

OPINION NO. 89-049**Syllabus:**

1. R.C. 305.31 confers no authority on a county auditor to determine the validity of referendum petition papers with respect to the requirements imposed by R.C. 3501.38(E); such determination must be made by the county board of elections.
2. When a circulator fails to indicate the number of signatures contained on a petition paper as required by R.C. 3501.38(E), such petition paper is invalid.

To: Alan R. Mayberry, Wood County Prosecuting Attorney, Bowling Green, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 25, 1989

I have before me your request for my opinion regarding the determination of the validity of referendum petitions. Your questions arise from the following facts. Pursuant to R.C. 4504.15 and R.C. 4504.16, your board of county commissioners passed a resolution to impose two five-dollar motor vehicle license taxes. Referendum petitions against this tax levy were circulated and filed with the county auditor. On a number of the petition papers, the space in the circulator's statement for the number of signatures on that petition paper was left blank. These petition papers, which contain a dispositive number of signatures, are facially correct in all other respects. Specifically you ask:

1. R.C. 3501.38(E) provides that "On each petition paper the circulator shall indicate the number of signatures contained thereon...." Is such language mandatory, requiring invalidation of such petition paper which omits the number of signatures?
2. Who has the duty - the County Auditor or the Board of Elections - to rule on the validity of such petition papers?

For ease of discussion, I shall examine your second question first. Both R.C. 4504.15 and R.C. 4504.16, which authorize resolutions to levy county motor vehicle taxes, provide that "such resolution is subject to a referendum as provided in sections 305.31 to 305.41 of the Revised Code...." R.C. 305.32 provides additionally that "[r]eferendum petitions shall be governed by the rules of section 3501.38 of the

Revised Code." R.C. 3501.38 itself expressly states that its provisions are applicable to "[a]ll declarations of candidacy, nominating petitions, or *other petitions presented to or filed with the secretary of state or a board of elections or with any other public office for the purpose of...holding an election on any issue....*" (Emphasis added.) Thus, in order to answer your question, I must examine the respective authority and duties of the county auditor and the county board of elections as set forth in these statutes.

The county auditor's role with respect to referendum petitions is found in R.C. 305.31 to R.C. 305.41. R.C. 305.31 states, in pertinent part:

When a petition, signed by ten per cent of the number of electors who voted for governor...is filed with the county auditor within thirty days after such resolution is passed or rule is adopted by the board of county commissioners...such county auditor shall...certify the text of the resolution or rule to the board of elections. The county auditor shall retain the petition. The board [of elections] shall submit the resolution or rule to such electors....

Pursuant to R.C. 305.35, the auditor must keep the petition open for public inspection for ten days after filing. Additionally, whoever files a petition must file a verified copy of the resolution with the auditor, R.C. 305.33, and a statement disclosing certain financial matters, R.C. 305.36.

In addition to the mandate under R.C. 305.31 to submit the resolution to the voters, the county board of elections has additional duties found in R.C. Chapter 3501, governing election procedure and election officials. R.C. 3501.38, which is expressly applicable to the referendum petitions you describe, does not itself describe the authority or duties of the county board of elections. Pursuant to R.C. 3501.11(K), however, the board is required to "[r]eview, examine, and certify the sufficiency and validity of petitions and nomination papers." Further, R.C. 3501.39 states:

The secretary of state or a board of elections shall accept any petition described in section 3501.38 of the Revised Code unless either of the following occurs:

....
(B) *The...petition violates the requirements of this chapter... or any other requirements established by law.* (Emphasis added.)

Although I have been unable to find any case law analyzing the authority of the county auditor to determine the sufficiency and validity of petition papers under R.C. 305.31 through R.C. 305.41 vis-a-vis the authority of the county board of elections under R.C. 3501.11(K), such analysis does exist regarding the authority of a city auditor. The city auditor's duties and functions with respect to municipal initiative and referendum petitions pursuant to R.C. 731.28 through R.C. 731.41 are analogous to the duties of the county auditor found in R.C. 305.31 through R.C. 305.41. See R.C. 731.28 and R.C. 731.29 (dealing with municipal initiative and referendum petitions, respectively, in language substantially identical to R.C. 305.31). See also R.C. 731.32 (verified copy of proposed ordinance filed with city auditor); R.C. 731.34 (city auditor to keep petition open for public inspection for ten days); R.C. 731.35 (financial disclosure statement must be filed with city auditor).

In *State ex rel. Williams v. Iannucci*, 39 Ohio St. 3d 292, 530 N.E.2d 869 (1988), the court considered the refusal of the city auditor to certify the text of a proposed ordinance to the board of elections pursuant to R.C. 731.28.¹ The court characterized the reasons given by the auditor as "allegations of: (1) *facial deficiencies of the petition* or text of the proposed ordinance, (2) violation of R.C.

¹ R.C. 731.28 provides, in pertinent part:

When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall,

731.35 (lack of itemized statement...), and (3) unconstitutionality or illegality of the proposed ordinance." *Id.* at 294, 530 N.E.2d at 870 (emphasis added). The court rejected any claims of unconstitutionality or illegality by the city auditor as premature, citing previous case law.² As to the remaining claims, the court stated:

Moreover, we find a *basic lack of authority for the auditor to refuse to certify* the text of a proposed ordinance *for any of the objections* he has made. R.C. 731.28 prescribes a duty in the auditor to certify a proposal to the board of elections if "signed by the required number of electors***." R.C. 3501.11(K) provides that boards of election are to review the sufficiency and validity of petitions....

...We construe R.C. 731.28 to confer on the auditor *only the ministerial duty to certify* to the board of elections *the text of a proposal for which sufficient signatures have been obtained*. We construe R.C. 3501.11(K) to confer on boards of elections authority to review the sufficiency and validity of petitions under relevant statutes. Finally, R.C. 731.28 requires a board of elections to submit proposals to electors, but *only if* the petitions are sufficient and valid and *all relevant laws have been observed*.

Id. at 294, 530 N.E.2d at 870 (emphasis added).³ Because of the similarity in language between R.C. 731.28 and R.C. 305.31, I must conclude, based upon the court's decision in *Iannucci*, that R.C. 305.31 confers upon the county auditor only the ministerial duty to certify the text of a resolution or rule for which sufficient signatures have been obtained on a referendum petition. Pursuant to R.C. 3501.11(K), the county board of elections has the duty to rule on the validity of such a referendum petition under all relevant statutes.

I turn now to your initial question and examine whether the board of elections is required to invalidate petition papers which do not comply with the requirement of R.C. 3501.38(E) that the circulator indicate the number of signatures contained on each petition paper. R.C. 3501.38(E) states:

On each petition paper *the circulator shall indicate the number of signatures contained thereon*, and shall sign a statement made under penalty of election falsification that he witnessed the affixing of every signature, that all signers were to the best of his knowledge and belief qualified to sign, and that every signature is to the best of his knowledge and belief the signature of the person whose signature it purports to be. (Emphasis added).

after ten days, certify the text of the proposed ordinance or measure to the board of elections. The auditor or clerk shall retain the petition.

The board [of elections] shall submit such proposed ordinance or measure for the approval or rejection of other electors....

² See *State ex rel. Walter v. Edgar*, 13 Ohio St. 3d 1, 469 N.E.2d 842 (1984); *State ex rel. Williams v. Brown*, 52 Ohio St. 2d 13, 368 N.E.2d 838 (1977).

³ I note that earlier decisions referred to the initial duty of the clerk to determine the validity of petitions. See, e.g., *State ex rel. Janasik v. Sarosy*, 12 Ohio St. 2d 5, 230 N.E.2d 346 (1967); accord *State ex rel. Kennedy v. Cuyahoga County Bd. of Elections*, 46 Ohio St. 2d 37, 346 N.E.2d 283 (1976). The court's holding in *Iannucci* has more clearly defined the limits of that initial duty with respect to the specific types of deficiencies listed by the court (facial deficiencies of the petition or text, failure to file an itemized financial disclosure statement, perceived unconstitutionality or illegality of the proposed ordinance). I see no conflict

The requirement to indicate the number of signatures was added to R.C. 3501.38(E) in 1981. See 1979-1980 Ohio Laws, Part II, 4570, 4678 (Am. Sub. H.B. 1062, eff. March 23, 1981). Prior to 1981, for those petitions where the circulator was to indicate the number of signatures obtained, the requirement was found, not in an express statutory directive, but in the text of forms for petitions set forth in various statutes. See, e.g., 1947 Ohio Laws 325, 334-36 (Am. Sub. S.B. 3, eff. Jan. 2, 1948) (amending what is now R.C. 3513.07 to include a fill-in blank for the number of signatures on a candidate's petition form). Typically, in establishing such forms, the General Assembly has required only that the petition form actually used be substantially as presented in the statute. See, e.g., R.C. 303.12 (zoning referendum petitions); R.C. 3513.07 (candidate petitions). R.C. 3501.38, however, lists specific requirements and contains no such language allowing only "substantial" compliance. See R.C. 3501.38 ("[a]ll...petitions...shall...be governed by the following rules") (emphasis added).

The leading case regarding failure to indicate the number of signatures on statutory forms, is *State ex rel. Loss v. Bd. of Elections*, 29 Ohio St. 2d 233, 281 N.E.2d 186 (1972), in which the court stated:

In our view, the requirement of R.C. 3513.07, that the circulator state in the jurat the number of signatures personally witnessed by him, is a protection against signatures being added later. As such, it is a *substantial, reasonable requirement*. It is the function of the legislative branch and not within our province to pass upon the wisdom of such a provision.

Relator has failed to comply with a statutory requirement in connection with his petition for candidate. The action of the board of elections in rejecting the petition was not an abuse of discretion or contrary to law.

Id. at 234, 281 N.E.2d 187 (citation omitted).⁴ In two earlier cases involving indication of the number of signatures, however, the court held that the board of elections abused its discretion by invalidating the petitions. In *State ex rel. Keyse v. Sarosy*, 175 Ohio St. 237, 193 N.E.2d 269 (1963), the circulator stated there were 17 signatures, when the petition paper actually contained two crossed out signatures

between *Iannucci* and cases which have held that the clerk or auditor has authority to invalidate petitions on other grounds. See, e.g., *State ex rel. Mika v. Lemon*, 170 Ohio St. 1, 161 N.E.2d 488 (1959) (village clerk has no duty to certify the text of a proposed ordinance to the board of elections when the circulator of the petition has not filed a verified copy of the text as required by R.C. 731.32); accord *State ex rel. Clink v. Smith*, 16 Ohio St. 2d 1, 240 N.E.2d 869 (1968); *State ex rel. Brettel v. Canestraro*, 32 Ohio St. 3d 190, 513 N.E.2d 956 (1987) (county auditor has no duty to certify text to board of election when circulator has not filed verified copy required by R.C. 305.33); cf. *State ex rel. Vanderwerf v. Warren*, 20 Ohio St. 2d 9, 252 N.E.2d 164 (1969) (syllabus) (county auditor has no duty to act when an unverified copy of a resolution is filed; however, if he does certify the text to the board of elections, the referendum will not be stayed where the "document is, nevertheless an accurate copy of the original resolution and proves no other defect").

⁴ In addition to other defects in the petition papers, circulators failed to indicate the number of signatures in *State ex rel. Reese v. Tuscarawas County Bd. of Elections*, 6 Ohio St. 2d 66, 215 N.E.2d 698 (1966) and *State ex rel. Ferguson v. Brown*, 173 Ohio St. 317, 181 N.E.2d 890 (1962). In *Reese*, the court summarily upheld invalidation of the petitions without discussing the defects. In *Ferguson*, the court also upheld the invalidation, but discussed only certain of the defects, not including the omission of the number of signatures. I note that the analysis of the defects which were discussed in *Ferguson* was later rejected by the court in *State ex rel. Saffold v. Timmons*, 22 Ohio St. 2d 63, 258 N.E.2d 112 (1970) on grounds which would not be applicable to the missing signature total.

and 15 valid signatures. The court found that, even though only 15 signatures were valid, the crossed-out signatures "may nonetheless be a signature as far as the affidavit of a circulator of a nominating petition is concerned," and therefore the count of 17 could not be considered false. *Id.* at 237, 193 N.E.2d at 270. In *State ex rel. Schwarz v. Hamilton County Bd. of Elections*, 173 Ohio St. 321, 181 N.E.2d 888 (1962), the circulator stated there were 27 signatures, when the petition actually contained 28. At a hearing held by the board of elections, the circulator explained under oath that he did not include one of the signatures in the total since he knew that signature was invalid because it was by an individual from out of county. Thus, in both *Keyse* and *Schwarz*, the board of elections impermissibly ignored what the court in *Schwarz* characterized as "uncontradicted and plausible explanation[s]" of the discrepancy between the number in the circulator's statement and the count of actual signatures.

It does not appear, however, that the holding in *Loss* would have differed even if the board of elections had had evidence that no signatures were added after filing. The court expressly rejected the contention that the board could simply count the signatures itself. Rather, the court found the requirement that the circulator indicate the total number of signatures to be a substantial legislative mandate. *Keyse* and *Schwarz* are distinguishable from *Loss* in that the circulators in *Keyse* and *Schwarz* provided arguably correct totals. Neither case involved total omission of the number. I am aware that the court in *Loss*, by holding that the board of elections did not abuse its discretion or act in a manner contrary to law, did not expressly hold that the board was required to reject the petitions. However, the language used in *Loss* is not a reluctant deferral to the discretionary authority of the board of elections, but rather an affirmative endorsement of the board's decision. See also *State ex rel. Allen v. Bd. of Elections*, 170 Ohio St. 19, 20, 161 N.E.2d 896, 897 (1959) ("substantial compliance does not contemplate complete omission"); *accord Hill v. Cuyahoga County Bd. of Elections*, 68 Ohio St. 2d 39, 40-41, 428 N.E.2d 402, 403 (1981).

Perhaps even more importantly, *Loss*, *Keyse*, and *Schwarz* were all decided prior to the passage of Am. Sub. H.B. 1062 in 1981. It is no longer necessary to speculate which parts of an entire statutory form the legislature considered most crucial. The requirement that the circulator indicate the number of signatures is now an express legislative directive in R.C. 3501.38(E). The combined force of the holding in *Loss* and the mandate of R.C. 3501.38(E) lead to the inescapable conclusion that the indication of the number of signatures contained on a petition paper is mandatory. I find support for this view in the case of *State ex rel. Betras v. Mahoning County Bd. of Elections*, No. 86 C.A. 56 (Ct. App. Mahoning County, April 21, 1986) (unreported). In *Betras*, as in *Loss*, the circulator omitted the number of signatures from the R.C. 3513.07 candidate petition form. The circulator also had a receipt from the board of elections showing the number of signatures at the time the petition was filed. Even though the board knew, by virtue of the receipt, that no signatures had been added after filing, the court of appeals, relying on R.C. 3501.38(E) and *Loss*, held that it was not an abuse of discretion for the board to invalidate the petition. I conclude that a petition paper which does not indicate the number of signatures contained therein as required by R.C. 3105.38(E) must be invalidated by the county board of elections.

It is, therefore, my opinion, and you are hereby advised, that:

1. R.C. 305.31 confers no authority on a county auditor to determine the validity of referendum petition papers with respect to the requirements imposed by R.C. 3501.38(E); such determination must be made by the county board of elections.
2. When a circulator fails to indicate the number of signatures contained on a petition paper as required by R.C. 3501.38(E), such petition paper is invalid.