

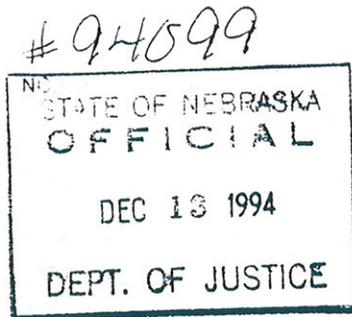


STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
 LINCOLN, NEBRASKA 68509-8920
 (402) 471-2682
 TDD (402) 471-2682
 CAPITOL FAX (402) 471-3297
 1235 K ST. FAX (402) 471-4725

DON STENBERG
 ATTORNEY GENERAL

L. STEVEN GRASZ
 SAM GRIMMINGER
 DEPUTY ATTORNEYS GENERAL



DATE: December 12, 1994

SUBJECT: Correction of Technical Errors in Amendments to the Nebraska Constitution Proposed by Initiative Petition of the People

REQUESTED BY: E. Benjamin Nelson
 Governor of Nebraska

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

At the general election on November 8, 1994, the people of the State of Nebraska approved amendments to the Nebraska Constitution which impose term limits on various state and federal officials. Those term limit amendments were proposed through an initiative petition effort of the people.

In your opinion request letter, you state that the petition language implementing constitutional term limits contains technical errors with regard to the placement of appropriate constitutional sections. Those errors are apparently acknowledged by the individuals who drafted the original petition. You then point out that *Neb. Rev. Stat. § 32-712 (1993)* requires you, as Governor, to proclaim, within 10 days of the completion of the Board of State Canvassers meeting, that any initiative measures which are approved by the voters of the state are in full force and effect as the law of the State of Nebraska. In connection with that proclamation process, you ask for our opinion as to whether:

. . . these technical errors [in the constitutional amendments proposed by initiative petition] can be corrected and who has the proper legal authority to cure

David K. Arterburn
 L. Jay Bartel
 J. Kirk Brown
 David T. Bydalek
 Laurie Smith Camp
 Delores N. Coe-Barbee
 Dale A. Comer

James A. Elworth
 Lynne R. Fritz
 Royce N. Harper
 Lauren Lee Hill
 Jay C. Hinsley
 Amy Hollenbeck
 William L. Howland

Marilyn B. Hutchinson
 Kimberly A. Klein
 Joseph P. Loudon
 Charles E. Lowe
 Lisa D. Martin-Price
 Lynn A. Melson
 Fredrick F. Neid

Marie C. Pawol
 Kenneth W. Payne
 Alan E. Pedersen
 Paul N. Potadle
 James D. Smith
 James H. Spears
 Mark D. Starr

John R. Thompson
 Barry Waid
 Terri M. Weeks
 Alfonza Whitaker
 Melanie J. Whittamore-Mantzios
 Linda L. Willard

Governor E. Benjamin Nelson
December 12, 1994
Page -2-

them. If your conclusion is that I have such authority, may the technical corrections be made in the proclamation? If I cure these errors and a lawsuit is subsequently filed against me for making the corrections, will you represent me in any such action?

For the various reasons discussed below, we do not believe that you have the authority to correct the technical errors in the petition as a part of your proclamation duties under § 32-712. However, we do believe that such errors may be cured as a part of the duties of the Nebraska Secretary of State and the Revisor of Statutes.

The technical errors described in your letter involve the amendments approved for Art. III, § 8, Art. IV, § 3 and Art. VII, § 15 of the Nebraska Constitution, which amendments generally impose term limits upon Nebraska legislators, state constitutional officers and state educational officers. In each of those amendments, the term limiting paragraph ends with language which makes the officer in question unable to serve in or ineligible to file for the office involved for a specified period after the expiration of the second of two consecutive terms "and as further provided in Article XV Section 20." Article XV, Section 20 of the Nebraska Constitution, as amended through the same petition effort in November, 1994, applies to federal officers. Article XV, Section 21 of the 1994 petition amendments, on the other hand, applies to the appointment of state officers. As a result, it appears clear that the reference to "Article XV Section 20" in the amendments at issue should actually be a reference to "Article XV Section 21." You ask if you can make that change in your proclamation under Section 32-712.

Art. III, § 4 of the Nebraska Constitution provides that an initiative measure to amend the Constitution "shall take effect upon proclamation by the Governor which shall be made within ten days after the official canvass of such votes." Moreover, the pertinent portions of Section 32-712 provide:

The board of state canvassers shall canvass the votes upon each initiative or referendum measure in the same manner as is prescribed in the case of presidential electors. The Governor shall, within ten days of the completion of the canvass, issue his or her proclamation giving the whole number of votes cast in the state approving and rejecting each measure and declaring such measures as are approved by the constitutional number or majority of those voting to be in full force and effect as the law of the State of Nebraska from the date of such proclamation.

Therefore, the Governor's task under the Constitution and Section 32-712 is to declare, proclaim or publish the results of elections where initiative or referendum measures are proposed by the people.

Nebraska cases indicate that the election process is not complete until the election results are canvassed and declared according to law. *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 45 N.W.2d 122 (1950). In addition, constitutional amendments by initiative become effective, as noted above, upon certification by the Board of State Canvassers and proclamation by the Governor. Art. III, § 4, Constitution of Nebraska; *Swanson v. State of Nebraska*, 132 Neb. 82, 271 N.W. 264 (1937). However, the duty of declaring or publishing the results of an election is ministerial in nature. *State v. Elder*, 31 Neb. 169, 47 N.W. 710 (1891); 29 C.J.S. *Elections* § 237 (4); 26 Am. Jur. 2d *Elections* §304. In that regard, the Nebraska Supreme Court has indicated that ministerial acts may be enforced by mandamus since they do not involve judgment or discretion on the part of a state officer. *State ex rel. Ball v. Hall*, 130 Neb. 18, 263 N.W. 400 (1935). And, a ministerial act generally is defined as an act which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his or her judgment upon the propriety of the act being done. *Gibson v. Winterset Community School Dist.*, 258 Iowa 440, 138 N.W.2d 112 (1966).

Since the Governor's function in declaring the results of an initiative election under the Constitution and Section 32-712 is ministerial in nature, we do not believe that you have authority to look behind the certification of the Board of State Canvassers to consider any technical defects in the initiative petition itself. In essence, your ministerial task is confined to publishing the results of the initiative election and declaring the initiative measure passed and in effect. Therefore, we believe that your proclamation pursuant to Section 32-712 should reflect the initiative language as presented to the petition signers, and we do not believe that you have authority to correct the technical errors enumerated in your letter.

While we do not believe that the Governor possesses the authority to correct technical errors in initiative petitions in the proclamation mandated by Section 32-712, that authority does rest with the Secretary of State and Revisor of Statutes in connection with the printing of constitutional amendments initiated by the people.

In addition to Section 32-712, *Neb. Rev. Stat. § 32-704* (6) (1993) also deals with procedures subsequent to presentation of an initiative measure to the people:

If any such measure shall, at the ensuing election, be approved by the people, then the copies of the petition filed with the Secretary of State and a certified copy of the Governor's proclamation declaring the same to have been approved by the people shall be identified and preserved. The Secretary of State shall cause every such measure and amendment to the Nebraska Constitution so approved by the people to be printed with the general laws enacted by the next ensuing session of the Legislature with the date of the Governor's proclamation declaring the same to have been approved by the people.

As a result, the Secretary of State has the authority, under Section 32-704 (6), to print amendments to the Nebraska Constitution initiated by the people.¹

The Secretary of State is the keeper of the public records of the State in his office, and it is generally the duty of a recording officer to correct mistakes and to supply omissions in records whenever he discovers them from data in his office. 81 C.J.S. *States* §132; 76 C.J.S. *Records* § 21. In addition, the Secretary of State has broad general authority to enforce the provisions of the election laws under *Neb. Rev. Stat. § 32-1052* (1993). See *State ex rel. Wieland v. Beermann*, 246 Neb. 808, ___ N.W.2d ___ (1994). Those general rules, together with the authority of the Secretary of State under Section 32-704 (6) to print amendments to the Nebraska Constitution subsequent to an election, lead us to conclude that the Secretary of State does have the necessary authority to make the technical corrections in the constitutional amendments in question when they are printed. Those corrections should be included in the printed version of the constitutional amendments at issue.

In addition, *Neb. Rev. Stat. § 49-705* (2) (f) (1993) allows the Revisor of Statutes to "correct faulty internal references" in preparing the statutory supplements and statutory replacement volumes issued periodically by his or her office. Those materials published by the Revisor of Statutes include the provisions of the Nebraska Constitution. Since the technical errors in the term

¹ We would also note that Section 32-704 (6) supports our conclusion that the Governor does not have authority to correct technical errors in initiative petitions in his or her proclamation under Section 32-712. Section 32-704 (6) requires a copy of the original initiative petition to be preserved along with the Governor's proclamation of passage. If the Governor's proclamation contains corrected language for the constitutional amendments instituted by initiative, then the archival copies of those amendments would be inconsistent.

Governor E. Benjamin Nelson
December 12, 1994
Page -5-

limits amendments referenced in your letter involve what are essentially faulty internal references, and since the authority for the Revisor of Statutes in Section 49-705 (2) (f) is not limited, on its face, to statutory provisions, we believe that the Revisor of Statutes, in consultation with the Secretary of State, has the authority to make the technical corrections in the term limits amendments referenced in your letter as those amendments are printed in the proper volume of the Nebraska Statutes.

Apart from the technical errors in the term limits amendments noted in your opinion request letter, we would also point out that there is an additional technical error in that initiative petition. The latter portion of the initiative petition purports to amend Article XV of the Nebraska Constitution by adding new Sections 19, 20, 21 and 22. However, there is currently a Section 19 in Article XV of the Nebraska Constitution which deals with local liquor licenses. Therefore, Sections 19, 20, 21 and 22 in Article XV of the initiative petition must be renumbered when they are placed in the Constitution as Sections 20, 21, 22 and 23 respectively. We believe that the Secretary of State clearly has authority to make that change in numbering as the amendments are printed, since the initiative petition in question itself states in its preamble that: **THE CONSTITUTION OF THE STATE OF NEBRASKA SHALL BE AMENDED AS INDICATED; OR PLACED IN ARTICLES AND SECTIONS AS DETERMINED BY COMPETENT AUTHORITY OF THE STATE AS FOLLOWS.** (emphasis added).² That change will necessitate a further change in numbering in the paragraphs referenced in your letter.

In sum, we do not believe that you have authority to make the technical corrections in the initiative petition referenced in your letter as a part of your proclamation under 32-712, and your proclamation should set out the actual language of the initiative petition. However, the Secretary of State and the Revisor of Statutes should make the necessary technical corrections as the constitutional amendments are printed either in the bound volumes of statutes, in the statutory supplements, or separately. In that regard, we would suggest that the Secretary of State place an appropriate certification with the archival copies of the initiative petition and your proclamation in this instance to explain any changes in numbering in printed versions of the

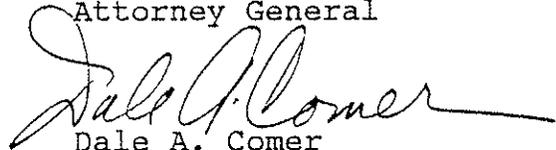
² We believe that this situation lends further support to our conclusion that the Secretary of State may correct the technical errors in the initiative petition described in your letter as the amendments are printed. As a result of the misnumbering in the latter portion of the initiative petition, the numerical references in the paragraphs set out in your letter which cross-reference the wrong constitutional section would have to be changed even if those errors had not occurred.

Governor E. Benjamin Nelson
December 12, 1994
Page -6-

Constitution. It also might be appropriate to place a copy of this opinion with those materials.

Sincerely yours,

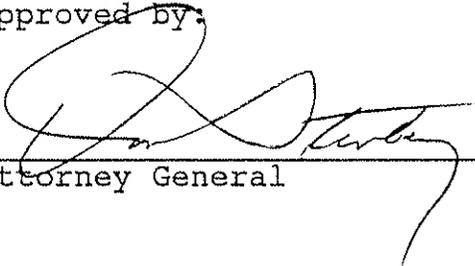
DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

05-26-14.op

Approved by:



Attorney General