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#93051
NO.
STATE OF NEBRASKA
OFFICIAL
JUN 28 1993
DEPT. OF JUSTICE

DATE: June 28, 1993

SUBJECT: Statutory requirements for the registration of petition circulators who circulate initiative and referendum petitions in multiple counties.

REQUESTED BY: Allen J. Beermann
Nebraska Secretary of State

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

Neb. Rev. Stat. § 32-705, among other things, deals with the requirements for circulators of initiative and referendum petitions in Nebraska. Prior to 1992, that section generally required petition circulators to have attained the constitutionally prescribed age, and to be residents and registered voters of the State of Nebraska. Under the pre-1992 version of the statute, circulators circulating petitions outside the county in which they were registered to vote were also required to register with the Secretary of State. Your office then made lists of registered circulators available to the counties for each petition drive in order to facilitate the process of verification that petition circulators met the requirements of the statute.

During the 1992 legislative session, the Nebraska Legislature passed LB 424 which was approved by Governor Nelson on March 26, 1992. LB 424 concerned elections in Nebraska, and the bill amended numerous Nebraska Statutes dealing with elections and election procedures including Section 32-705. With respect to that particular statute, Section 14(4) of LB 424 removed the provision from Section 32-705 which required petition circulators who circulated petitions outside the county in which they were registered to vote to also register with the Secretary of State, and replaced that registration provision with a provision which made knowingly circulating an initiative or referendum petition

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outside the county in which one was registered to vote a misdemeanor. Section 14(5) of LB 424 provided, in turn, that signatures on initiative and referendum petitions secured in a manner contrary to the new requirements for petition circulators should not be counted. In addition to those amendments to Section 32-705, Section 19 of LB 424 contained repealer provisions which specifically repealed the previous version of Section 32-705 including its provisions dealing with registration of petition circulators who circulated petitions in multiple counties.

We believed that those portions of LB 424 which prohibited individuals from circulating initiative and referendum petitions outside the county in which they were registered to vote violated the initiative and referendum rights granted to the people of Nebraska by the Nebraska Constitution. As a result, we brought an original action in the Nebraska Supreme Court seeking to have Sections 14(4) and 14(5) of LB 424 declared unconstitutional. Ultimately, in ***State ex rel. Stenberg v. Beermann***, 240 Neb. 754, 485 N.W.2d 151 (1992), the Court agreed with our position, and stated:

> We hold that § 14(4) of 1992 Laws, L.B. 424, and § 14(5) of the same act, to the extent it is referable to violations of § 14(4), violate Neb. Const. art. III, § 4, by impeding the initiative and referendum process instead of facilitating the process as the Constitution requires.

Id. at 757, 485 N.W.2d at 153. On the basis of this holding, Section 14(4) and the appropriate portion of Section 14(5) of LB 424 from the 1992 Legislative Session are unconstitutional under the Nebraska Constitution, and void from the date of their enactment. ***State v. Bardsley***, 185 Neb. 629, 177 N.W.2d 599 (1970).

The ***Beermann*** case did not specifically reference the repealer provisions contained in Section 19 of LB 424, and there was some concern that those provisions of the bill remained in force and in effect. Consequently, on the chance that the original registration provisions for petition circulators in Section 32-705 were repealed by LB 424 even after the decision in ***Beermann***, LB 398 was introduced in the 1993 Legislative Session. That bill sought to reinstate the provisions whereby petition circulators would be required to register with the Secretary of State in order to circulate initiative and referendum petitions in multiple counties. However, LB 398 was not designated as a priority bill by any senator or legislative committee, and therefore, it did not reach final reading or passage by the Legislature in the 1993 session. This set of circumstances has now generated a number of questions from you regarding the registration requirements for petition circulators who wish to gather signatures in multiple counties. In

several instances, such petition efforts have already begun. Our responses to your various inquiries are set out below.

Your first three questions all have the same essential focus: what is the effect of the ***Beermann*** holding upon the repealer provisions in Section 19 of LB 424, and is there now any statutory authority or requirement for the Secretary of State to register petition circulators who circulate initiative and referendum petitions in multiple counties? We previously answered almost precisely those same questions for you in an informal opinion dated August 14, 1992.

Your earlier opinion request involved the situation where some circulators of petitions supporting initiative measures proposed for the November general election ballot had apparently circulated petitions outside of the county where they were registered to vote without registering with your office as required by the old version of Section 32-705. As a result, the validity of some petition signatures, and, correspondingly, whether certain of the then-pending initiative measures could be placed on the general election ballot might have turned on what requirements for petition circulators remained under Section 32-705 in the wake of the ***Beermann*** decision. In Informal Opinion # I92-055, we concluded that the repealer provisions of LB 424 remained effective to repeal the previous registration requirements for multiple county petition circulators. After determining that the repealer provisions in Section 19 of LB 424 were severable from the portions of the bill held unconstitutional in ***Beermann***, we stated:

> In the present instance, certain signatures on petitions supporting initiative measures for the November ballot may be invalidated if those portions of Section 19 of LB 424 which repeal the previous Section 32-705 are considered invalid along with Sections 14(4) and 14(5) of that bill. Those signatures were obtained by circulators who did not register with your office to circulate petitions outside the county in which they were registered to vote. Given the lack of clear Nebraska precedent in this area, and given the inclination of Nebraska courts to preserve and protect the initiative rights of the people through liberal construction of statutes pertaining to those rights, we do not believe that our courts would hold that Section 32-705 was only partially repealed so as to impose the previous registration requirement upon petition circulators. Rather, we believe that our courts would hold that ***the repeal of the previous version of Section 32-705 under LB 424 remains operative so that no registration requirement for circulators exists until such time as the Legislature clearly indicates by new legislation its intent to***

> ***reimpose that requirement. As a result, we conclude, in response to your first question, that Section 19 of LB 424 repealed the original Section 32-705 along with the provision contained therein providing the mechanism for petition circulators to register with the Nebraska Secretary of State. The only portions of Section 32-705 currently in force are those portions constitutionally reenacted as a part of LB 424.***

Since our answer to your initial question is "yes," it becomes necessary to address the additional questions propounded in your letter. First, you ask, " . . . does any mechanism now exist or did it exist for circulators to become registered with the Secretary of State?"

> ***For the various reasons stated above, we believe that Section 19 of LB 424 remains effective to repeal the previous version of Section 32-705 including its requirement that circulators register in some fashion with the Secretary of State in order to circulate petitions outside the county in which they are registered to vote. Consequently, there are presently no registration requirements under that statute.***

Informal Op. Att'y Gen. No. I92-005 (August 14, 1992) at 4, 5. We continue to believe that our Informal Opinion # I92-055 represents the correct analysis of the applicable law. Therefore, in our view, Section 19 of LB 424 repealed the provisions of the previous Section 32-705 pertaining to registration of multiple county petition circulators, and there is no statutory authority or requirement which mandates your registration of those circulators.

You next ask whether, without the registration requirements of the previous Section 32-705, you can "request and/or require petition drive sponsors to provide and certify the names and addresses of multi-county circulators so that election officials can properly check, verify and certify petition sufficiency?" Absent authorization in Section 32-705 or elsewhere, we do not believe that you can require multiple county petition circulators to register, or that you can require petition drive sponsors to provide you with the names and addresses of multiple county petition circulators. However, you have broad general authority over the conduct of elections under ***Neb. Rev. Stat. §§*** 32-1051 to 32-1056 (1988). We believe that your general authority would allow you to request such lists from petition sponsors and to maintain those lists and any voluntary registrations to aid in the later verification process.

Finally, you express your concern that you must wait upon the passage of LB 398 to resolve this issue, and you ask if the current

status of the law concerning registration of multiple county circulators has endangered the petition drives in progress. Another previous opinion which we prepared for you has some bearing on your final question.

In our Op. Att'y Gen. No. 92104, issued on August 24, 1992, we dealt with a number of questions which you raised regarding the effect of particular problems with circulator certifications for initiative petitions. At the conclusion of that opinion, we discussed invalid circulator certifications and their effect upon petition signatures:

> 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 facia 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.
>
> 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 fail, ***unless the genuine signatures are affirmatively shown.***

Id. at 635, 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.

Op. Att'y Gen. No. 92104 (August 24, 1992) at 6,7 (citations omitted).

In the present instance, absent any statutory requirement for registration of multiple county circulators, it is possible that petitions may be sent to counties for signature verification where the circulators who circulated those petitions are not registered voters. For example, a circulator registered to vote in Lancaster County might circulate petitions in Gage County. Those Gage County petitions would be sent to Gage County for verification. However, this does not necessarily invalidate all of the signatures on those petitions. For the reasons stated in our Opinion # 92104, we believe that the proponents of those signatures could come forward at the time of verification with sufficient evidence that the petition circulators in question were registered voters and otherwise met the statutory criteria, or with other evidence of signature authenticity. That would be sufficient to allow verification of the signatures.

Alternatively, you have authority to "determine the validity and sufficiency" of signatures on a petition under ***Neb. Rev. Stat. §*** 32-704 (Cum. Supp. 1992). In instances such as those described above, you would have some indication as to where the petition circulator might be registered to vote since the circulator is required to list his or her address in the circulator certification attached to the petition. You could contact those counties on

suspect petitions to determine if the circulators met the requirements of the statute.

Therefore, while the process of signature verification for petition efforts is certainly more cumbersome absent the reinstitution of registration requirements for multiple county petition circulators, it does not appear that properly circulated petitions are in jeopardy.

Sincerely yours,

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