

OFFICIAL OPINION NO. 89-01, Requirements for petitions to change the number of county commissioners

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Craig Thompson
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OFFICIAL OPINION NO. 89-01

Requirements for petitions to change the number of county commissioners

Dear Mr. Thompson:

You have requested an official opinion relating to the following factual situation:

FACTS:

Pursuant to the provisions of SDCL 7-8-3, a number of Clay County residents wish to change the number of county commissioners from the current number of three (3) to five (5). Fifteen (15) percent of the registered voters of Clay County petitioned the Board of County Commissioners for the increase. Following the submission of said petition in April of 1988, however, a number of the signatures were found to be duplicated and thereby invalidated. Consequently, the number of actual signatures fell below the statutorily required fifteen (15) percent. As a result, the change of commissioners question was not submitted to a vote of the county at the "next primary election" which transpired on June 7, 1988. Subsequent to June 7, 1988 additional signatures have been collected and the actual signatures now exceed the statutorily required fifteen (15) percent.

QUESTIONS:

1. Since the change in county commissioners question was not submitted to a vote of the voters of Clay County at the "next primary election", do the persons gathering signatures for the petitions need to collect further signatures in order to obtain the necessary percentage of registered voters desiring such a change?

2. May the revised petition, including signatures obtained after the June 7, 1988 primary election, be allowed to "carry over" until the next primary election which is to take place in 1990?

3. May circulators of petitions be paid to carry petitions?

4. Does the fact that a petition was not signed by the person who actually circulated the petition invalidate the petition?

5. May a person who has signed a petition have his name removed therefrom after he has signed and, if so, for how long does a petitioner have such right of withdrawal?

IN RE QUESTIONS NO. 1 AND NO. 2:

SDCL 7-8-3 provides:

The number of county commissioners of any county may be increased to five or reduced to three. If fifteen percent of the registered voters of the county, based upon the total number of registered voters at the last preceding general election, petition the board of county commissioners for an increase or decrease in the number of county commissioners, the board shall submit the question to a vote of the voters of the county at the next primary election. Notice of the submission of such questions shall be given in the notice of such primary election. (Emphasis added.)

It is clear from the foregoing statutory language that the Board of County Commissioners must submit this type of question to the voters of the county at the "next primary election" which follows the proposal of said question. From the facts that you have presented, it would appear that the original signatures obtained for this petition would now be invalidated due to the fact that the petition which they proposed to the Board of County Commissioners was not suitable to be submitted to the voters of the county at the primary election on June 7, 1988. The reason the proposal was not submitted on June 7 was because it was determined that there were not enough valid signatures to require submission of the question to the voters. As a result, the petition to which these signatures attached became a nullity.

The signatures obtained after the June 7 primary election, however, should be allowed to "carry over" because they attached to a new proposal which sought to change the number of county commissioners. In fact, these signatures, if accurate, could be applied to a similar petition which could be presented to the Board of County Commissioners for submission to

the voters at the next primary election. It should be noted that the specific number of required petitioners may have changed since the original petition drive was initiated in April of 1988 because a general election has transpired in the interim.

In light of the foregoing, it being understood that the signatures originally submitted for the June 7, 1988, primary are no longer valid for any purpose, the answer to your first question would be "Yes," to the extent that additional signatures must now be obtained in order to have the statutorily required number of persons desiring such a change based upon the total number of registered voters at the recent general election. Furthermore, the answer to your second question is also "Yes," only to the extent that the signatures obtained subsequent to the June 7 primary election are valid and are subject to the review of the Clay County Board of County Commissioners at some point prior to the next primary election.

IN RE QUESTION NO. 3:

Next you address the question of whether circulators of petitions may be paid to carry the petitions in light of recently enacted SDCL 2-1-13.

This Office recently opined that the statutory prohibition against paid circulation of initiative or referendum petitioners contained in SDCL 2-1-13 was indirectly invalidated by the United States Supreme Court's holding in Meyer v. Grant, ___ U.S. ___, 108 S.Ct. 1886 (1988). See, Attorney General Opinion 88-50. In Meyer, the United States Supreme Court held that a Colorado statute which prohibited the payment of petition circulators imposed a burden on political expression which the State failed to adequately justify. Meyer, 108 S.Ct. at 1895. Thus, the answer to your third question is "Yes", circulators may be paid to carry petitions despite the provisions of SDCL 2-1-13.

IN RE QUESTION NO. 4:

SDCL 7-18A-12 provides:

Each person who has circulated a petition shall, before filing the petition, attach his affidavit, signed under oath, which shall state that he and each of the persons who signed the petition is a qualified voter of the county. One or more pages of signatures may be attached to a single affidavit. (Emphasis added.)

It is clear from the foregoing statutory language that a circulator of a petition must sign and attach an affidavit thereto. See also, SDCL 2-1-10.

The South Dakota Supreme Court has held that failure to attach an affidavit, signed under oath, renders the signatures on such a petition invalid. *Corbly v. City of Colton*, 278 N.W.2d 459, 462 (S.D. 1979). Thus, the answer to your fourth question is "Yes," petitions which were circulated but not attested to by the circulator are invalid and the signatures thereon should not be applied toward the statutory requirement of signatures.

IN RE QUESTION NO. 5:

There are no applicable statutory provisions which establish the right of a person who has signed a petition to withdraw their name from such petition. It has been held, however, that there are instances in the absence of statute which would permit signers of a petition to withdraw their names if they acted in a timely manner. *Healey v. Rank*, 82 S.D. 54, 140 N.W.2d 850, 851-852 (1966). Other jurisdictions have set forth that the period for timely withdrawal ends with the filing of the petition before the body authorized to receive it. *Knowlton v. Hezmalhalch*, 89 P.2d 1109, 1113 (Cal. 1939); see also, *Annot.*, 27 A.L.R.2d 604 (1953). In any case, withdrawals may not occur after a petition has been acted upon by the authorized body. *Jefferson Highway Transp. Co. v. St. Cloud*, 155 Minn. 463, 193 N.W. 960 (1923).

In the case at hand, it would seem that precedent in this State establishes that once the petition is submitted to the county auditor and forwarded to the Board of County Commissioners, any attempt to withdraw names from such a petition would be untimely. See, *Healey*, 140 N.W.2d at 852. Consequently, a person who had signed the petitions in question would have a right to withdraw their name prior to the submission of the petitions to the Clay County Board of County Commissioners but would not have such a right thereafter.

Respectfully submitted,

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