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ATTORNEY GENERAL OPINION NO. 90- 120

David R. Heger
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Re: Elections -- Recall of Elected Officials -- Grounds for Recall; Sufficiency; Alleged Violation of the Kansas Open Meetings Act; Petition; Change in Boundaries of County Commission District

Synopsis: A recall petition states sufficient grounds under K.S.A. 1989 Supp. 25-4302 if that petition contains an allegation and sufficient information concerning a public official's alleged willful violation of the Kansas open meetings act (KOMA), K.S.A. 75-4317 et seq. The election district referred to in K.S.A. 1989 Supp. 25-4320 and 25-4325 is the district which currently exists and which the local elected official now represents. The election officer should review the petition in light of the district as it exists rather than as it existed prior to redistricting under K.S.A. 19-204. Cited herein: K.S.A. 19-204; 25-4301; 25-4317; 25-4318; K.S.A. 1989 Supp. 25-4320; 25-4325; K.S.A. 25-4317.

* * *

Dear Mr. Heger:

As Miami County Counselor you request our opinion on a recall matter involving a county commissioner. You ask that we address the following issues:

"1. When the boundaries of a commissioner's district have been altered after the election of the commissioner, should the commissioner face recall from the district that existed at the time of election or the district that exists at the time of the recall petition?

"2. When a district has been realigned pursuant to K.S.A. 19-204, how should the County Election Officer compute the number of signatures needed to satisfy the 40% requirement of K.S.A. 25-4325?

"3. Is the language of a proposed recall petition sufficient if misconduct is alleged due to a specific violation of the Kansas Open Meetings Act, in spite of the language of the petition being misleading or inaccurate?"

K.S.A. 25-4301 et seq. set forth the procedures involved in the recall of an elected official. Pursuant to K.S.A. 1989 Supp. 25-4302, before a petition for recall is circulated, it must state sufficient grounds for a recall. The county or district attorney determines the sufficiency of the grounds stated in a recall petition involving most local elected officials. The grounds stated in the petition in issue allege a violation of K.S.A. 75-4317 et seq., the Kansas open meetings act (KOMA). The alleged violation involves a county commissioner and failure to provide notice of a specific meeting.

The county election officer questions the sufficiency of the grounds in this petition because the county commissioner has not been "charged" for violation of the KOMA by the Attorney General or the county attorney and because the statement concerns a general failure to notify the public and press. We have been informed that the Miami county attorney has previously approved the sufficiency of the grounds stated in the petition. Those grounds specifically state, "on August 8, 1990, Mr. Zakoura violated the Kansas open meetings act by participating in a meeting on financing a new county courthouse and jail building, and not notifying the public or making this meeting available to the newspapers as to keep the public informed."

As you are aware, the KOMA does not require notification of public meetings to the general public or newspapers, unless such entities or individuals have requested notification. The petition in question does not discuss whether notification was requested. We must determine whether this omission causes the petition to lack sufficient grounds.

Unger v. Horn, 240 Kan. 740, 743 (1987), discusses the issue of recall petitions alleging violation of the KOMA: "An allegation in a petition for recall that a public official willfully violated the Kansas Open Meetings Act is a legally sufficient claim of misconduct and may subject the public official to a recall election." It is not necessary that the official be charged by this office or the district or county attorney or convicted of violating the KOMA. Rather, if the petition contains sufficient information concerning the alleged violation of the KOMA, the electors become the decision-makers and may decide for themselves the truth or falsity of the allegations contained in the recall petition. While we might prefer more specific information in the petition in question, it appears to imply that notification of meetings was requested and therefore it contains sufficient information concerning the alleged misconduct. We therefore do not take issue with the county attorney's decision concerning the sufficiency of grounds stated in this recall petition.

After the county attorney determines that the alleged grounds for recall of a local elected official are sufficient, recall of a local elected officer proceeds pursuant to K.S.A. 25-4318 et seq. The correct contents and procedures for such a recall petition are set forth at K.S.A. 1989 Supp. 25-4320:

"(a) Each petition for recall of a local officer shall include: (1) The name and office of the local officer sought to be recalled; (2) the grounds for recall described in particular in not more than 200 words; (3) a statement that the petitioners are registered electors of the election district of the local officer sought to be recalled; (4) the names and addresses of three registered electors of the election district of the officer sought to be recalled who shall comprise the recall committee; (5) the statement of warning required in K.S.A. 25-4321, and amendments thereto; and (6) a statement

that a list of all sponsors authorized to circulate recall petitions for such recall may be examined in the office of the county election officer where the petition is required to be filed. Each sponsor shall be a registered elector of the election district of the local officer sought to be recalled and of the county in which such sponsor circulates the petition. . . ." (Emphasis added).

K.S.A. 1989 Supp. 25-4325 discusses who should sign a recall petition:

"Before being filed, each petition shall be certified by an affidavit by the sponsor who personally circulated the petition. The affidavit shall state in substance that (a) the person signing the affidavit is a sponsor, (b) the person is the only circulator of that petition or copy, (c) the signatures were made in such person's actual presence, (d) to the best of such person's knowledge, the signatures are those of the persons whose names they purport to be, (e) the person circulated the petition in the manner provided by this act and (f) the person signing the affidavit, being duly sworn, on oath states that the statements of grounds for recall contained in the recall petition are true. In determining the sufficiency of the petition, the county election officer shall not count signatures on petitions not properly certified. The recall committee may file the petition only if signed by registered electors in the election district of the local officer sought to be recalled equal in number to not less than 40% of the votes cast for all candidates for the office of the local officer sought to be recalled in the last general election at which a person was elected to such office. If more than one person was elected to such office at such election the number of signatures required shall be equal to not less than 40% of the votes cast at such election for all

candidates for the office divided by the number of persons elected to such office." (Emphasis added).

You inform us that after the last county commission election all the commission districts were reorganized pursuant to K.S.A. 19-204. As a result of these boundary changes the commissioner in question now represents an area which contains precincts that were previously part of all three commission districts. The election officer of your county questions whether the recall petition should be accepted from electors from the old district or from residents of the realigned district. You have advised her to accept petitions from the present district as it now exists. We concur with that advice.

Questions concerning who may sign recall petitions are ordinarily governed by express provision. 63A Am.Jur.2d Public Officers and Employees, § 200 (1984). K.S.A. 1989 Supp. 25-4320(a) states that each petition shall include "a statement that the petitioners are registered electors of the election district of the local officer sought to be recalled. . . ." (Emphasis added). K.S.A. 1989 Supp. 25-4325 refers to a petition "signed by registered electors in the election district of the local officer sought to be recalled." (Emphasis added). The language in the statutes does not address previous election districts. You inform us that one of the previous district's precincts has already cast votes in this year's primary election for another commissioner district. This further emphasizes the fact that the "election district" refers to the district as it now exists.

While the district boundaries have been altered, the district continues to exist. The form has changed from the time the county commissioner was elected. However, there is still a specific district which the elected official represents. Thus, it is our opinion that the election district referred to in K.S.A. 1989 Supp. 25-4320 and 25-4325 is the one which currently exists and which the local official in question now represents. To hold otherwise would allow recall of an elected official by individuals who now cannot vote to fill that official's position.

The final issue you ask that we address concerns computation of the 40 percent requirement set forth at K.S.A. 1989 Supp. 25-4325. The statute requires the number of signers of the petition to be "equal in number to not less than 40 percent of the votes" cast in the last general election. You ask whether

that 40 percent should be the total votes cast for the third district commissioners in 1988 general election or 40 percent of the total votes cast for commissioner in the last general election held in the various precincts that now compose the reorganized third district. You favor basing the percentage upon the total votes cast in the precincts that now compose this commissioner's district because those voters are the current constituents affected by the commissioner's actions.

"The qualifications of persons who may sign a petition for an election are determined by statute authorizing the presentation of the petition." 26 Am.Jur.2d Elections § 190 (1966). The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute. State v. Adee, 241 Kan. 825, 829 (1987). Where the language of the statute is plain and unambiguous, that language controls. Barber v. Williams, 244 Kan. 318, 324 (1989). K.S.A. 1989 Supp. 25-4325 clearly states that the petition may be filed "only if signed by registered electors in the election district of the local officer sought to be recalled. . . ." (Emphasis added). There is a presumption that legislation is enacted in light of and with the knowledge of other statutory provisions. City of Lenexa v. Board of County Commissioners of Johnson County, 237 Kan. 782 (1985).

County commission districts may change boundaries pursuant to K.S.A. 19-204. When this occurs, the districts continue to exist, but the precincts making up those districts may be altered. K.S.A. 19-204 was originally enacted in 1901 and was last amended in 1981. K.S.A. 1989 Supp. 25-4325 was enacted in 1976 and was last amended in 1987. It does not address the situation which necessarily occurs when a district has changed boundaries following the last general election. However, we may presume that in enacting K.S.A. 1989 Supp. 25-4325 the legislature was cognizant of the provisions of K.S.A. 19-204.

On its face, K.S.A. 1989 Supp. 25-4325 provides that the signators must be registered electors of the election district and refers to the last general election at which the person to be recalled was elected. It does not provide for or address subsequent changes in the boundaries of election districts. We must therefore conclude that K.S.A. 1989 Supp. 25-4325 refers to registered electors from and elections occurring in the election district as it now exists. Thus, the election officer should review the petition in light of votes cast from and elections conducted in the district as it now exists.

In summary, a recall petition states sufficient grounds under K.S.A. 1989 Supp. 25-4302 if that petition contains an allegation that a public official willfully violated the Kansas open meetings act (KOMA), K.S.A. 75-4317 et seq. and sufficient factual information supporting such an allegation. The election district referred to in K.S.A. 1989 Supp. 25-4320 and 25-4325 is the district which currently exists and which the local elected official now represents. The election officer should review the petition in light of the district as it exists now rather than as it existed prior to redistricting under K.S.A. 19-204.

Very truly yours,


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