

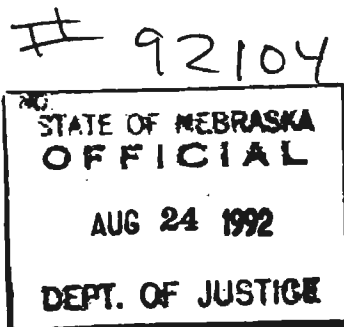


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DATE: August 24, 1992

SUBJECT: Initiative Petitions; Do particular problems with the petition certifications on initiative petitions invalidate the signatures on those petitions?

REQUESTED BY: Allen J. Beermann, Nebraska Secretary of State

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

Two groups of individuals have now filed petitions with your office pursuant to Neb.Rev.Stat. § 32-704 (Cum. Supp. 1990) in order to put certain initiative measures on the November general election ballot in Nebraska. Apparently, in your review of those petitions for validity, certain problems have arisen concerning the notarization of petition circulators' signatures and other matters of form. Therefore, you have requested our opinion on numerous questions concerning the effect of form and notarization errors on the validity of initiative petitions. Under Section 32-704, you must determine the validity and sufficiency of those petitions in order to decide whether the initiative measures in question should be placed on the general election ballot in November.

We will deal specifically with each of your questions in turn. However, before we consider those questions directly, we would review the law in Nebraska dealing with initiative measures in general.

In Nebraska, "[t]he right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." State ex rel. Brant v. Beermann, 217 Neb. 632, 636, 350 N.W.2d 18, 21 (1984). As a result,

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[p]rovisions concerning the initiative, the legislative power reserved to the people, should receive liberal construction to effectuate the policy proposed and adopted by the initiative as a part of the democratic process.

Id. The constitutional right of initiative should not be circumscribed by restrictive legislation, or a narrow or strict interpretation of the statutes pertaining to its exercise. State ex rel. Morris v. Marsh, 183 Neb. 502, 162 N.W.2d 252 (1968). In keeping with this policy of liberal construction of statutes to effectuate the initiative process, Section 32-705 (5) specifically provides that, "[c]lerical and technical errors in a[n] [initiative] petition shall be disregarded if the forms prescribed in this section are substantially followed." We will now consider each of your specific questions in the context of this clear public policy in favor of effectuating the right of initiative.

Neb.Rev.Stat. §§ 32-703, 32-704, and 32-713 (Reissue 1988 and Cum. Supp. 1990) deal with the form of petitions for initiative measures and the requirements placed upon petition signers. In addition to those provisions, Section 32-705, as amended by LB 424 in 1992, adds a requirement that an notarized affidavit executed by the petition circulator and certifying certain matters must be attached to the petition signatures in each case. Most of your questions deal with problems in the circulator certification attached to the petitions presented to you. We will first deal specifically with each of the questions you presented and discuss the effect of the problem upon the circulator certification. We will then discuss generally how those various problems impact the validity of the petition signatures and the petitions themselves, since you need to know if each specific problem described in any way invalidates the signatures of the petition signers on the particular petition in question. In each case, we will quote your precise question, and give our response.

1. "Notary Public forgets or omits to affix notary seal [on the certification for circulators required by Section 32-705]."

The Nebraska cases which in any way consider the effect of the omission of a notary's seal from the notary's certification are contradictory. The older cases seem to indicate that the notary's seal must be present to validate the notary's certification. For example, in Welton v. Atkinson, 55 Neb. 674, 76 N.W. 473 (1898), the Nebraska Supreme Court considered the issue of whether a deposition was admissible where the notary who had authenticated the deposition signed the transcript as a notary but did not affix any impression of his official seal. The court stated that if an

officer is required to attach his official seal to his acts, a certificate unauthenticated by the impression of such seal is invalid. Therefore, the court concluded that the deposition was inadmissible. See also Sheridan County v. McKinney, 79 Neb. 220, 112 N.W. 329 (1907); Byrd v. Cochran, 39 Neb. 109, 58 N.W. 127 (1894). On the other hand, in General Motors Acceptance Corporation v. Sutherland, 122 Neb. 720, 241 N.W. 281 (1932), the court indicated that the omission of a notarial seal from an affidavit is "...not generally fatal." Id. at 723, 241 N.W. at 282.

The general rule in other jurisdictions appears to be that where there is a statute which requires the official acts of a notary to be authenticated with his or her official seal, such acts are void and ineffectual in the absence of the seal. 1A C.J.S. Acknowledgements § 67 a; 66 C.J.S. Notaries § 8 b. In this regard, Neb.Rev.Stat. § 64-107 (Reissue 1990) states, after listing the official duties of notaries,

Over his signature and official seal, he [the notary] shall certify the performance of such duties so exercised and performed under the provisions of this section, which certificate shall be received in all courts of this state as presumptive evidence of the facts therein certified to.

(emphasis added.) The general rule above, when considered with Section 64-107, leads us to conclude that the older cases in Nebraska state the correct rule with respect to the absence of the notary's seal. This is particularly true since the court in the Sutherland case did not discuss the earlier cases or the notary statute which existed at that time. As a result, we believe that the notary's certification is invalid on the certification for the petition circulator where the notary did not affix his official seal to the petition. We will discuss the effect of that situation upon the validity of the signatures contained on that petition page subsequently.

2. "The Notary Public affixes their notary seal [on the certification for circulators required by Section 32-705], but fails to sign as a notary."

With respect to this deficiency, the general rule appears to be that the signature of a notary is needed in order to validate the notary's certification as an official act. For example, in Holmes v. Crooks, 56 Neb. 466, 76 N.W. 1073 (1898), the court indicated that the jurat portion of an affidavit and the affidavit itself were invalid where the notary affixed his official seal but neglected to sign the instrument. See also Advance-Rumely Thresher

Co. v. Wagner, 29 F.2d 984 (8th Cir. 1928); Bank of Weiner v. Jonesboro Trust Co., 168 Ark. 859, 271 S.W. 952 (1925); Davis v. Hale, 114 Ark. 426, 170 S.W. 99, (1914); 1A C.J.S. Acknowledgements § 66 a. Consequently, we believe that the circulator certification on the initiative petition is invalid in the instance where the notary did not sign the certification but only affixed his or her official seal.

3. "Notary Public in the jurot [sic] or certification clause [of the certification for circulators] indicates that 'the act of notarization is taking place, for example, in Lincoln, Nebraska, however in the venue the Notary Public indicates the county where the petitions came from rather than that county where the act of notarization occurred."

In our opinion found at Report of the Attorney General, 1967-1968, No. 160 at 240, we considered this precise question. We concluded at that time that, where the notary public in question was a general notary with authority to act statewide, ". . . a page of a petition is not defective solely because the page was signed outside the jurisdiction of venue." Id. at 244. Our determination in that opinion was based upon several Nebraska cases dealing with affidavits involving absentee ballots which suggested that a difference between the venue of an affidavit and the place of execution was not, by itself, defective if the officer before whom the authentication was made had authority in the jurisdiction of venue. We have reviewed our conclusion in that earlier opinion, and continue to believe that it is correct. Since we presume that the notary in the present instance was a general notary with authority to act statewide, we believe that the circulator certification in question was not defective.

4. "A page or pages of petitions are duly signed by voters and a circulator, for example, on June 6, 7 and 8, the notary public when notarizing the signature of the circulator in the attestation clause places the month of May 1992. Result it appears the notarization appeared a month before signatures were affixed."

The date as stated in a certificate of acknowledgement is not regarded as a material fact, and a certificate otherwise sufficient will not be rendered void by a mistake in the date. Hernett v. Meier, 173 N.W.2d 907 (N.D. 1970); 1A C.J.S. Acknowledgements § 62. Given this general rule, it seems to us that this mistake could be considered a technical or clerical error under Section 32-705, and thus, the circulator certification in question would not be voided. However, as discussed below, you may wish to ask for some additional evidence with respect to this petition.

5. Various pages of signatures contain the dates and signatures of signers, for example, April 12 through the 16th, on the first 7 or 8 lines of the petition page. The circulator and notary then notarize that page on April 16, then for some reason, that page is again circulated and signatures begin to appear on line 9 to line 20 with dates in June or July."

With respect to this particular problem, it seems to us that the circulator certification would be valid for those signatures taken in April. However, there would be no valid circulator certification for those signatures obtained in June and July. You may wish to ask for additional evidence as to those signatures, as discussed below.

6. "In some instances the circulator or the notary (we are not sure which) indicated in the attestation clause that the petition page contained, for example, 18 signatures when in fact that particular page only contained 11 signatures. In this a fatal error, thus disenfranchising [sic] all the signers on a given page?"

In light of the policy favoring liberal interpretation of the statutes dealing with the initiative rights of the people noted above, we believe that this situation involves a clerical or technical error under Section 32-705 which does not disenfranchise all the petition signers on a particular page.

7. "(This is not a notary problem.) On a given petition page signers dated on line 1-4, for example, their signatures April 21 and 22. On lines 5, 6, 7, the signers affixed in front of their signature, April 26 and 27, then following on lines 8 through 16 or even 20, the dates appear once again, April 21 and 22. Absent fraud, even though the dates are obviously out of sequence. Should the signatures be counted valid?"

Again, we believe that this situation involves a clerical or technical error under Section 32-705, and we do not believe the petition in question is invalid. The signatures should be counted, assuming the other aspects of the petition are proper.

8. "Several circulators began circulation of petition pages and obtained signatures prior to the time that they, the circulator became a registered voter. Does this situation become fatal to all of the signatures gathered by that circulator who was in fact not a registered voter when he or she, the circulator obtained signatures?"

Section 32-705, as amended by LB 424 in 1992, requires a petition circulator to execute an affidavit which states that he or she is a registered voter in Nebraska. Moreover, circulation of an initiative petition if one is not a registered voter can constitute a felony. See Neb.Rev.Stat. § 32-713 (Reissue 1988). As a result, the Nebraska statutes contemplate that petition circulators must be registered voters, and we believe that all signatures obtained by individuals who are not registered voters prior to the time that they become registered voters are invalid and should not be counted.

It could be argued, in this regard, that a requirement that initiative petitions must be circulated by registered voters unconstitutionally impinges upon the right of initiative. However, the legislature may enact reasonable legislation in connection with the initiative and referendum process so as to prevent fraud and to render intelligible the purpose of the proposed law or constitutional amendment. State ex rel Winter v. Swanson, 138 Neb. 597, 294 N.W. 200 (1940). It seems to us that requiring petition circulators to be registered voters could well help prevent fraud by providing handwriting samples, records of circulators, etc. Indeed, in Libertarian Party of Nebraska v. Beermann, 598 F.Supp. 57 (D. Neb. 1984), the court indicated that requiring petition circulators for petitions seeking a new political party to be registered voters was a valid use of the state's police power to prevent fraud and misrepresentation among petition circulators. In a similar fashion, we believe that requiring petition circulators to be registered voters in the present instance serves a legitimate state purpose, and is constitutional.

Finally, we would turn to a discussion of the validity of petition signatures on a particular petition when its circulator certification is invalidated for some reason. In response to several of your questions above, we have indicated that, in our view, the circulator certification is invalid. Therefore, you need to know, for purposes of putting the particular initiative measure on the ballot, if the signatures on such a problem petition are invalidated along with the circulator's certification.

Courts in several jurisdictions have indicated that when there are irregularities in circulator certifications or their notary attestations in connection with petition efforts, those irregularities simply destroy the prima facie presumption of validity which attaches to the petition signatures on a properly certified petition, and the burden of proof with respect to the validity of the signatures is then shifted to their proponents. The signatures in question are not null and void, but may be reinstated upon proper proof. United Labor Committee of Missouri v. Kirkpatrick, 572 S.W.2d 449 (Mo. 1978); Direct Sellers

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Association v. McBrayer, 109 Ariz. 3, 503 P.2d 951 (1973); Oklahomans for Modern Alcoholic Beverage Controls v. Shelton, 501 P.2d 1089 (Okla. 1972); Whitman v. Moore, 59 Ariz. 211, 125 P.2d 445 (1942).

Our own supreme court seems to have adopted this rule in Barkley v. Pool, 103 Neb. 629, 173 N.W. 600 (1919). In that case, the circulators of several referendum petitions were found to have acted fraudulently, and the trial court held that all petition certificates for those circulators were impeached and unworthy of credence. The trial court, therefore, refused to count the signatures on the petitions circulated by those circulators when no further evidence was presented as to the genuineness of any of the signatures in question. The Nebraska Supreme Court affirmed the trial court's decision, and stated the rule as follows:

As the circulator of a petition is the agent of the signer, and his oath is the only evidence of the genuineness of the signature, it follows as a matter of course that, where he is shown to have acted fraudulently, the value of his verification is destroyed, and the petition must fall, unless the genuine signatures are affirmatively shown.

Id. at 635, 636, 173 N.W. at 602 (emphasis added).

On the basis of this precedent, we believe that when there are problems with petition certifications, those problems simply remove the presumption of validity that attaches to a properly certified petition. For example, such would be the case in the instance noted above where the notary failed to affix his seal to the circulator certification. In the absence of any additional proof as to the genuineness of the signatures on the petition in question, they should not be counted. However, proponents of those signatures could come forward with additional evidence to establish that they are authentic. In that event, they could be counted even though the petition certification is bad.

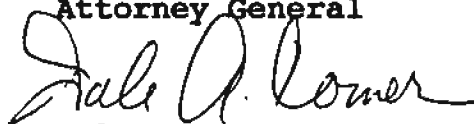
We would also note that, in our view, you have authority as Secretary of State to consider additional evidence concerning the validity of particular signatures on a petition where there is a problem with the petition certification. Under Section 32-704 (3), when a petition is presented to you for filing, you shall, with the aid and assistance of the county clerks and election commissioners, ". . . determine its validity and sufficiency." It seems to us that this language gives you the authority to consider additional evidence as to the validity of signatures. Moreover, the certifications which are returned to you from county clerks and election commissioners may provide some of that additional

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evidence. As a result, a problem with a petition certification such as those notarial problems discussed above does not necessarily invalidate all of the petition signatures on that document. Proponents of those signatures may submit affidavits or other evidence to you to help you determine the "validity and sufficiency" of that petition.

Sincerely yours,

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Approved by:


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