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ATTORNEY GENERAL OPINION NO. 82- 134

The Honorable Jack H. Brier
Secretary of State
2nd Floor - Capitol
Topeka, Kansas 66612

Re: Elections -- Primary Elections -- Determining Validity of Declarations of Candidacy

Synopsis: The requirement of K.S.A. 25-208a, that the validity of a candidate's declaration of intent be determined by an election officer within three days of its filing, is directory only. Thus, an election officer may make such determination within a period of time after the declaration is filed that is reasonable under all the attending facts and circumstances.

Within three days after a candidate's receipt of notice that an election officer has found such candidate's declaration of intent to be invalid, the candidate may file written objections to such finding.

Where the secretary of state has erroneously certified a candidate, pursuant to K.S.A. 25-209, as having filed a valid declaration of intent, the secretary of state has an implied legal duty to correct the error when it is discovered. However, in the absence of an actual set of facts and circumstances, the secretary of state's proper course of action and the legal consequences thereof, cannot be determined. Cited herein: K.S.A. 25-206, 25-208a, 25-209, 25-308.

* * *

Dear Secretary Brier:

You have posed several questions regarding an election officer's responsibilities under the state election laws. Your questions

concern portions of two particular statutes, K.S.A. 25-206 and 25-208a.

The relevant provisions of K.S.A. 25-206 are found in subsection (a), which inter alia requires that, when an individual files a declaration of intent to become a candidate for a national, state, county or township office,

> "[s]uch declaration . . . shall be attested before a county election officer or deputy county election officer in the case of county and township offices, and before a county election officer, the secretary of state or a deputy of one of such officers in the case of state and national offices, and a notary public in the case of precinct committeemen and committeewomen . . . ."

K.S.A. 25-208a provides for the determination of the validity of nomination papers or a declaration of intent, as follows:

> "(a) Within three (3) days from the date of the filing of nomination papers or a declaration of intent by a candidate for United States senator or representative or for state office, the secretary of state shall determine the validity of such papers or declaration.
>
> "(b) Within three (3) days from the date of the filing of nomination papers or a declaration of intent by a candidate for county or township office or for precinct committeeman or committeewoman, the county election officer shall determine the validity of such papers or declaration.
>
> "(c) If any nomination papers or declarations are found to be invalid, the secretary of state or the county election officer, as the case may be, shall notify the candidate on whose behalf the papers or declaration was filed that such nomination papers or declaration have been found to be invalid and the reason for the finding. Such candidate may make objection to the finding of invalidity by secretary of state or the county election officer in accordance with K.S.A. 25-308."

Within the context of these statutory provisions, you have posed a presumably hypothetical situation where an election officer determines the invalidity of a declaration of intent,

by reason of its being improperly attested, after the expiration of the three-day period specified in K.S.A. 25-208a. With respect to this situation you first inquire whether the election officer is authorized to give a candidate notice of such invalidity after the three-day period has expired.

Initially, it is to be observed that K.S.A. 25-208a does not require that a candidate be given notice of the election officer's finding of invalidity within three days of the filing of a declaration of intent. Rather, it requires that the declaration's validity be determined within this three-day period. Subsection (c) then requires that, once a declaration of intent has been determined invalid, the candidate is to be given notice thereof. Thus, we suspect that your intended question is whether an election officer may find a declaration of intent to be invalid at a time more than three days after it has been filed.

Resolution of this question depends on whether the requirements of K.S.A. 25-208a are to be regarded as mandatory or directory. Pertinent to this issue is the rule of statutory construction set forth in School District v. Clark County Comm'rs, 155 Kan. 636 (1942):

> "There is a rule of statutory construction familiar to all lawyers, which is that when the legislature prescribes the time when an official act is to be performed, the broad legislative purpose is to be considered by the courts whenever they are called upon to decide whether the time prescribed by statute is mandatory or directory. If mandatory, there must be strict conformity. If directory, the legislative intention is to be complied with a [sic] nearly as practicable." Id. at 638.

In Wilcox v. Billings, 200 Kan. 654, 657, 658 (1968), the Court paraphrased the language of 82 C.J.S. Statutes §376:

> "No absolute test exists by which it may be determined whether a statute is directory or mandatory. Each case must stand largely on its own facts, to be determined on an interpretation of the particular language used. Certain rules and aids to construction have been stated. The primary rule is to ascertain legislative intent as revealed by an examination of the whole act. Consideration must be given to the entire statute, its nature, its object, and the consequences which

> would result from construing it one way or the other. It has been said that whether a statute is directory or mandatory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition; and a statute is regarded as directory where no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results. On the other hand, a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory, and when a fair interpretation of a statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power or must be performed before certain other powers can be exercised, the statute must be regarded as mandatory."

This issue has been addressed in a substantial number of cases within the context of election statutes. For example, in Jones v. State, 1 Kan. 273 (1863), the Court noted:

> "In other words, unless a fair consideration of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely." Id. at 279.

We find particularly significant the following excerpt from Gilleland v. Schuyler, 9 Kan. 569 (1872):

> "The problem is to secure, first, to the voter a free, untrammeled vote; and secondly, a correct record and return of the vote. It is mainly with reference to these two results that the rules for conducting elections are

> prescribed by the legislative power. But these rules are only means. The end is the freedom and purity of the election. To hold these rules all mandatory, and essential to a valid election, is to subordinate substance to form, the end to the means. Yet on the other hand, to permit a total neglect of all the requirements of the statute, and still sustain the proceedings, is to forego the lessons of experience, and invite a disregard of all those provisions which the wisdom of years has found conducive to the purity of the ballot-box. Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials, should not be permitted to disfranchise a district. Yet rules, uniformity of procedure, are as essential to secure truth and exactness in elections as in anything else. Irregularities invite and conceal fraud. 'That a mere irregularity on the part of the election officers, or their omission to observe some merely directory provision of the law, will not vitiate the poll, is a point sustained by the whole current of authorities; but there has existed a great conflict of opinion as to what is an irregularity, and what is matter of substance.' Leading Cases on Elections, Brightly, p. 448." (Emphasis added.) Id. at 586, 587.

The Court concluded that mere irregularities on the part of election officers or their omission in observing a merely directory provision of law, will not vitiate the election. The provisions deemed directory were sections of the existing general election law relating to the challenging of persons offering to vote, the right of candidates and electors to be present in the room where the votes are received, and prohibiting the keeping and selling of intoxicating liquors at the election polls. See, also, Morris v. Vanlaningham, 11 Kan. 269 (1873).

In light of these judicial guidelines, it is our opinion that the requirement of K.S.A. 25-208a, that the validity of a candidate's declaration of intent be determined by an election officer within three days of its filing, is directory only. Accordingly, we believe that an election officer is permitted to determine the validity of a declaration of intent within a period of time after its filing that is reasonable under all the attending facts and circumstances. To conclude otherwise would have a potentially detrimental effect on the purity of the election process. It would permit an

unqualified candidate, i.e., one who has failed to comply with statutory prerequisites of candidacy, to appear on the ballot by virtue of an election official's mistake, inadvertence or untimely action.

Implicit in this conclusion, of course, is our belief that the provisions of K.S.A. 25-206 are mandatory upon one seeking to become a candidate for elective office. That statute requires that a declaration of intent be attested in a prescribed manner, and in our judgment, it is incumbent upon a person filing a declaration of candidacy to comply with these requirements. In support of this conclusion we have considered Bird v. Beggs, 116 Kan. 619 (1924), where the court strictly construed the statutory requirement that nomination papers were to be filed no later than noon on June 20 preceding the primary election. The candidate's declaration, which was filed at 2:30 p.m. on June 20, was declared a nullity. See, also, State, ex rel., v. Lutz et al., 116 Kan. 621 (1924); Parsons v. Ryan, 144 Kan. 370 (1936). Also, in Smith v. Bowman, 126 Kan. 576 (1928), the Court held that the forerunner of K.S.A. 25-206 contemplated a personal declaration and verification by the candidate, and the statutory prescription could not be deputed to an agent or proxy. In light of these analogous cases, we must conclude that the attestation requirements of K.S.A. 25-206 are mandatory, and failure to comply renders the declaration of intent invalid.

Your second question is predicated on an assumed response to your first question. Assuming that an election officer has a reasonable time in which to determine that a declaration of intent is invalid and give notice thereof to the candidate, you have asked if the candidate has a right to file written objections to such determination within three days after receipt of such notice.

Our response to this question needs little discussion. Subsection (c) of K.S.A. 25-208a provides for notice to be given a candidate that his or her declaration of intent has been determined invalid. It then provides: "Such candidate may make objection to the finding of invalidity by secretary of state or the county election officer in accordance with K.S.A. 25-308." The relevant provisions of K.S.A. 25-308 are found in subsection (b) thereof, which states:

> "(b) If the secretary of state or the county election officer finds any nomination papers or declaration of intent to be invalid pursuant to K.S.A. 25-208a, the candidate on whose behalf the papers or declaration was filed may make objection to such finding in writing

> within three (3) days of receipt by the candidate of notice of such finding." (Emphasis added.)

The foregoing provisions are plain and unambiguous, and the emphasized portion thereof clearly permits a candidate to file written objections to an election officer's finding that the candidate's declaration of intent is invalid, "within three (3) days of receipt by the candidate of notice of such filing." Nothing in these provisions predicates a candidate's right to file objections upon the timeliness of the notice. The absurdity and injustice of imposing such a condition are abundantly clear, particularly in light of our previous conclusion that an election officer is not bound to determine the validity of a declaration of intent within three days of its filing, but is required to do so within a reasonable period of time. Thus, in our opinion, irrespective of when a candidate receives notice that an election officer has determined such candidate's declaration of intent to be invalid, the candidate has three days after receipt of such notice to file written objections to the election officer's determination.

Before proceeding to your final question, a caveat is in order. Again, we believe the three-day period specified in K.S.A. 25-308(b) are mandatory upon the candidate. Although we are unaware of any case law precisely on point, we note that subsection (f) of that statute has been strictly construed against a candidate by our Supreme Court. That subsection provides:

> "(f) All mandamus proceedings to compel an officer to certify and place upon the ballot any name or names, and all injunction proceedings to restrain an officer from certifying and placing upon the ballot any name or names, must be commenced not less than thirty (30) days before the election."

The Court stated in Hiett v. Brier, 2 Kan. App. 2d 610 (1978):

> "It is obvious that the time limit in which to commence mandamus and injunction proceedings has as its primary purpose the speedy resolution of election contests. To permit untimely actions to delay and impede the orderly election process would be to defeat that purpose." (Citing Miller v. Clark, 62 Kan. at 288.) Id. at 614.

By this same rationale, it must be concluded that the three-day period for filing a candidate's objections is mandatory,

and failure to comply precludes a candidate from challenging a determination that his or her declaration of intent is invalid.

Your final question is predicated on the assumption that an election officer has determined a declaration of intent invalid subsequent to the certification of candidates, as prescribed by K.S.A. 25-209. Under those circumstances, you ask what steps should be taken by the election officer.

K.S.A. 25-209 provides as follows:

> "As soon as possible after the filing deadline, the secretary of state shall certify to each county election officer the name and post-office address of each person who has filed valid nomination petitions or a declaration of intent to become a candidate for United States senator or representative or for state office, together with the designation of the office for which each is a candidate and the party or principle which the candidate represents.
>
> "The county election officer shall forthwith, upon receipt thereof, publish for three (3) consecutive weeks in the official paper, a notice which shall set forth under the proper party designation, the title of each national, state, county and township office any part of the district of which is in the county, the names and addresses of all persons certified by the secretary of state as candidates for any national or state office any part of the district of which is in the county and, in addition thereto, the names and addresses of all persons from whom valid nomination papers or declarations have been filed in the county election officer's office, giving the name and address of each, the day of the primary election, the hours during which the polls will be open and stating that the primary election will be held at the regular voting places. Where such voting places are not well established and customarily known the published notice herein provided for shall give the location of such voting places." (Emphasis added.)

The situation you posit would most likely occur where, for example, a candidate for a state office waits until the last few days before the filing deadline to file a declaration of

candidacy. On the one hand, the secretary of state is directed by K.S.A. 25-208a to determine the validity of the declaration within three days of its filing. On the other hand, pursuant to K.S.A. 25-209 the secretary of state, "[a]s soon as possible after the filing deadline," must certify the candidates for state and national offices to the various county election officers. Under these circumstances, the likelihood of certifying a candidate whose declaration of intent is invalid is enhanced because of the competing time constraints.

We note that the duty of the secretary of state under K.S.A. 25-209 is certify candidates who have filed "valid" nomination papers or declarations of intent. The thrust of your request, then, is the effect of an erroneous certification, due to the discovery, after the certification, that a candidate's declaration of candidacy is invalid.

This question is not susceptible of a precise answer. However, we begin with the proposition that "[o]fficials have an implied legal duty to undo any actions they have taken in violation of a statute or ordinance." 67 C.J.S. Officers §201, citing Parks v. Board of County Com'rs of Tillamook County, 11 Or. App. 177, 501 P.2d 85, 68 A.L.R.3d 138 (1972). Thus, we believe that, where the secretary of state has erroneously certified a candidate, pursuant to K.S.A. 25-209, as having filed a valid declaration of intent, the secretary of state has an implied legal duty to correct the error when it is discovered. Beyond this, however, we cannot provide you with any firm guidelines, because of the hypothetical nature of your question.

In the absence of a clear set of factual circumstances, it would be inappropriate for us to speculate as to your proper course of action and the legal consequences thereof. It should be obvious that the legal considerations attending an erroneous certification that is discovered and corrected within a day or two after certification are different from the legal considerations required where, for example, the error is not discovered until after all of the required publications of the notice of election have been made. While there is substantial case law in Kansas regarding irregularities in elections, in general, and irregularities in notices of elections, in particular, these decisions turn upon the facts and circumstances of each case, and we are unable to provide you with any generally applicable rules for proceeding when an erroneous certification is discovered. This is particularly true where the erroneous certification is a result of an invalid declaration of intent, where the invalidity thereof is not determined within three days of its filing. As we previously advised, a declaration of candidacy's invalidity

must be determined within a period of time after its filing that is reasonable under all the attending facts and circumstances. Accordingly, in the absence of any such facts and circumstances, we are unable to reach a definitive conclusion regarding your proper course of action and the legal consequences thereof.

Very truly yours,

Robert T. Stephan
Attorney General of Kansas

W. Robert Alderson
First Deputy Attorney General

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