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September 21, 1984

ATTORNEY GENERAL OPINION NO. 84- 100

The Honorable Leroy A. Hayden
State Senator
P.O. Box 458
Satanta, Kansas 67870

Re: Elections -- Sufficiency of Petitions -- County-Wide Initiative; No Basis In Constitution or Statutes

Synopsis: Before a petition requesting that a question be submitted to the voters can be approved, the requirements of K.S.A. 25-3601 et seq. must be met. Among these requirements is the need for the petition to "clearly state the question which petitioners seek to bring to an election." K.S.A. 25-3602(b)(1). By implication, if no constitutional or statutory basis exists for the submission of the question set out in the petition, it should not be accepted by the county election officer when it is presented for filing. As neither the Kansas Constitution nor any Kansas statute authorizes the use of an initiative procedure to place county legislative matters on the ballot at a general election, a petition which calls for an election to establish a county health office is without effect in the absence of a statute specifically authorizing the same. Cited herein: K.S.A. 2-1905, 12-137, 12-138a, 12-3013, 25-3602, 65-201, Kan. Const., Art. 11, §7; Art. 13, §8.

* * *

Dear Senator Hayden:

As State Senator for the 39th District, you request our opinion on a petition which has recently been circulated in your home town of Satanta. Specifically, you inform us that the petition,

which calls for the establishment of a "county health office," was not accepted for filing by the Haskell County Clerk, who serves as the county election officer. The refusal was based on the lack of any statutory basis for this question to be placed on the ballot through such a procedure.

The placing of legislative items on the ballot for the approval of the electorate is commonly referred to an initiative procedure, and gives to the people the power to enact laws in the same way as their elected representatives. 82 C.J.S. Statutes §115, p. 193 (1953). As of 1982, 21 states permitted the use of initiative procedures, although this number did not include Kansas. The Council of State Governments, The Book of the States, 1982-83, p. 65 (1982). A larger number (37) allowed the use of referendums, whereby action by the legislature must be approved by a vote of the people before becoming effective. Id. at 66-67. While Kansas was included in this number, only laws concerning debt authorization or banking are subject to such procedures. Kansas Constitution, Article 11, Section 7; Article 13, Section 8.

Despite the absence of initiative procedures in Kansas for state-wide legislation, the legislature has given residents of cities the power to initiate the passage of ordinances through the procedures contained in K.S.A. 12-3013. As set forth therein, petitions may be submitted to the governing body of a city requesting that either the proposed ordinance be enacted or, failing that, submitted to the voters in a special election. The procedure can be employed in the case of any ordinance, except for those which are administrative (as opposed to legislative) in character, which deal with public improvements paid for by special assessments, or in cases where specific statutes allow referendums. K.S.A. 12-3013(e). The administrative ordinance exception has been used in at least two cases to void a petition circulated under the provisions of the statute. City of Lawrence v. McArdle, 214 Kan. 862 (1974), Rauh v. City of Hutchinson, 223 Kan. 514 (1978).

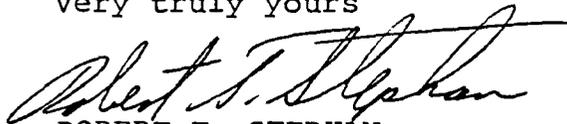
Your letter does not set forth, nor has our research disclosed, any comparable statutes regarding the use of initiative proceedings on a county-wide level. While there are some statutes which permit the holding of elections following the filing of petitions, they deal with the creation of special districts (K.S.A. 2-1905) (soil conservation districts) or the submission to the voters of actions already taken by a governing body (K.S.A. 12-137) (election on action taken by governing body imposing tax). Only in a very few cases can legislation actually be initiated by the filing of a petition. (K.S.A. 12-138a) (filing of petition to enact new tax or revenue measure). Likewise, the statutes which specifically deal with county health boards/officers (K.S.A. 65-201 et seq.)

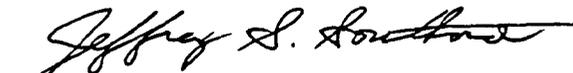
are silent as to the use of petitions to place the question of such a board's formation on a general or special election ballot. Accordingly, in that there is no statutory or constitutional basis for the holding of such an election, a county election officer is legally without authority to accept petitions calling for an election of this type when they are presented for filing. 82 C.J.S. Statutes §125(b), p. 222-223 (1953), 26 Am.Jur.2d Elections, §183, p. 13-14 (1966).

While it is our conclusion that no election with binding effect can be held under these circumstances, we wish to call your attention to a prior opinion of this office, No. 79-44, which dealt with the subject of advisory elections held at the county level. Although an advisory election cannot have the same legal effect as an election held pursuant to a statute, a county may expend public funds to hold such a non-binding vote, subject to the limits set forth in the opinion. We also enclose for your information a more recent opinion, No. 83-177, which discussed the holding of an advisory election by a private group, at the same time as, but physically separate from, a general election.

In conclusion, before a petition requesting that a question be submitted to the voters can be approved, the requirements of K.S.A. 25-3601 et seq. must be met. Among these requirements is the need for the petition to "clearly state the question which petitioners seek to bring to an election." K.S.A. 25-3602(b)(1). By implication, if no constitutional or statutory basis exists for the submission of the question set out in the petition, it should not be accepted by the county election officer when it is presented for filing. As neither the Kansas Constitution nor any Kansas statute authorizes the use of an initiative procedure to place county legislative matters on the ballot at a general election, a petition which calls for an election to establish a county health office is without effect in the absence of a statute specifically authorizing the same.

Very truly yours


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Jeffrey S. Southard
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