



STATE OF KANSAS

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August 5, 1977

ATTORNEY GENERAL OPINION NO. 77- 252

Mrs. Mary F. Hope
Commissioner of Elections
Shawnee County Courthouse
Topeka, Kansas 66603

Re: Elections--Recall--Grounds, Sufficiency of

Synopsis: Under K.S.A. 1976 Supp. 25-4302, the only grounds for recall are conviction of a felony, misconduct in office, incompetence and failure to perform a duty prescribed by law. Facts recited in a petition as grounds which do not support any of the four statutory bases for recall are insufficient. However, the county election officer has no authority to determine the legal sufficiency of grounds alleged in a recall petition which is presented for filing, and the sufficiency of grounds, if challenged, must be determined by a court of competent jurisdiction. The sufficiency of grounds for a recall election may not be challenged after the question is submitted to the voters. A petition may be circulated only by a sponsor within the precinct where such sponsor resides.

* * *

Dear Mrs. Hope:

You inquire concerning the sufficiency of grounds which are alleged in support of a petition for recall. K.S.A. 1976 Supp. 25-4302 states thus:

"Grounds for recall are conviction of a felony, misconduct in office, incompetence

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or failure to perform duties prescribed by law. No recall submitted to the voters shall be held void because of the insufficiency of the grounds, application or petition by which the submission was procured."

This enumeration of grounds for recall differs from constitutional, statutory and municipal charter provisions which are commonly found, and which provide merely that the petition shall contain a statement of grounds for recall, without elaborating upon the kinds of grounds which are sufficient. In Westpy v. Burnett, 82 N.J. Super. 239, 197 A.2d 400 (1964), the court reviewed a number of cases, and stated thus:

"The courts throughout the United States have generally adopted the view that the power granted to electors of a municipality to remove certain public officers through recall procedure is political in nature and that it is for the people, and not the courts, to decide the truth and sufficiency of the grounds asserted for removal. In most states, statutory and charter provisions as to recall are liberally interpreted in favor of the electorate. This liberality is also extended to the usually required statement or general statement 'of the grounds upon which the removal is sought.'" 197 A.2d at 404.

In Abbey v. Green, 28 Ariz. 53, 235 P. 150 (Sup.Ct. 1925), the court considered a petition filed under an Arizona constitutional provision which required the petition to contain a "general statement in not more than 200 words of the grounds for such removal." Among the grounds alleged were that the officer sought to be recalled, a judge, was "not worthy of belief. He has a violent and ungovernable temper. He suffers from hallucinations. He violates the law by presiding in court with a pistol in his hip pocket." The court held the grounds were sufficient, stating thus:

"The grounds or reasons assigned in the petition for the recall may be very general in their nature and character. It was the evident

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purpose to permit the electorate to get rid of an obnoxious and unsatisfactory officer with whom, for any or no reason whatever for that matter, they may have become displeased." 236 P. at 154.

In Conn v. City Council, 17 Cal.App. 705, 121 Pac. 714 (1911), the court considered a petition under a statute which required only "a general statement of the grounds for which removal is sought." The court upheld the petition thus:

"Manifestly the purpose of the charter in providing for a recall election is to give the people of the municipality the right to cut short the official term of every elected officer whose conduct in office is for any cause unsatisfactory or distasteful to the body of the community The petitioners are only required to state generally their grounds or reasons for demanding the removal of the obnoxious officer, for the obvious and only purpose, it seems to us, of furnishing information to the people of the community upon which a political issue rather than an issue at law may be raised and determined."

In State ex rel. Topping v. Houston, 97 Neb. 445, 143 N.W. 798 (1913), the court upheld a recall petition under a similar provision, and observed thus concerning the wisdom of the policy:

"If the people of the state find after a trial of the experiment that the provisions of the statute lead to capable officials being vexed with petitions for their recall, based upon mere insinuations or upon frivolous grounds, or because they are performing their duty and enforcing the law, as they are bound to do by their oath of office, or lead without good and sufficient reason to frequent costly and unnecessary elections, they have the power through their Legislature to amend the statute so as to protect honest and courageous officials. This may be done by increasing the

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number of names required to be signed to the election petition or by requiring specific charges of misconduct to be made therein Accusations of wrongful acts attributed to an officer merely by innuendo or by vague generalities as may now be done are often the most difficult to refute by proof and the hardest to meet by argument." 143 N.W. at 800.

It appears that no such latitude is given Kansas voters. Grounds for recall are enumerated with some specificity: 1) conviction of a felony; 2) misconduct in office, 3) incompetence, and 4) failure to perform duties prescribed by law. In many jurisdictions where the grounds for recall are not thus circumscribed, the courts have recognized the recall procedure as a device whereby the voters, for any reason which is good and sufficient to themselves, may shorten the term of any elected officer. Popular dissatisfaction for any reason is sufficient. In Kansas, however, the legislature obviously intended, and so provided, that recall may be obtained on only the four grounds enumerated, and for no other reason.

For example, if a petition is filed to recall a public officer on the ground that such officer had convicted a felony, and the officer had not in fact been so convicted, the statutory prerequisite for recall on that ground would be lacking, and presumptively, the petition would be subject to challenge and judicial review prior to submission to the voters. Under the statute, it is the fact of conviction of a felony, and not the mere allegation of that fact, which is required as a ground for recall.

More difficult questions are presented when any of the other three grounds are alleged. Misconduct in office and failure to perform duties prescribed by law are direct analogies to grounds for ouster prescribed by K.S.A. 60-1205, which provides that anyone who shall "willfully misconduct himself in office" or who shall "willfully neglect to perform any duty enjoined upon him or her by law" shall forfeit his or her office, and be subject to ouster therefrom. Neglect of duty and misconduct in office are largely interchangeable terms. Very commonly, an act or omission which constitutes neglect of duty also constitutes misconduct in office. See, e.g., State ex rel. Londerholm v. Schroeder, 199 Kan. 403, 430 P.2d 315 (1967) and State ex rel. Ferguson v. Robinson, 193 Kan. 480, 394 P.2d 48 (1964). The meanings of the terms are well established. Concerning neglect of duty as a ground for ouster, in State v. Kennedy, 82 Kan. 373, 108 Pac. 837 (1910), the court stated thus:

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"It is not every oversight or omission within the strict letter of the law which will entail forfeiture of office. The statute must be interpreted in the light of the mischief it was intended to remedy The purpose was to prevent persons from continuing to hold office whose inattention to duty, either because of its habitualness or its gravity, endangers the public welfare. Therefore the neglect contemplated must disclose either willfulness or indifference to duty so persistent or in affairs of such importance that the safety of the public interests is threatened." 82 Kan. at 386.

In Farmer v. Rutherford, 136 Kan. 298, 15 P.2d 474 (1932), the court declared that "[a]n act done by a public officer in direct violation of a statute regulating his official duties is official misconduct within the terms of his bond." 136 Kan. at 305.

In adopting those grounds as a basis for recall, the question is presented whether political grievances or popular dissatisfaction with the conduct of an elected officer is a sufficient ground for removal under K.S.A. 25-4302. Whether particular conduct constitutes misconduct in office or neglect of duty required by law involves, very often, a matter of judgment. It may be argued that whether any given action, decision or conduct of an elected official constitutes official misconduct or neglect of a duty required by law is a purely political question, and that whether whatever grounds are advanced in a petition as misconduct or neglect are in fact misconduct or neglect is to be determined by the voters. Such a latitudinarian construction of the terms would render K.S.A. 25-4302 virtually a dead letter, however. The legislature chose to limit the grounds upon which a recall election might be had, contrary to the practices in many other states. There are but four grounds, and a recall election may be called for no reason other than those recited in that statute. In so restricting the grounds upon which recall may be based, the legislature clearly rejected the use of recall elections as a vehicle for the expression of purely political or popular dissatisfaction. In Joyner v. Shuman, 116 So.2d 472 (Fla. Dist. Ct. App. 1959), the court reviewed an earlier Florida decision and stated thus:

"[W]e are convinced that . . . the Supreme Court of this State meant to hold that legitimate or authorized actions of a city official,

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although such actions caused extensive opposition among a large segment of the city, were not sufficient to justify a recall. This decision, as we construe it, is in opposition to the so-called purely 'political view' which is simply that the people have the right to vote for the recall of their officials whenever their actions in office are unpopular or irritate a sufficient number to initiate the recall proceeding and a majority of the electorate support the recall group in their views." 116 So.2d at 480.

In my judgment, the 1976 Kansas Legislature made a similar choice, by circumscribing the grounds for which a recall election may be held. The facts which are alleged and recited in the petition must support one of the four grounds for recall, official misconduct, conviction of a felony, neglect of a duty required by law or incompetence.

Thus, the 1976 legislature provided a remedy for the popular electoral removal of elected officials which is only slightly broader than existing statutes authorizing judicial proceedings to oust such elected officials. The grounds for recall, conviction of a felony, neglect of duty, official misconduct and incompetence, substantially duplicate the grounds for ouster, with the exception of incompetence, a term which is undefined in the ouster legislation but which refers, presumptively, to mental incapacity. By thus virtually restricting the grounds for recall to those already available for ouster of elected officials, the legislature has not provided the voters with the broad and effective remedy which is available in other states as a means whereby the voters themselves may shorten the term of and remove from office any elected official with whom they for any reason are no longer satisfied. It is unfortunate that the grounds for recall have been so severely restricted that recall provides the voters with scarcely a better remedy than the long-established judicial ouster statutes. I believe that prompt action should be taken to make recall elections available to the voters for whatever reasons they deem sufficient to terminate the tenure of their elected officials and remove them from office for ignoring the wishes of their constituents.

As county election commissioner, you are required to review the petition and to determine its sufficiency under the act. K.S.A. 1976 Supp. 25-4226. However, under that section, that determination does not extend to the legal sufficiency of the grounds alleged in the petition:

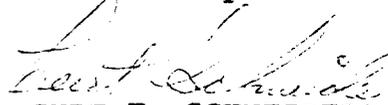
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"Such county election officer shall notify the recall committee that the petition was improperly filed if he or she determines that (a) there is an insufficient number of subscribing qualified registered electors, or (b) the petition was filed within less than one hundred and eighty (180) days of the termination of the term of office of the local officer sought to be recalled, or (c) the local officer sought to be recalled has been or is being subjected to another recall election during his or her current term of office."

Thus, whether the facts recited in a submitted petition are legally sufficient to constitute misconduct in office, neglect of duty or incompetence is a question which may be decided only at the instance of the officer sought to be recalled, presumptively, in a court of appropriate jurisdiction, in an action to challenge the legal sufficiency of the petition. Once a recall is submitted to the voters, however, it may not be held void because of insufficiency of the grounds. K.S.A. 1976 Supp. 25-4302.

Secondly, you inquire whether a petition may be circulated by a sponsor only within the precinct in which the sponsor resides. K.S.A. 1976 Supp. 25-4320 states in pertinent part that "[e]ach sponsor shall be a registered elector of the election district of the local officer sought to be recalled and of the precinct in which such sponsor circulates the petition," whereas K.S.A. 1976 Supp. 25-4324 provides that the petitions "may be circulated only by a sponsor and only in person throughout the election district of the local officer sought to be recalled." The latter statute specifies the procedure for circulation of the petition, i.e., personal circulation by sponsors only, and perhaps redundantly, restricts circulation to the election district of the officer sought to be recalled. The former provision further specifies that a sponsor may circulate the petition only in the precinct in which such sponsor resides, and in my judgment, the latter controls over any arguable ambiguity in the former. Thus, a sponsor may circulate a recall petition only in the precinct in which such sponsor resides.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj