic and germane, this _____ day of _____, 1981." Such statement is followed by the signature of a "qualified elector of the City of Pratt, Kansas," and a statement by a notary public that the qualified elector's statement was subscribed and sworn to before such notary public.

It is clear, therefore, that there is a significant disparity between the recitals at the end of the petitions in question and the requirements of K.S.A. 1980 Supp. 25-3602(c). Whereas the statute requires a verification by the circulator of the petition "to the effect that such circulator personally witnessed the signing of the petition by each person whose name appears thereon," the petition submitted for our review contains a statement, apparently made under oath, by a "qualified elector of the City of Pratt, Kansas," that the signatures on the petition are "valid, authentic and germane." Thus, the issue presented for our determination is the effect such disparity has on the petition's validity.

The opinions of this office have consistently viewed the requirements of K.S.A. 1980 Supp. 25-3602 as being mandatory. In Attorney General Opinion No. 77-303, Attorney General Schneider stated:

"The requirement of verification by the circulator is clearly mandatory, and is not merely

a formality which may be disregarded at will. In the language of K.S.A. 1976 Supp. 25-3602(c), and the clear weight of authority, the verification is mandatory, and a petition lacking the verification of signatures is legally insufficient to authorize the city governing body to call an election" Id. at 3.

The "authority" relied upon in reaching this conclusion was referenced earlier in that opinion, as follows:

"[T]he writer at 5 McQuillin, Municipal Corporations §16.63 at p. 238 states thus:

"'Without verification or a sufficient authentication the petition is legally insufficient. It sometimes is required that it be made to appear by affidavit or verification that the signers of the petition signed it with knowledge of its contents, and such a requirement is mandatory.' [Footnotes omitted.]

"In State ex rel. Janasik v. Sarosy, 12 Ohio St. 2d 5, 230 N.E. 2d 347 (1967), the court granted a writ of prohibition against a board of elections, preventing the submission of a referendum question to the voters, on the ground that the petition lacked the affidavit of the circulator attesting to the authenticity of the signatures. The court held the statutory requirement must be followed strictly, quoting from its previous decision in an analogous case, State ex rel. Abrams v. Bachrach, 175 Ohio St. 257 at 261, 193 N.E.2d 517 at 520 thus:

"'Thus, sound public policy dictates that the section requiring the affidavit of a circulator of an initiative petition to contain a statement that the signers thereof "signed such petition with knowledge of the contents thereof" must be strictly complied with, and that the failure to include such statement will invalidate the petition.'" Id. at 2, 3.

Subsequently, in Attorney General Opinion No. 78-40, such conclusion was reiterated by Attorney General Schneider in discussing the recitals and other provisions required in petitions by 25-3602, as follows:

"This provision was amended in 1966 to require that the petition set forth clearly the question which the petitioners seek to bring to an election, the taxing or political subdivision in which the election is sought to be held, the recital described supra, and a verification signed by the circulator of each set of documents in the petition. These are all mandatory requirements of any petition and, generally speaking, the courts have held that the lack of mandatory matter from a petition invalidates the document. See, e.g., State ex rel. Janasik v. Sarosy, 12 Ohio St.2d 5, 230 N.E.2d 347 (1967); State ex rel. Abrams v. Bachrach, 175 Ohio St. 257, 193 N.E.2d 517; Community Gas and Service Co. v. Walbaum, 404 P.2d 1014 (Okla. 1965)." Id. at 2.

We reached a similar conclusion in Attorney General Opinion No. 80-97, regarding the requirement of this statute that each petition shall pertain to a single issue or proposition:

"It has long been held in this state that when the holding of an election depends upon the presentation of a petition to invoke the election machinery, it is necessary that the petition conform to statutory requirements. Greeley County v. Davis, 99 Kan. 1 (1916) and cases cited therein at 5. See also 29 C.J.S. Elections, §69, p. 159. The requirement of K.S.A. 1979 Supp. 25-3602(a) that only a single issue be presented by a petition is mandatory ('each petition shall consist . . .'), not merely a formality which may be disregarded at will, for the failure to do so removes a condition precedent to the holding of the election. Greeley, supra." Id. at 4.

We affirm the conclusion reached in each of these prior opinions, that the requirements of K.S.A. 1980 Supp. 25-3602 are mandatory. Thus, in this instance, it is essential to the petition's validity that it contain a verification which complies with the requirements of subsection (c) of this statute. In our judgment, however, the petition under consideration here fails to meet these requirements.

In support of this conclusion, we note that "a verification is an affidavit attached to a statement as to the truth of the matters therein set forth." D.J. Fair Lumber Co. v. Karlin, 199 Kan. 366, 369 (1967). Although the form of the sworn statement contained at the end of the petition considered here could be more explicitly stated in the form of an affidavit, such statement is arguably a verification. However,

it is not, in our opinion, the verification required by the statute.

By the provisions of K.S.A. 1980 Supp. 25-3602(c), the legislature has explicitly required that the circulator of the petition verify that such circulator personally witnessed the signing of the petition. In two material respects, the verification on the petition by the Pratt electors fails to satisfy these requirements. First, there is no indication that the verification is made by the circulator of the petition; and second, it does not indicate that the affiant personally witnessed the signing of the petition by each person whose name appears thereon.

Having failed to meet the mandatory statutory requirements, it is our opinion that the petition is materially defective and, therefore, invalid. Where a petition, on its face, constitutes an instrument which is a material departure from a requisite statutory form, the petition is void. In Community Gas and Service Co. v. Walbaum, 404 P.2d 1014 (Okla., 1965), an initiative petition, proposing to enact an ordinance granting a franchise for construction of a natural gas distribution system, was struck down for failure to include a statutorily required clause informing the signatory of penal sanctions for fraudulent signature. The court noted that:

"[W]hile clerical and technical defects in an initiative petition may and should be disregarded, a material departure from the statutory form renders an initiative petition ineffective and void. If statutory provision is essential to guard against fraud, corruption or deception in the initiative and referendum process, such provision must be viewed as an indispensable requirement and failure to substantially comply therewith is fatal." Id. at 1016.

We understand it has been suggested that, even though the verification on the petition does not meet the precise requirements of the statute, it should be found to be in substantial compliance. We cannot agree. While we are aware of case law which indicates that a petition should be upheld where there has been substantial compliance with the pertinent statutory requirements, we do not believe the petition here presents an opportunity for the application of this judicial doctrine. In our judgment, the verification on the petition represents a material departure from that required by the statutes.

We believe statements of the Court in Sabatini v. Jayhawk Construction Co., 214 Kan. 408 (1974), to be supportive of

our determination. In considering whether there had been compliance with an annexation statute, the Court stated:

"Substantial compliance is all that is required. Substantial compliance requires compliance in respect to the essential matters necessary to assure every reasonable objective of the statute. (City of Kansas City v. Board of County Commissioners, 213 Kan. 777, 518 P.2d 403.)" Id. at 411.

As to the "reasonable objective" of 25-3602(c) in requiring the circulator of a petition to verify that he or she personally witnessed each person sign the petition, we find instructive the opinion of the South Dakota Supreme Court in Corbly v. Colton, 278 N.W.2d 459 (S.D. 1979). There, it was noted that "the oath of the circulator attached to a referendum petition is a substantial requirement and that the petition is invalid without it." Id. at 462. The court further stated:

"As we pointed out in Nist v. Herseth, supra, the purpose of this oath is to insure that the persons whose names appear on the petition did, in fact, sign it. SDCL 2-1-7 provides that the petition must be signed in person by the petitioners. In order for this to be meaningful, the circulator must personally witness each signature on a petition and swear that he or she observed each signature. Nist v. Herseth, supra. Without such an oath, the City finance officer had no basis to believe that the signatures were properly collected or that the petition was valid.

"Nor is the defect remedied by the City finance officer's 'independent verification' of the signatures. She cannot substitute her evaluation of the signatures for the oath of the circulator. Although she may know that each signer is a resident of Colton, and may be able to determine that the subscribers are registered to vote, she cannot say from her personal knowledge that the petition was personally signed by those whose names appear on it. Neither can she say that the purported petitioners signed in her presence, since they obviously did not." (Footnotes omitted.) Id.

In Graham v. Corporon, 196 Kan. 564 (1966), the Kansas Supreme Court interpreted statutory language providing for the verifi-

cation of a protest petition. While the following statement of the Court regarding such language is not precisely on point with the issue presented for our review, we believe it provides insight as to the Court's regard of the importance of having the signatures on a petition verified by a person who personally witnessed such signatures:

"In requiring verification, the legislature sought to provide evidence or proof that all signatures were genuine and prevent the fraudulent procurement of names of signers to the protest. To sustain the appellees' contention that each sheet of a protest paper must be verified by a signer of that sheet, would tend to deprive the verification of its value and put a premium upon a reckless oath. This necessarily follows since, to permit the verification by a signer of a particular sheet, who did not personally see other persons sign that sheet so as to know that the signatures thereon were genuine, would thwart both the literal meaning and the plain purpose of the statute." 196 Kan. at 569.

We think it without question that it is essential to a county election officer's determination of a petition's sufficiency that there be an assurance that the signatures on the petition are valid. Equally apparent is the fact that the legislature has provided for such assurance by requiring each circulator of a petition to state under oath that he or she personally witnessed these signatures. Accordingly, a verification which does not so state represents a material departure from the essential requirements of 25-3602(c), thereby precluding a finding of substantial compliance.

Finally, it has been suggested that, if the verification on the petition is defective, the circulators of the various petition documents should be permitted to amend these documents to remove the defect by filing an appropriate verification. While we are aware of Kansas cases which have sanctioned the alteration of a petition after it has been filed with the designated officer by the addition of signatures thereto or the withdrawal of signatures therefrom, we do not believe such cases can be relied upon to support the county counselor's suggestion.

First, it should be noted that the Kansas cases we have reviewed have turned on the then existing pertinent statutory provisions. And those cases which have permitted a petition to be so amended, or have inferentially supported such proposition, have specifically relied upon a statute which either

specifically permitted such amendment [e.g., Hay v. Dorn, 93 Kan. 392 (1914)], or prescribed a time period within which the petition must be filed, but was silent as to whether amendment could be made after it was so filed [e.g., Rodgers v. Ottawa, 83 Kan. 176 (1910); Price v. City of McPherson, 92 Kan. 82 (1914)], or made no provision for either amendment or filing deadline [Cowles v. School District, 88 Kan. 603 (1913)]. In the latter cases, addition or subtraction of names was sanctioned until final action had been taken on the petition by the affected governing body. [For additional cases which have addressed this issue, see State, ex rel., v. Eggleston, 34 Kan. 714 (1886); State, ex rel., v. City of Independence, 114 Kan. 837 (1923); State, ex rel., v. City of Walnut, 166 Kan. 296 (1949).]

Notwithstanding the prior judicial construction of statutes which were silent as to the amendment of petitions which have been filed with the designated public official, it is clear from these cases that this proposition is subject to legislative control. Thus, it is essential to note the pertinent provisions of subsection (a) of K.S.A. 1980 Supp. 25-3602, which was enacted subsequent to all of the cases previously cited. K.S.A. 1980 Supp. 25-3602(a) states:

"(a) Each petition shall consist of one or more documents pertaining to a single issue or proposition under one distinctive title, and such documents shall be filed with the county election officer or other official, if another official is designated in the applicable statutes, such filing to be made at one time all in one group. Later or successive filings of documents relating to the same issue or proposition shall be deemed to be separate petitions and not a part of any earlier or later filing." (Emphasis added.)

In our judgment, the emphasized language of the foregoing quoted provisions precludes the amendment of a petition which has been filed with a county election officer under authority of K.S.A. 25-3601 et seq. All documents constituting a petition must be filed at one time, and any subsequent filing, even though it relates to such petition, cannot be regarded as part of the previously filed petition. Thus, once filed, it is our opinion that a petition cannot be amended by a subsequent filing. In harmony with our opinion is the conclusion reached by Attorney General Miller in a letter opinion dated June 8, 1973. There, it was determined that the language of 25-3602(a) emphasized above precluded the addition of signatures to a petition after it has been filed. See VIII Att'y Gen. Op. 517, 518.

Similarly, we do not believe that the petition in question may be withdrawn, amended by the addition of an appropriate verification and then refiled. Although the Kansas Supreme Court held in Coney v. City of Topeka, 96 Kan. 46 (1915), that where a city clerk had determined a petition to be insufficient, it should be surrendered to the person who filed it, that case is distinguishable from the situation at hand, because the statute considered in Coney specifically authorized the withdrawal of such petition. Here, we have no such statute.

Moreover, in the opinion of Attorney General Miller noted above, it was concluded that,

"once filed, a petition may not be withdrawn. Indeed, regarding a petition which might contain several hundred or thousand signatures, it is unclear who would be lawfully entitled to withdraw a petition once filed, even if withdrawal were permitted." Id. at 520.

We concur in this opinion and believe that it is supported by general authority. Notably, we believe the following excerpt from The State, ex rel., v. Younkin, 108 Kan. 634 (1921), to be instructive:

"While the powers of a public officer or board are those and those only which the law confers, yet when the law does confer a power or prescribe a duty to be performed or exercised by a public officer, the powers granted and duties prescribed carry with them by necessary implication such incidents of authority as are necessary for the effectual exercise of the powers conferred and duties imposed. In Throop on Public Officers, §542, the correct rule is stated:

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers." (See, also, Comm'rs of Brown Co. v. Barnett, 14 Kan. 627.)"
Id. at 638.

We have been unable to discover any specific statutory authority to support a finding that the county election officer may permit a petition to be withdrawn once it is filed, and even though the Younkin case quoted above recognizes the authority

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of a public officer to exercise implied powers, such implied powers must be derived from and necessary to the exercise of powers expressly granted. Again, we are unaware of any express grant of statutory authority to the county election officer which would carry with it the implied authority to return a filed petition for amendment and refiling.

Finally, even though we acknowledge the dearth of pertinent case law regarding this question, particularly in Kansas, we note that some of the cases from other jurisdictions concerning the withdrawal of signatures from a petition have denied such withdrawal because of lack of jurisdiction. For example, in Bordwell v. Dills, 70 Ark. 175, 66 S.W. 646 (1902), it was stated:

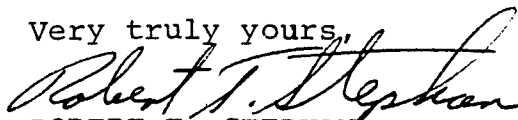
"Before the filing with the clerk . . . the petition is in the power of the signers. Each signer may control his signature. It is not yet a petition in which the public is interested. . . . But when the petition has been filed . . . the public has now become interested in it. The jurisdiction of the subject-matter has now attached. In the absence of something in the statute permitting it, no individual signer, nor, indeed, all the signers, could thereafter withdraw or erase their names from the petition." 66 S.W. at 647.

Of similar import is Seibert v. Lovell, 92 Iowa 507, 61 N.W. 197, 199 (1894), regarding the fact that jurisdiction of the appropriate public official attaches at the time the petition is filed and without regard to subsequent acts of the petitioners.

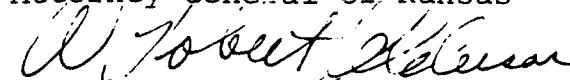
Although these cases are from other jurisdictions, we find them persuasive to a conclusion that jurisdiction of the county election officer to determine a petition's sufficiency attaches at the time the petition is filed with such officer, and thereafter the petitioners have no jurisdictional basis to support a request for withdrawal of the petition.

Thus, it is our further opinion that a county election officer has no authority to permit an invalid petition which has been filed with such officer to be withdrawn, amended to correct the deficiencies and refiled.

Very truly yours,


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