

1203

1. FALSE STATEMENT—IF BOARD OF ELECTIONS DETERMINES AFFIDAVIT OF CIRCULATOR CONTAINS FALSE STATEMENT WITHIN KNOWLEDGE OF CIRCULATOR, ENTIRE PETITION PAPER SHOULD BE REJECTED—SECTION 4785-71 G. C.

2. SIGNATURES—INVALID BY REASON OF FACTS UNKNOWN TO CIRCULATOR—PETITION PAPER AND VALID SIGNATURES SHOULD BE ACCEPTED BY BOARD OF ELECTIONS.

SYLLABUS:

1. If a board of elections determines that the affidavit of a circulator prescribed by Section 4785-71, General Code, contains a statement which is false within the knowledge of such circulator, it should reject the entire petition paper to which such affidavit is attached.

2. If a board of elections determines that a petition paper prescribed by Section 4785-71, General Code, contains signatures which are invalid by reason of facts unknown to the circulator of such petition paper, the petition paper and the valid signatures thereon should be accepted by such board.

Columbus, Ohio, February 27, 1952

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Our office has been asked to rule on the validity of a Declaration of Candidacy and petition filed by a candidate for state office. In this particular instance the Board has determined that one person on such petition signed the name of another person. There were in all twenty-five signatures on said petition, and the circulator signed an affidavit to the following effect:

'.....being duly sworn deposes and says that he is a qualified elector in the state of Ohio and resides at the address appearing below his signature hereto; that he is a member of the..... party; that he is the circulator of the foregoing petition paper containing 25 signatures, and that said signatures were written in his presence and are the signatures of the person whose signatures they purport to be.'

"It is the thought of the Board that inasmuch as it is apparent that the circulator did not see 25 people actually sign their own name, but that he saw 24 persons sign, that said oath is invalid.

"We, therefore, request that you render an opinion as to whether an entire petition is therefore invalid, or just that one signature which was written by another person."

As pointed out in your request, the circulator of a petition paper bearing a declaration of candidacy signed an affidavit in the form prescribed by Section 4785-71, General Code. The Board of Elections with whom the circulator filed the petition paper has determined that one person signed the name of another person thereto. Your question is whether the entire petition paper must be held to be invalid on the ground that it bears a false affidavit which vitiates all of the signatures, or whether only the particular signature in question must be held invalid, and the remaining valid signatures accepted.

I have also been informed by a subsequent communication that the Board of Elections in question has rejected the entire petition paper.

Strictly speaking, therefore, there is nothing before me for my opinion in the actual case which you have presented. You will notice that Section 4785-70, General Code, does not provide for a protest and hearing in a case where a board has rejected a declaration of candidacy and petitions, and its action in so doing is final—subject only to a review in the courts on the ground of abuse of discretion. See *State ex rel McGinley v. Bliss, et al*, 149 Ohio St., 329.

It is true, however, that among your duties as chief election officer of the state you are required by Section 4785-7, General Code, "to advise with members of * * * boards as to the proper methods of conducting elections." The question which you have presented is one which you might properly be asked in performing that duty, and I therefore will undertake to advise you concerning it.

The best discussion of your problem is set out in the case of *State ex rel Gongwer v. Graves*, 90 Ohio St., 311. In the course of its per curiam opinion the court said, pages 322-324:

"It is insisted, however, that all the names upon any part of a petition should not be rejected because one or more is forged, false or fraudulent, and that is true if the verification to that part is not a perjury. These petitions and each separate part thereof depend for their efficiency and their validity upon the affidavit of the circulator that each of the signatures attached to such part was made in the presence of affiant; that to the best of his knowledge and belief it is the signature of the person it purports to be; that he believes the person who signed it to be an elector; that he signed the petition with knowledge of the contents thereof; that each signer signed the same on the date set opposite his name. If it appears from the evidence that the affidavit so attached to any petition or part of a petition is knowingly and intentionally false, then the affidavit is a perjury and can serve no purpose whatever; the whole part of the petition dependent thereon for its validity must fall.

"It must be conceded that any part of a petition to which no affidavit whatever is attached would have to be rejected *in toto*. The constitution requires an affidavit to each part of a petition, and without that affidavit it would be as worthless as blank paper, no matter if every signature thereon were genuine. An affidavit proven to be wilfully, corruptly and intentionally false is worse than no affidavit at all, for it brands the whole part of the petition to which it is attached with the indicia of fraud. If no affidavit is fatal to the whole petition or any separate part thereof, although the lack of such affidavit is due to innocent mistake,

oversight or inadvertence of the person circulating the same, and if all the signatures appearing thereon must be rejected without reference to whether they are genuine or not, upon what rule can it be said that it is the duty of the secretary of state, where it appears that the affidavit to any part of a petition is wilfully, corruptly and intentionally false, to determine upon other evidence the genuineness of signatures appearing thereon and, if he finds that there are some genuine signatures upon that particular part, to include them in the count? Such a holding would be an invitation to commit fraud and perjury.

“It is not sufficient that some of the signatures on some of the parts of a petition are genuine, nor is it absolutely necessary to the validity of the petition or any part thereof that every signature thereon should be genuine; but it is absolutely necessary to the validity of the petition or any part thereof that the circulator, when he makes affidavit certifying the signatures on these petitions, should believe that he is stating the truth. If it later appear that some one has imposed upon him and signed or forged the name of another, the circulator may still believe in the truth of his affidavit and it will support every genuine signature upon it, and only the ones not genuine will be stricken therefrom. But if the circulator knew that a signature appearing on such part of a petition was not genuine; if he knew that such signature was not written on the petition in his presence; if he knew that the person whose signature it purports to be was not an elector; if he knew that the person signing said petition did not sign it with knowledge of its contents, yet, notwithstanding his knowledge, he wilfully, corruptly and intentionally makes a false and perjured affidavit to the contrary, then such affidavit is worthless and the petition or part of a petition to which it is attached does not fill the requirement of the constitution, and the genuine signatures thereon cannot be counted for the reason that that part of the petition lacks the affidavit required by the constitution.”

While it is true that the court in that case based its decision upholding the Secretary of State's rejection of the entire petition papers on the ground of obvious perjury and fraud, I believe that it established guides for other less flagrant cases. In my opinion those guides establish the following rules:

If a board of elections determines that the affidavit of a circulator prescribed by Section 4735-71, General Code, contains a statement which is false within the knowledge of such circulator, it should reject the entire petition paper to which such affidavit is attached.

If a board of elections determines that a petition paper prescribed by Section 4785-71, General Code, contains signatures which are invalid by

reason of facts unknown to the circulator of such petition paper, the petition paper and the valid signatures thereon should be accepted by such board.

I realize that in arriving at one of the two above determinations any given board of elections will be confronted with numerous factual situations and decisions which are mixed questions of fact and law. No general rule can be laid down which will anticipate and answer those questions. It should be remembered that the board's decision will be overruled by the courts only if it amounts to an abuse of discretion, and close questions must therefore rest in the sound discretion of the various boards.

Respectfully,

C. WILLIAM O'NEILL
Attorney General