

N.D.A.G. Letter to Goter (Oct. 2, 1991)

October 2, 1991

Mr. Wayne Goter
Flasher City Attorney
P.O. Box 1552
Bismarck, ND 58502

Dear Mr. Goter:

Thank you for your August 14, 1991, letter in which you request my opinion regarding the requirements for circulators of recall petitions. Please excuse the delay in responding.

In your letter, you asked for my response to the following five questions:

1. Must petition circulators be "qualified electors" under § 16.1-01-09(3) N.D.C.C., or need the circulators only be persons over the age of eighteen under § 16.1-01-09(5) N.D.C.C.?
2. Must each person involved in the circulation of recall petitions sign an affidavit as provided under § 16.1-01-09(3) N.D.C.C.?
3. Is each person who goes door to door with a recall petition for the purpose of obtaining signatures a petition circulator, or may only one of such persons be deemed the "circulator" of the recall petition?
4. What acts or conduct would establish a person as a petition circulator?
5. Are recall petitions invalid if they are circulated by unqualified persons, i.e., persons under the age of 18, or persons who are not qualified electors?

You further stated that the situation in Flasher involved a person who is not a qualified elector accompanying a qualified elector while a petition was being circulated.

In my opinion, petition circulators must be qualified electors. N.D.C.C. § 16.1-01-09, which governs the signature and circulation of petitions for initiatives, referendums, and recall was enacted in 1981. At that time, the only statutory qualification for a circulator of the petition was that the circulator must be at least eighteen years of age. N.D.C.C. § 16.1-01-09. N.D. Const. art. III, § 3, however, referring to initiative and referendum petitions, states, "[t]he petition shall be circulated only by electors." In 1983, N.D.C.C. § 16.1-01-09 was amended by adding the requirement that an affidavit must be attached to a petition for initiative, referendum or recall. The affidavit must be signed by the circulator and state, among other things, that the circulator is a qualified elector. 1983 N.D. Sess. Laws ch. 238.

Currently, N.D.C.C. § 16.1-01-09(5) prohibits the circulation of any petition under that section by anyone under eighteen years of age. N.D.C.C. § 16.1-01-09(3) also requires the circulator to attach an affidavit to the petition which states that the circulator is a qualified elector. N.D.C.C. S 16.1-01-09(3). "Qualified elector" is defined 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. N.D.C.C. § 1-01-51. Subsection 3 of N.D.C.C. § 16.1-01-09 does not conflict with, but augments, subsection 5 of N.D.C.C. § 16.1-01-09. There being no inconsistency between subsections 3 and 5 of N.D.C.C. § 16.1-01-09, both sections must be given full effect and a petition circulator must be both a qualified elector and at least eighteen years of age.

Your second and third questions are closely related, and I will answer them together. Section 16.1-01-09(3) provides that each petition must "have attached thereto an affidavit executed by the circulator" attached to it. N.D.C.C. § 16.1-01-09(3). The phrase "the circulator" indicates that one person would have the responsibility of circulating the petition, being present when each person signs the petition, and executing the required affidavit. The person signing the affidavit must affirm that the attached petition was executed in the person's presence, that the person signing the petition is a qualified elector and that each signature is the genuine signature of the person who signed the petition. It is therefore my opinion that a valid petition need contain only one affidavit signed by the qualified circulator. Others may accompany the circulator, but would not need to sign an affidavit or meet the requirements of a circulator.

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. If two persons are present when each person signs the petition, either may sign the affidavit if he is a qualified elector.

Your fifth question is whether a petition is invalid if it is circulated by one who is not a qualified elector. The Secretary of State, or other officer with whom the petition is filed, is the party who must ultimately determine whether a petition is valid or invalid. See e.g. N.D.C.C. § 16.1-01-10. A petition affidavit signed by one who is unqualified to do so, however, presents a facial irregularity which raises serious questions regarding the validity of the signatures to which the purported circulator is attesting. A person who signs a petition affidavit when not qualified to do so is subject to criminal penalties. N.D.C.C. § 16.1-01-12(10).

Although not an issue decided by the Court, the question of the validity of petitions which bore a false circulator's affidavit was addressed by two of the justices in McCarney v. Meier, 286 N.W.2d 780, 787-792. (N.D. 1979). Justice Vande Walle, in his special concurrence, indicated that the question of a petition bearing a false affidavit would be a

harder one than the question actually before the Court in that case. However, since the question must first be decided by the Secretary of State, it was not a proper matter to be determined by the Court in that proceeding. Chief Justice Erickstad, in his dissent, indicated that rejection of the petition would be an appropriate deterrent for falsely sworn affidavits.

I therefore conclude 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.

Sincerely,

Nicholas J. Spaeth

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