



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

October 5, 1981

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81- 224

The Honorable Gerald Friedeman  
State Representative, One Hundred-Twelfth District  
2603 Forest  
Great Bend, Kansas 67530

Re: State Departments; Public Officers, Employees --  
Municipal Accounting Board -- Obtaining Audit of  
a Third Class City

Synopsis: An audit of a third class city, for which an audit is not otherwise required by K.S.A. 1980 Supp. 75-1122, may be accomplished only by action of the city's governing body, as provided in K.S.A. 75-1125, although such action may be compelled by a petition of the city's electors filed with the governing body. K.S.A. 75-1125 requires any such petition to be signed by a number of currently qualified electors equal to 20% or more of the number of electors who voted in the last municipal election for officers, and does not require the petition to be signed by 20% or more of the same persons who actually voted in said election.

The contents of the petition must conform to the requirements of K.S.A. 1980 Supp. 25-3602.

Although a county attorney has no duty to assist in the preparation of such petition, he or she may assist in the preparation of the petition as part of his or her private practice, absent a professional conflict of interests.

An action in mandamus may be brought to compel the governing body to act in accordance with the petition if necessary. Cited herein: K.S.A. 19-702, 22a-106, 25-3601, K.S.A. 1980 Supp. 25-3602, 75-1122, K.S.A. 75-1125, 77-201.

\*

\*

\*

Gerald Friedeman  
Page Two

Dear Representative Friedeman:

You have requested an Attorney General Opinion concerning an interpretation of K.S.A. 75-1125 which relates to auditing accounts of third class cities. Specifically, you have asked the following questions:

1. Does "20% . . . of the voters" [referred to in K.S.A. 75-1125] mean that petition signers, in order for their signatures to be valid, must be voters in the election mentioned in the statute?
2. Is there another way to accomplish an audit of a third class city, e.g., Pawnee Rock?
3. Where should the petition be delivered?
4. May the county attorney assist in the preparation of the petition?
5. What should the petition state?
6. What can be done if the governing body ignores the petition?

K.S.A. 75-1125 states:

"The governing body of any municipality not covered by K.S.A. 75-1122 of this act may employ a licensed municipal public accountant or accountants or certified public accountant or accountants to examine and audit the accounts of such municipality for such period as it may deem proper: Provided, That upon a written petition filed with the governing body of any such municipality not provided for by K.S.A. 75-1122 by 20% or more of the voters of said municipality who voted at the last election for officers of such municipality it shall be the duty of said governing body to employ a licensed municipal public accountant or accountants or certified public accountant or accountants to examine and audit the accounts of such municipality for such period of time as may be set out in the petition of the voters."

K.S.A. 1980 Supp. 75-1122 requires an annual audit for all municipalities which have aggregate annual gross receipts in excess of \$275,000 or which have general obligation or revenue bonds outstanding in excess of \$275,000. Pawnee Rock, the municipality which is the subject of your inquiry, has neither

aggregate annual gross receipts in excess of \$275,000 nor general obligation or revenue bonds in excess of \$275,000. Therefore, the provisions of K.S.A. 75-1122 do not apply, and said city is subject to audit under the provisions of K.S.A. 75-1125.

While there are apparently no Kansas cases which interpret the precise language, "20% or more of the voters . . . who voted at the last election," there is a case interpreting very similar language which we believe is dispositive of this issue. In State, ex rel. Brewster v. City of Wichita, 100 Kan. 399 (1917), the Kansas Supreme Court was asked to determine the constitutionality of an act of the legislature which would allow cities to adopt a city manager form of city government. The petition which requested that a proposition to come under the provisions of the new law be placed before the voters was challenged for having an insufficient number of signatures. The provision in the act specified that the petition was to be "signed by not less than twenty-five per cent of the total number of legally qualified electors voting for mayor at the last preceding election." The court concluded thus:

"As suggested by the plaintiff, unless the legislature intended that the wishes of the voters of two years ago, many of whom may have moved elsewhere and some of whom may have died, should be ascertained, rather than the wishes of the present citizens and voters, the petition is valid . . . What the legislature had in mind, of course, was one-fourth of the electors . . . . Any other construction seems unreasonable." Id. at 406, 407.

"Electors voting" and "voters who voted" have similar meanings. (See "voter" -- Black's Law Dictionary, 4th Ed., p. 1748). Thus, the phrases may be construed the same. In the context of the statutes pursuant to which each petition was filed the purpose is the same -- namely, to give a fixed number upon which to base the percentage of signatures required to force official action. Likewise, the Court's reasoning in the above-quoted case is equally applicable to K.S.A. 75-1125. Therefore, in our judgment, K.S.A. 75-1125 requires the petition to compel an audit to be signed by qualified electors of the municipality in a number equal to 20% or more of the number of electors who voted in the last municipal election for officers. It does not require the petition be signed by 20% or more of the same persons who actually voted in said election.

Your second question asks if there is another way to accomplish an audit of a third class city. Upon review of the statutes, we find no other method provided.

Third, you ask where the petition should be delivered. The statute (K.S.A. 75-1125) provides that the petition is to be filed "with the governing body." K.S.A. 1980 Supp. 25-3602 states that petitions shall be filed with the county election officer, unless another official is designated in the applicable statute. Since 75-1125 requires that the petition be filed "with the governing body" and the term "official" used in 25-3602 encompasses the plural as well as the singular under rules of statutory construction (see K.S.A. 77-201 Third), it is our opinion that the petition is to be filed with the city council.

Fourth, you ask whether the county attorney may assist in the preparation of the petition. K.S.A. 19-702 defines the county attorney's duties. There is no duty listed which would require him to assist with the preparation of such petition, but there is no specific prohibition against him engaging in private practice. Edwards County Commissioners v. Simmons, 159 Kan. 41, 57 (1944). This is in contrast to K.S.A. 1980 Supp. 22a-106(b) which requires district attorneys and their assistants to devote full time to official duties and prohibits them from engaging in private civil practice. Thus, while the county attorney is not required to assist in the preparation of the petition in his official capacity as county attorney, he is not precluded from doing so as part of his private practice, unless a professional conflict of interest exists.

Fifth, you ask what the petition should state. K.S.A. 1980 Supp. 25-3602 enumerates what a petition must contain to be sufficient:

"(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.

"(b) Each petition shall, unless otherwise specifically required: (1) Clearly state the question which petitioners seek to bring to an election;

"(2) name the taxing subdivision or other political subdivision in which an election is sought to be held; and

"(3) contain the following recital above the spaces provided for signatures: 'I have personally signed this petition; I am a registered elector of the state of Kansas and of \_\_\_\_\_ (here insert name of political or taxing subdivision), and my residence address is correctly written after my name.'

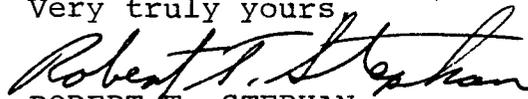
"Such recital shall be followed by blank spaces for the signature, residence address and date of signing for each person signing such petition.

"Whenever petitioners are required by law to possess qualifications in addition to being registered electors, the form of the petition shall be amended to contain a recital specifying the additional qualifications required and stating that the petitioners possess such qualifications.

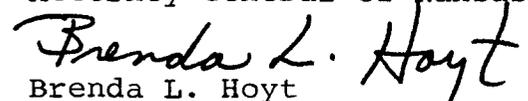
"(c) Any such petition shall contain, at the end of each set of documents carried by each circulator, a verification, signed by the circulator, to the effect that such circulator personally witnessed the signing of the petition by each person whose name appears thereon." (Emphasis added.)

Last, you ask what can be done if the governing body ignores the petition. The Kansas Court of Appeals has upheld a mandamus action brought to compel an audit by petition under K.S.A. 75-1125 in Runyon v. City of Neosho Rapids, 2 Kan. App. 2d 619 (1978). In that case, plaintiff-electors of Neosho Rapids filed a petition with the city's governing body, requesting an audit. Since the petition was determined to contain sufficient signatures, the court held that the duty to audit was mandatory and that the statutory duty could not be relieved by the Board of Tax Appeals. Therefore, if the governing body ignores the petition, we believe an action for mandamus may be brought to compel the audit.

Very truly yours,

  
ROBERT T. STEPHAN

Attorney General of Kansas

  
Brenda L. Hoyt  
Assistant Attorney General