

LETTER OPINION
95-L-201

August 14, 1995

Honorable Bill Oban
State Representative
616 East Meadow Lane
Bismarck, ND 58504

Dear Representative Oban:

Thank you for your July 31, 1995, letter concerning the commencement of the petition review period available to the Secretary of State for passing on the sufficiency of a workers compensation referral petition. This question arises out of a recent effort to refer Senate Bill 2202 which was enacted by the 54th Legislative Assembly.

It is my understanding that on July 5, 1995, supporters of the proposed referral submitted 344 petitions to refer the bill. The Secretary of State had previously determined that 12,776 signatures of qualified electors were necessary for the referendum to be submitted to the voters. The petitions submitted prior to 5:00 p.m. on July 5, 1995, contained only 12,409 signatures. Thus, the Secretary of State determined the number of signatures submitted was 367 short of the number required. The petition proponents attempted to submit additional petitions after 5:00 p.m. which were rejected as untimely pursuant to N.D.C.C. § 16.1-01-09(7).

Subsequently, the matter was heard by the North Dakota Supreme Court which issued its opinion on July 27, 1995. See Husebye v. Jaeger, Supreme Court No. 950227 (N.D., July 27, 1995). The court determined that the statutory 5:00 p.m. deadline for submitting petitions was unconstitutional. Husebye v. Jaeger, slip op. at 10. Consequently, the court ordered the petition supporters to deliver the disputed petitions to the Secretary of State and also ordered the Secretary of State to "accept the disputed petitions to 'pass upon' them for sufficiency." Id. at. 11.

Article III, Section 6 of the North Dakota Constitution provides, in part:

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.

N.D.C.C. § 16.1-01-10 provides, in part:

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The secretary of state shall have a reasonable period, not to exceed thirty-five days, in which to pass upon the sufficiency of any petition mentioned in section 16.1-01-09. The secretary of state shall conduct a representative random sampling of the signatures contained in the petitions by the use of questionnaires, post cards, telephone calls, personal interviews, or other accepted information gathering techniques, or any combinations thereof, to determine the validity of the signatures. Signatures determined by the secretary of state to be invalid may not be counted, and all violations of law discovered by the secretary of state must be reported to the attorney general for prosecution.

(Emphasis supplied.)

Neither Article III, Section 6 of the North Dakota Constitution nor N.D.C.C. § 16.1-01-10 states when the petition review period commences.

It is my understanding that although the Secretary of State counted the signatures on the petitions submitted prior to 5:00 p.m. on July 5, 1995, he did not otherwise pass upon the sufficiency of those initial 344 petitions. It is also my understanding that the Secretary of State counted the number of petition signatures he received by mail the day after the 5:00 p.m. deadline; however, he likewise did not pass upon the sufficiency of those disputed petitions. It is my further understanding that the Secretary of State's petition review process is a very detail-oriented review. That office sends out about 2,000 post cards to petition signers in order to aid in the determination of the validity of signatures. See N.D.C.C. § 16.1-01-10.

In Hernett v. Meier, 173 N.W.2d 907 (N.D. 1970), the court, in construing a predecessor provision to present Article III, Section 6 of the North Dakota Constitution, noted:

The Constitution does not prescribe the procedure for the Secretary of State to follow when petitions are presented to him. Just what he shall do in examining the petitions or how he shall determine the sufficiency of the petitions is not specifically set out. So the Constitution places upon the Secretary of State the duty of determining, in the first place, whether the petitions conform to the requirements of the Constitution and the laws of

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this State. In the discharge of such responsibility placed upon him, the Secretary of State must exercise a certain amount of discretion.

Id. at 918. See also State v. Hall, 186 N.W. 284 (N.D. 1921) (in filing recall petitions and calling a special election, the Secretary of State exercises discretion concerning the sufficiency of such petitions).

When the original 344 petitions were presented to the Secretary of State, he determined that there was a legally insufficient number of signatures, and no overall review of the sufficiency of the petitions was performed at that time. Further, no review of the sufficiency of the disputed petitions mailed after the 5:00 p.m. submission deadline to the Secretary of State was done.

The court in footnote 2 on page 11 of its slip opinion in Husebye v. Jaeger noted that "Jaeger did the only thing he could do when faced with the attempted submissions of petitions after 5:00 p.m.", i.e., to not accept them since they had been submitted after the statutory deadline then in effect. In order for there to be a duty to pass upon the sufficiency of petitions submitted to the office of the Secretary of State, that is, in order to constitute petitions under the law, the petitions must, prima facie, contain at the time of filing the required number of signatures. See Dixon v. Hall, 198 S.W.2d 1002, 1003 (Ark. 1946).

Only after the Supreme Court determined that the 5:00 p.m. submission deadline was unconstitutional and ordered the Secretary of State to accept the disputed petitions and to "pass upon each petition" did the Secretary of State factually and legally have petitions with the requisite number of signatures upon which to conduct a review. According to the Secretary of State's office, the disputed petitions were submitted on July 28, 1995, one day after the Supreme Court issued its opinion in Husebye v. Jaeger. It was only at that point that the Secretary of State had petitions with the requisite number of signatures upon which to conduct a review of sufficiency.

The primary purpose of statutory construction is to ascertain the intent of the Legislature and the intent must first be sought from the language of the statutory provision itself. Production Credit Association of Minot v. Lund, 389 N.W.2d 585, 586 (N.D. 1986). Further, in enacting a statute it is presumed that a reasonable result is intended and a result feasible of execution is intended. N.D.C.C. § 1-02-38.

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If the Secretary of State is to perform a review under the constitution and statutes of the state of North Dakota, he must have a reasonable amount of time to do so. See N.D.C.C. § 16.1-01-10 ("[t]he secretary of state shall have a reasonable period . . . to pass upon the sufficiency of any petition"). In Ford v. Mitchell, 61 P.2d 815, 823 (Mont. 1936), a statute provided that the Secretary of State must "immediately" upon the filing of an initiative petition signed by the requisite number of voters and timely filed certify that fact to the Governor in writing. Notwithstanding that the statute used the word "immediately," the court stated:

It is said that the word "immediately" does not permit of any delay. Manifestly, the statute requiring the secretary of state to make certificates, and companion statutes requiring him to determine certain facts in connection with the handling of these petitions, must be construed to afford that officer sufficient time reasonably and accurately to perform his duties required by law. The secretary of state must determine the sufficiency of the petition as to the requisite number of signers.

See also State v. Garner, 128 S.E.2d 185, 189 (W.Va. 1962) (determination by city of validity of referendum petition must be made within statutorily prescribed time and if no specific time is set out, then within a reasonable time).

It is evident that one purpose of the statutory review period provided in N.D.C.C. § 16.1-01-10 is to prevent fraud and abuse and maintain the integrity of the referral process. That statute provides that "[s]ignatures determined by the secretary of state to be invalid may not be counted, and all violations of law discovered by the secretary of state must be reported to the attorney general for prosecution." Id. Further, this review process allows for the correction or amendment of certain remediable errors. See N.D. Const. Art. III, § 6; Dixon v. Hall, 198 S.W.2d at 1003 ("[c]orrection and amendment go to form and error, rather than to complete failure").

In order for the Secretary of State to perform this important review of the petitions, it is necessary to have a sufficiently reasonable time to do so. If the time period were deemed to "relate back" to the July 5 filing deadline, it is unlikely that this important review could be conducted thoroughly and reasonably. Under the particular facts and

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circumstances of this matter, it is my opinion that the statutory review period did not commence until all the petitions were actually submitted to the Secretary of State at a time when he had a clear legal duty to consider them as being properly submitted to him, i.e., the date the remainder of the petitions were actually turned over to the Secretary of State (July 28, 1995) pursuant to the order of the North Dakota Supreme Court. The Secretary of State did not have legally sufficient petitions in hand to conduct a review until July 28, 1995.

To construe this statute otherwise would run counter to the presumed legislative intent that in enacting the statutory review process in N.D.C.C. § 16.1-01-10 the Legislature intended a reasonable result and a result feasible of execution. See N.D.C.C. § 1-02-38. Also, to artificially compress the time period for conducting this important review might be counterproductive to the integrity and fairness of the referral process.

Furthermore, I am not aware of any countervailing constitutional or policy considerations in this case which would militate against allowing the Secretary of State a reasonable time of up to 35 days to pass upon the sufficiency of the petitions in this case. There is no statewide election imminent at which this measure must appear on the ballot. As soon as the Secretary of State completes his review of the sufficiency of the petitions, the "committee for the petitioners" will have its constitutionally mandated 20 days for "correction and amendment" of the petitions. See N.D. Const. Art. III, § 6.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jjf/pg