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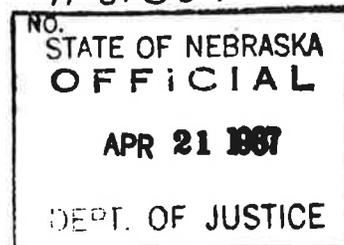
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April 17, 1987

#87054



SUBJECT: Retroactive Effect of LB 716

REQUESTED BY: Senator Timothy J. Hall

WRITTEN BY: Robert F. Bartle  
Special Assistant Attorney General

QUESTION: Whether the passage of LB 716, as introduced, would affect the status of any criminal proceeding filed on the basis of current law?

CONCLUSION: The passage of LB 716 should not affect any pending criminal proceedings filed on the basis of the current law, except to the extent that the Legislature decided to change any penalty provisions applicable to anyone who may be convicted under the current law.

By your letter of March 27, 1987, you have requested an Attorney General's opinion concerning certain provisions of LB 716, a bill amending the current law relating to initiative and referendum petitions. You have asked whether the passage of LB 16, as originally introduced, would "affect the status of any criminal proceeding filed on the basis of current law." By current law, I assume you are referring to the legislative provisions regulating the circulation of such initiative and referendum petitions as set forth at Neb. Rev. Stat. §§32-702, et seq. (Reissue 1984).

As the Nebraska Attorney General's office has been involved in criminal proceedings relating to alleged violations of the current law, the Attorney General has appointed me as a special assistant to prepare this opinion.

Before I address the question raised, I should qualify my response by noting that I am unaware of any criminal proceeding against anyone accused of only an improper signing of an initiative or referendum petition. Rather, my understanding is that pending prosecutions in Nebraska involve circulators of petitions

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or individuals responsible for the verification of signatures on petitions, apparently acting as notaries public. Pending cases also involve allegations that certain circulators received payments beyond the expense reimbursement provision of current law.

To briefly summarize the proposed changes in current law embodied in LB 716, I note the amendments change the registered voter requirement to an "elector" requirement, provide for driver's license verification, change the requirements of qualifying circulators of petitions, and change the wording of the Class IV felony violations to language which proscribes the filing of "a false sworn statement" by a circulator or a false signature by a notary public. The proposed amendments, at Section 5, appear to remove the prohibition against paying circulators of petition any salary or wage. Under existing law, a circulator could only receive expense reimbursements. In summary, I would characterize the amendments as providing some substantive changes in both the circulation and verification process attendant to the initiative and referendum law.

With respect to criminal proceedings filed on the basis of current law, the general rule recognized by the Nebraska Supreme Court is when an offense is committed prior to a statutory change, the amendment to the statute occurring after the offense has been committed is not applicable. Berry v. Wolff, 193 Neb. 717, 228 N.W.2d 885 (1975). This general rule was also recognized in a number of cases considered by the court following the Legislature's passage of the new criminal code which became effective in January, 1979. The court consistently held that the new criminal code was only applicable to offenses committed after the adoption of the law and not applicable to offenses occurring prior to the effective date of January 1, 1979. State v. Fuller, 203 Neb. 233, 279 N.W.2d 756 (1979); State v. Munn, 203 Neb. 810, 280 N.W.2d 649 (1979); State v. Griggs, 203 Neb. 830, 280 N.W.2d 657 (1979). However, it should be noted that in each of the above-cited cases, the Supreme Court pointed out that the Legislature specifically provided that the provisions of the code shall not apply to any offense committed prior to January 1, 1979. See, e.g., Fuller, 203 Neb. at 242; Neb. Rev. Stat. §28-103 (Reissue 1985).

In your letter, you mentioned that it was not your intent, as the introducer of LB 716, to have the new provisions apply in criminal proceedings now pending. There is no provision of LB 716 that sets forth that intent in writing, but our Supreme Court has held that no such legislative "pardon" is to be inferred in such cases. Lower v. State, 109 Neb. 590, 191 N.W. 674 (1923). Therefore, based upon the above analysis, I would conclude that the passage of LB 716 would not affect current criminal proceedings, at least with respect to the statutory definition of prohibited actions.

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The matter of statutory penalties, however, requires separate analysis. If the Legislature chose to change the criminal penalty applicable to certain violations of initiative and referendum law, that decision could affect pending prosecutions. In State v. Randolph, 186 Neb. 297, 183 N.W.2d 225 (1971), cert. denied, 403 U.S. 909 (1972), the court stated:

[We] therefore hold that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the legislature has specifically provided otherwise.

Id. at 301-302, 183 N.W.2d at 228 (emphasis added).

The so-called Randolph doctrine is also embodied in Nebraska statutory law at Neb. Rev. Stat. §29-2204.01 (Reissue 1985). The rule only applies in a situation where the Legislature decreases the penalty for a specified offense, and not in a situation where the Legislature decided to increase a penalty. State v. Peiffer, 212 Neb. 864, 326 N.W.2d 844 (1982). However, the rule only applies when the Legislature does not make a substantive change in the definition of a crime or a reclassification of the offense. Id., State v. King, 214 Neb. 855, 336 N.W.2d 576 (1983).

With respect to pending cases involving charges such as a false verification of petition signatures, the amendments of LB 716 appear to have no effect as the Class IV felony penalty remains the same. However, with regard to cases involving the alleged improper payment of circulators, the amendments raise questions not clearly answered by existing case law. Since the present version of LB 716 does not provide specific language regarding retroactive effect, it could be argued that anyone convicted for making or receiving improper payments should be sentenced under the amended law which has removed the penalty provisions.

On the other hand, since the amendments have reclassified the offenses significantly, I believe the better argument is that the Randolph doctrine would not apply, and therefore convictions would result in sentencing under the law existing at the time of the offense.

Sincerely,



Robert F. Bartle  
Special Assistant Attorney General

RFB:sjr  
cc: Patrick J. O'Donnell  
Clerk of the Legislature