

LETTER OPINION
94-L-234

September 1, 1994

Honorable Al Jaeger
Secretary of State
600 East Boulevard Avenue
Bismarck, ND 58505-0500

Dear Secretary of State Jaeger:

Thank you for your August 16, 1994, letter concerning the circulation of an initiative petition.

Several of the questions you asked have been addressed in a previous opinion issued by this office. See Letter from former Attorney General Nicholas Spaeth to Wayne Goter dated October 2, 1991 (a copy of which is enclosed for your information). You raise certain questions about whether the initiative petitions in question were circulated by an elector. You noted that Article III, Section 3 of the North Dakota Constitution requires that a petition only be circulated by electors.

Your first question concerned the meaning of the term elector. In the aforementioned October 2, 1991, letter, former Attorney General Spaeth opined that petition circulators must be "qualified electors." The letter further quoted from North Dakota Century Code (N.D.C.C.) § 1-01-51 which defines a qualified elector as "a citizen of the United States who is eighteen years of age or older; and is a resident of this state and of the area affected by the petition."

See also Article II, Section 1 of the North Dakota Constitution ("every citizen of the United States, who has obtained the age of eighteen years and who is a North Dakota resident, shall be a qualified elector."). Consequently, it is my opinion that to circulate a petition a circulator must be a qualified elector, that is, a citizen of the United States, eighteen years of age or older, who is a North Dakota resident and a resident of the area affected by the petition.

You next asked what constitutes circulation of a

Honorable Al Jaeger
September 1, 1994
Page 2

petition. In the October 2, 1991, letter, that issue was addressed:

Your fourth question is what acts or conduct would establish a person as a petition circulator. Black's Law Dictionary states that "a thing is 'circulated' when it passes, as from one person or place to another." BLACK'S LAW DICTIONARY 243 (6th Ed. 1990). The circulator, then, would be one who causes a thing to be circulated. In this case, a circulator is the person who has accepted the responsibility for passing the petition around, obtaining the signatures of qualified electors on the petition in that person's presence and executing the required affidavit.

See also Letter from Attorney General Spaeth to Secretary of State Ben Meier (Nov. 20, 1987) discussing the term "circulator" ("although this term is not defined in the constitution or in the statutes, it clearly refers to those persons who physically circulate a petition with the hope of gaining signatures to that petition.").

You next asked if a petition is being circulated by an elector "when the elector is in the presence of an individual, who is not an elector, but who is actively soliciting and persuading a citizen of this state to sign a petition being held by the elector." In the October 2, 1991, letter former Attorney General Spaeth noted that "others may accompany the circulator, but would not need to sign an affidavit or meet the requirements of a circulator." I would further note that the activities of "actively soliciting and persuading a citizen" are not essential components of circulating a petition, rather, circulation is the actual passing of the petition from one person to another. Consequently, it is my opinion that an elector who is circulating a petition may be accompanied by another individual who is not an elector; however, only the qualified elector who is circulating the petition may sign the affidavit required by N.D.C.C. ? 16.1-01-09(3).

You then asked whether a petition is being circulated by an elector, within the meaning of the law, when the petition is actually in the physical possession of the

Honorable Al Jaeger
September 1, 1994
Page 3

non-electors and the electors are only witnessing the signature and signing the required affidavit.

As noted above, the circulator is the one who causes a thing to be circulated, i.e., the person who accepted responsibility for passing the petition around, obtaining the signatures of qualified electors on the petition in that person's presence, and executing the required affidavit. The essential aspect of circulation is that the petition is passed from one person to another or that it is physically circulated by a person. See Letter from Attorney General Spaeth to Secretary of State Ben Meier (Nov. 20, 1987).

In the circumstances you posed, while the elector witnesses the signatures and could presumably in good faith execute the affidavit required by N.D.C.C. ? 16.1-01-09(3), that person did not physically circulate the petition, obtain the signatures or actually pass it from one person to another. In this instance, the person actually circulating the petition and obtaining the signatures was not an elector and therefore was not legally qualified to do so. In so doing, the non-electors are doing more than accompanying the circulator, but actually performing the function of a circulator. While it may be argued that, under these circumstances, the spirit of the law is being followed in that the qualified electors are actually present when the petition is passed and the qualified electors execute the required affidavit, when a law is unambiguous, the letter of the law is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. ? 1-02-05.

In this instance, neither N.D.C.C. ? 16.1-01-09(3) which provides that a circulator be a qualified elector nor Article III, Section 3 of the North Dakota Constitution which mandates that a petition only be circulated by an elector is ambiguous. Consequently, it is my opinion such a petition would not be circulated by an elector within the meaning of the law.

You next asked about the validity of signatures obtained by a non-electors when no electors were actually present. Presumably, the affidavit required by N.D.C.C. ? 16.1-01-09 was either improperly executed by a non-qualified elector or was falsely completed by an elector. In the aforementioned October 2, 1991, letter from former Attorney General Spaeth, he

Honorable Al Jaeger
September 1, 1994
Page 4

concluded that "if the Secretary of State or other petition reviewing official determined a petition was circulated by a person who is not a qualified elector, or did not have the required affidavit attached or had a false affidavit attached, that official could conclude the petition would be invalid." Under these circumstances, where the petition was circulated by someone who was not a qualified elector as required by law and the required affidavit must have been unlawfully executed, I concur with the conclusion of former Attorney General Spaeth and it is my opinion that you could reasonably conclude that such petitions and the signatures thereon are invalid.

Finally, you indicated that certain individuals were hired to circulate the initiative petition in question. These individuals were paid "at a rate of \$56 per day plus a \$50 bonus per consultant for completion of the project." You asked whether this method of payment would violate N.D.C.C. ? 16.1-01-12(11) which provides as follows:

16.1-01-12. Election offenses -- Penalty. It is unlawful for a person to:

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11. Pay or offer to pay any person, or receive payment or agree to receive payment, on a basis related to the number of signatures obtained for circulating an initiative, referendum, or recall petition. This subsection does not prohibit the payment of salary and expenses for circulation of the petition on a basis not related to the number of signatures obtained, as long as the circulators file their intent to remunerate prior to submitting the petitions and fully disclose all expenditures and revenues upon submission of the petitions to the secretary of state.

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A violation of subsections 1 through 14 is a class A misdemeanor. Any signature obtained in violation of subsection 11 is void and may not be counted.

Under the circumstances you outlined in your question, the main method of payment is a flat rate per day. That, of course, would not violate N.D.C.C. ? 16.1-01-12(11) since it in no way is related to the number of signatures obtained for circulating the petition, assuming the required disclosures are made.

Honorable Al Jaeger
September 1, 1994
Page 5

The problem lies with the payment of the \$50 bonus upon "completion of the project." Presumably, the Legislature enacted this statute in an effort to deter fraud and abuse. If petition circulators were paid a piecework rate solely on the basis of number of signatures obtained, the incentive presented to circulators would be to obtain the maximum amount of signatures in the shortest time to maximize their compensation. Consequently, the opportunities for cutting corners or outright fraud would increase. It would appear that under the pay system described in your letter, there would be more incentive for circulators to work more days, at \$56 per day, than to hurriedly complete circulation of the petition in order to receive a one-time payment of \$50. Consequently, the temptation to gather as many signatures as quickly as possible with the increasing potential for fraud or abuse would not be great under this pay scheme.

Moreover, a violation of this section is a criminal offense. Criminal statutes are to be strictly construed against the state and in favor of an accused. E.g., State v. Rambousek, 479 N.W.2d 832, 834 (N.D. 1992). Although under a broad reading of the statute the circulators would not qualify for the \$50 bonus until the requisite number of signatures had been obtained, strictly speaking, the bonus (or the flat rate per day) received was not related to any specific number of signatures obtained by any individual circulator. Indeed, individual circulators presumably would qualify for this bonus whether they turned in ten signatures or ten thousand signatures or even if they obtained no signatures whatsoever, since they would be paid the flat rate of \$56 per day plus the bonus if the overall goal collectively was met.

Although I do not condone the use of bonuses such as described in your letter, and would discourage petition sponsoring committees from utilizing such forms of payment, because of the requirement that criminal statutes be narrowly construed, it is my opinion that a payment system as described in your letter would not be a violation of N.D.C.C. ? 16.1-01-12(11). I do believe it is important to add a caveat here, however. As noted by other attorneys general in the past when asked to give an opinion as to whether certain conduct or circumstances may constitute a violation of a criminal statute, it must be noted that this opinion is only dealing with an

Honorable Al Jaeger
September 1, 1994
Page 6

abstract question of law and whether, in fact,
specific conduct or circumstances would give rise to a
criminal violation would ultimately be up to a trier
of fact.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jjf/pg
Enclosure