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ATTORNEY GENERAL OPINION NO. 2012-26

Ryan Kriegshauser  
Office of Legal Counsel and Policy  
Secretary of State's Office  
Memorial Hall  
120 S.W. 10<sup>th</sup> Avenue  
Topeka, KS 66612-1594

Re: Elections—Advance Voting—Advance Voting; Ballots and Ballot Envelopes; Declaration, Form; Failure of Elector to Complete Declaration; Effect; Challenged and Objected to Ballots

Elections—Original Canvass of Elections—Rules for Canvassers; Validity of Ballots or Parts Thereof; Technical Error; Advance Voting; Ballot Envelope; Declaration

Synopsis: Failure to complete the address portion of the affidavit printed on the advance voting ballot envelope is a technical error that, by itself, does not invalidate the ballot contained therein. Absent any other issues regarding the ballot, the votes cast thereon should be counted. Cited herein: K.S.A. 25-1119; 25-1120; K.S.A. 2011 Supp. 25-1122; 25-1122d; 25-1123; 25-1124; K.S.A. 25-1133; 25-1134; 25-1135; 25-1136; K.S.A. 2011 Supp. 25-3002; Kan. Const., Art. 5, § 1; Kan. Const., Art. 5, § 3 (repealed); L. 1995, ch. 192; L. 1967, ch. 208.

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Dear Mr. Kriegshauser:

On behalf of Kansas Secretary of State Kris Kobach, you request our opinion regarding whether votes cast by advance voting ballot should be counted when the voter fails to complete the address portion of the declaration printed on an advance voting ballot envelope.

The State of Kansas has for most of its history conferred upon a segment of its electorate the right to participate in elections by allowing them to vote by absentee ballot.<sup>1</sup> The purpose for allowing voting in such a manner is not to modify the qualifications of electors, but rather is to allow greater participation in the electoral process by persons who possess the qualifications of electors, but who are temporarily absent from their residence.<sup>2</sup> In 1995, the Kansas Legislature enacted legislation that provided for advance voting, a concept that replaced absentee voting.<sup>3</sup> Except for those electors delineated in Article 5, Section 1 of the Kansas Constitution, advance voting "is a privilege granted electors"<sup>4</sup> by statute.<sup>5</sup>

"Any registered voter may file with the county election officer where such person is a resident or where such person is authorized by law to vote as a former precinct resident, an application for an advance voting ballot."<sup>6</sup> The applicant for such a ballot is required to complete an affirmation that contains information regarding the person's name, residence address,<sup>7</sup> birth date, the address to which the advance voting ballot is to be mailed<sup>8</sup> and provide proper identification.<sup>9</sup> "No county election officer shall provide an advance voting ballot to a person who is requesting an advance voting ballot to be transmitted by mail unless: (1) The county election officer verifies that the signature of the person matches that on file in the county voter registration records."<sup>10</sup> If the county election officer is not able to verify that the signatures match, the applicant is to be contacted and offered another opportunity to provide a verifiable signature.<sup>11</sup> "If the county election officer is unable to reach the person, the county election officer may transmit a provisional ballot, however, *such provisional ballot may not be counted unless a signature is included therewith that can be verified.* . . ."<sup>12</sup>

An advance voting ballot may be transmitted to the applicant by mail or in person in the office of the county election officer or a satellite advance voting site.<sup>13</sup> Any mailed advance voting ballot "shall be transmitted with printed instructions prescribed by the secretary of state and a ballot envelope bearing upon the outside a printed form as described in K.S.A. 25-1120. . . ."<sup>14</sup>

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<sup>1</sup> Kan. Const., Art. 5, § 1. See Kan. Const., Art. 5, § 3 (repealed); *Lemons v. Noller*, 144 Kan. 813 (1936).

<sup>2</sup> *Lemons*, 144 Kan. at 822.

<sup>3</sup> See L. 1995, ch. 192.

<sup>4</sup> 26 Am.Jur.2d *Elections* § 331 (2004).

<sup>5</sup> "Any registered voter is eligible to vote by advance voting ballot. . . ." K.S.A. 25-1119(a).

<sup>6</sup> K.S.A. 2011 Supp. 25-1122(a).

<sup>7</sup> Residence address includes, when appropriate, the precinct number, ward number, street number and name, city or township name, and county.

<sup>8</sup> K.S.A. 2011 Supp. 25-1122d. The affirmation includes a printed statement noting that providing false information on the application is a severity level 9, nonperson felony. *Id.*

<sup>9</sup> K.S.A. 2011 Supp. 25-1122(c).

<sup>10</sup> K.S.A. 2011 Supp. 25-1122(e).

<sup>11</sup> K.S.A. 2011 Supp. 25-1122(e)(1).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> K.S.A. 2011 Supp. 25-1123(a).

<sup>14</sup> *Id.* An elector voting by advance voting ballot at the office of the county election officer or satellite advance voting site may elect to deposit the ballot into a locked ballot box without an envelope. *Id.*

The ballot envelope shall also bear a declaration in substance as follows:

THIS DECLARATION MUST BE COMPLETED AND SIGNED

"I \_\_\_\_\_ do hereby declare that I marked the enclosed ballot and that such ballot was enclosed and sealed in this envelope by me. My legal residence is in the \_\_\_\_\_ precinct, \_\_\_\_\_ township, (or, in the \_\_\_\_\_ precinct of the \_\_\_\_\_ ward, \_\_\_\_\_ street in the city of \_\_\_\_\_), in the county of \_\_\_\_\_, state of Kansas.

(Signed) \_\_\_\_\_<sup>15</sup>

The voter is required, after marking the ballot, to "personally [ ] place the ballot in the ballot envelope bearing the same number as the ballot and seal the envelope. The voter shall complete the form on the envelope and shall sign the same."<sup>16</sup>

A special election board established pursuant to K.S.A. 25-1133 conducts the canvass of advance voting ballots.<sup>17</sup> Such canvass includes the following procedures:

(a) The vote of any advance voting voter may be challenged in the same manner as other votes are challenged, as nearly as may be, and the judges of the special election board shall determine the validity of each advance voting ballot. *Whenever the judges determine that the form accompanying an advance voting ballot is insufficient, or that the voter is not a registered voter, or the challenge is otherwise sustained, the advance voting ballot envelope shall not be opened.* In all such cases, the judges shall endorse on the back of the envelope the word "provisional" and state the reason for sustaining the challenge.

(b) *Any advance voting ballot envelope which has not been signed shall not be opened, and no vote on the ballot therein shall be counted.* Such envelope or ballot shall be challenged in the same manner in which other votes are challenged.

....

(e) Void, provisional and objected to advance voting ballots shall be transmitted to the county election officer in the same manner as personally cast provisional ballots are transmitted but shall be placed in separate envelopes or sacks, appropriately labeled and sealed. Votes contained in

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<sup>15</sup> K.S.A. 25-1120.

<sup>16</sup> K.S.A. 2011 Supp. 25-1124(a). Other methods of marking and completing the ballot and ballot envelope are allowed when an elector has an illness or physical disability or is not proficient in reading the English language. *Id.*

<sup>17</sup> K.S.A. 25-1134; 25-1135.

void and provisional advance voting ballots shall not be included in the total of votes certified by the special election board. Void, provisional and objected to advance voting ballots shall be reviewed by the board of county canvassers, and such board shall finally determine the acceptance or rejection of each void, provisional or objected to ballot.<sup>18</sup>

Rules applicable to the original canvass by election boards, intermediate and final canvasses by county boards of canvassers, and the final canvass by the State Board of Canvassers are set out in K.S.A. 2011 Supp. 25-3002. "No ballot, or portion thereof, shall be invalidated by any technical error unless it is impossible to determine the voter's intention. Determination of the voter's intention shall rest in the discretion of the board canvassing in the case of a canvass. . . ."<sup>19</sup>

"Election laws are liberally construed to permit exercise of the right of suffrage conferred by the Constitution and laws of the state."<sup>20</sup> Rather than determining whether election provisions are mandatory or directory, the courts should take "a practical approach[,] focusing on the purpose of the statute and the question whether the challenged act or omission impeded voters in exercising their voting rights."<sup>21</sup>

In *Hansen v. Lindley*<sup>22</sup> and *Burke v. State Board of Canvassers*,<sup>23</sup> the Kansas Supreme Court reviewed the effect of irregularities in affidavits that were submitted during the absentee voting process. The Court noted that two affidavits were required for absentee voting.<sup>24</sup> Both affidavits contained blanks on which the applicant/voter was to provide his address.<sup>25</sup> The first affidavit – referred to as the "qualifying affidavit" in *Burke*<sup>26</sup> – was included on the application that was filed with the county election officer and used to determine whether the person was qualified to receive an absentee voting ballot.<sup>27</sup> The second affidavit – the "identifying affidavit"<sup>28</sup> – was included with the absentee ballot and was signed at the time the advance voting ballot was marked.<sup>29</sup> "[T]he only purpose of [the second affidavit] is to show [the voter] is the same person as the one who was certified by the county clerk to the secretary of state as a qualified elector. . . ."<sup>30</sup>

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<sup>18</sup> K.S.A. 25-1136 (emphasis added).

<sup>19</sup> K.S.A. 2011 Supp. 25-3002(b)(1).

<sup>20</sup> *Burke v. State Bd. of Canvassers*, 152 Kan. 826, 836 (1940). See also *Patterson v. Justus*, 173 Kan. 207, 211 (1952), quoting *McMillan v. Siemon*, 36 Cal.App.2d 721, 726 (1940) ("The exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning").

<sup>21</sup> *Cure v. Bd. of County Comm'rs of Hodgeman County*, 263 Kan. 779, 787 (1998).

<sup>22</sup> 152 Kan. 63 (1940).

<sup>23</sup> 152 Kan. 826 (1940).

<sup>24</sup> *Hansen*, 152 Kan. at 70; *Burke*, 152 Kan. at 831-32.

<sup>25</sup> *Hansen*, 152 Kan. at 69; *Burke*, 152 Kan. at 831-32.

<sup>26</sup> 152 Kan. at 832.

<sup>27</sup> *Hansen*, 152 Kan. at 70; *Burke*, 152 Kan. at 832.

<sup>28</sup> *Burke*, 152 Kan. at 831.

<sup>29</sup> *Hansen*, 152 Kan. at 69; *Burke*, 152 Kan. at 831.

<sup>30</sup> *Burke*, 152 Kan. at 834.

The statutes reviewed in *Hansen* and *Burke* were repealed in 1967 and the current procedure was enacted.<sup>31</sup> The current procedure likewise requires completion of two affidavits, one with the application submitted to the county election officer requesting an advance voting ballot, and the second that is completed at the time the advance voting ballot is marked and returned to the county election officer. It appears that the purposes served by the two affidavits continue to be distinct in that the first affidavit regards determining whether the applicant is entitled to an advance voting ballot and the second serves the purpose of identifying the person who cast the advance voting ballot. State statute provides that an advance voting ballot envelope that has not been signed is not to be opened and the vote on the ballot therein is not to be counted. By contrast, the Legislature has not addressed the effect of failing to complete the address portion of the affidavit on the advance voting ballot envelope. Failure to complete the address portion of the affidavit printed on the advance voting ballot envelope is a technical error that, by itself, does not invalidate the ballot contained therein. Absent any other issues regarding the ballot, the votes cast thereon should be counted.

Sincerely,

Derek Schmidt  
Attorney General

Richard D. Smith  
Assistant Attorney General

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<sup>31</sup> See L. 1967, ch. 208.