

OPINION
64-93

July 3, 1964 (OPINION)

The Honorable Ben Meier

Secretary of State

RE: Elections - Petitions - Withdrawal of Signature

Your office has inquired of the attorney general relative to the withdrawal of names of qualified electors on petitions for a constitutional amendment, and whether or not such name or names may be withdrawn, and if so, under what circumstances. You state that the signer of an initiative petition desires to withdraw her name, and has so indicated by a letter to you.

After some research of the question, we conclude that the general rule is that the name of a signer may be withdrawn up to the time when the petition is acted upon by the official, board, or body to whom it is addressed. However, we point out that every case depends upon the particular statute which covers it, as indicated by our Supreme Court in *Coghlan v. Cuskelly*, 62 N.D. 275, 244 N.W. 39, where the Court said: "Many cases may be found in the books touching upon the right to add or withdraw signatures from jurisdictional petitions. These cases arose under a variety of conditions and circumstances. They disclose that there is a marked diversity of holding with respect to the question of the right to withdraw. * * * But almost without exception each of these cases turns upon the wording of the particular ordinance, statute, or constitutional provision under which it arises and is of no great value as a precedent except in the consideration of a similar provision."

In *Coghlan v. Cuskelly*, above cited, our court held that "Where a sufficient recall petition is filed with the proper officer pursuant to the provisions of Article 33 of the amendments of the Constitution of North Dakota, providing for the recall of certain elective officers, an elector who has signed the same may not, after the filing of such petition and before the election has been called, withdraw his signature therefrom."

It should be noted that Article 33 does not contain the provision of section 25, which reads: "The Secretary of State shall pass upon each petition, and if he finds it insufficient, he shall notify the 'Committee for the Petitioners' and allow twenty days for correction or amendment. * * *" Section 16-01-11 of the North Dakota Century Code provides that "No person shall sign any initiative, referendum, or recall petition circulated pursuant to the provisions of sections 25 and 202 of the constitution of this state, and of Article 33 of the amendments of such constitution, unless he is a qualified elector. No person shall sign any such petition more than once and each signer shall add his residence, post office address, and the date of signing. Each copy of any petition provided for in this section, before being filed, shall have attached thereto an affidavit to the effect that each signature to the paper appended is the genuine signature of the person whose name it purports to be, and

that each such person is a qualified elector. Any person violating this provision of this section is guilty of a misdemeanor." (Emphasis supplied.)

One of the citations following section 16-01-11 states that: "The statute is intended to regulate and facilitate the circulation of initiative, referendum, or recall petitions so as to aid the secretary of state to pass upon and determine the sufficiency of the petition before filing the same, and must be liberally construed so as to effect its purpose. Wood v. Byrne, 60 N.D. 1, 232 N.W. 303; Schumacher v. Byrne, 61 N.D. 220, 237 N.W. 741." (Emphasis supplied.)

We have read these two cases and fail to see where they hold that the filing of the petition does not take place until the secretary of state has determined the sufficiency of the petition. It is our view that the filing takes place when the petitions are received by the secretary of state. "If the petition is fair on its face he (the secretary of state) must receive it and file it." Coghlan v. Cuskelly. We do not see how it can be otherwise, and the following illustration supports our contention, viz., if petitions calling for amendment to the constitution are deposited with the secretary of state on July 6, 1964, (the last day for filing, i.e., 120 days prior to the November election), the said officer proceeds to pass upon the petitions to determine their sufficiency. This might require fifteen days. He finds them sufficient and proceeds to file them on July twenty-first, which is less than 120 days before the November election. If the petitions prove to be insufficient, the committee for the petitioners is given twenty days to correct and amend them. If the petitions are corrected and amended, the secretary of state would be obliged to file them on August tenth, only eighty-five days before the November election. Consequently, we hold that the date of filing is when the committee for the petitioners parts company with the petitions and leaves them in the office of the secretary of state. It is at that point that the governmental machinery begins to grind on said machinery.

The great majority of cases recognizes the right of withdrawal as incidental to the right of petition itself, but where the right to withdraw is recognized, the withdrawal must be made before a point in time after which no names may be withdrawn. We hold that point to be the time of filing the petitions with the secretary of state.

Our view of this matter is supported by Uhl v. Collins (1932) 271 Cal. 1, 17 P. 2d. 99, which actually involved withdrawals from an initiative petition and in that case the Court said: "* * * In order to accomplish anything, the proponents of a measure must be able to rely upon signatures obtained, and, if continually forced to seek new ones to take the place of withdrawals, may never be able to prepare a proper petition within the limited period which usually exists. To permit withdrawals after the petition is completed and filed, and the work of securing signatures abandoned, seems to us to make the system wholly unworkable. We do not believe that this mere implied power of the signer, which is not expressly provided for in our constitution or statutes, can be used so as to jeopardize the exercise of the constitutional right itself. * * *"

Taking into account the within and foregoing discussion, it is our opinion that the signer of the initiative petition to whom you refer may not withdraw her name.

HELGI JOHANNESON

Attorney General