IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel, LOREN MORRIS,

Plaintiff and Relator,

vs.

FRANK MARSH, Secretary of State, State of Nebraska,

Defendant and Respondent.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having come on for hearing on the 28th day of August, and continued to various times up to and including the 16th day of September, 1968, and on the evidence adduced and the written briefs of the parties, the Court makes the following findings of fact and conclusions of law:

The original itemized financial statement submitted by relators at the time of the filing of the petition with the Secretary of State was certainly not complete. However, based on the Court's holding in Winter v. Swanson, 138 Neb. 59, and with the supplemental statement filed on August 28, 1968, the Court finds that these statements contain the information known to the petitioners at the time of filing. Therefore, respondent's objections to this statement are overruled.

Originally the Secretary of State had published July 5 as the final date for filing petitions, and at some later date had changed this to July 3rd. The general rule in computing a months time is to start with a particular date, and go to the corresponding date of the succeeding month, less one. Applying this rule in the instant case would indicate to the Court that November 4, 1968 was

the last date of a four months period beginning July 5, 1960, and therefore November 5 would be not less than four months in the future. Alternately using the count-back system of excluding the first date and including the last, July 4th would be said to be the last date upon which the petitions could be filed in order to qualify for the November 5th election. R.R.S. 25-2221 states in general that if the last day for doing an act falls on a Sunday, a Saturday or a holiday, the time is extended one day. July 4th was a holiday, and therefore the time should be extended to July 5th. Therefore, whichever method is used, the conclusion seems inescapable that a petition filed on July 5th would permit submission to the voters in an election to be held on November 5th. Therefore, all valid signatures filed up to and including July 5th should have been counted by the Secretary of State.

The remaining objections have to do with attacks on individual signatures as well as complete petitions, for a variety of reasons. The only requirement which the Constitution of the State of Nebraska makes as to the signing of an initiative petition is that the signers must be electors. Electors were defined by the Constitution as being any person, a citizen of the United States, over twenty-one years of age, who has resided in the State of Nebraska for the last six months, and in the county and precinct for the time required by law. Any statute which is passed could not extend or enlarge these requirements. However, the burden would be upon the petitioners, the relators in this case, to prove that each signer was in fact an elector. The various statutes which require that the petitions be signed in a certain way, and that the signers be registered voters is, in effect, a rule of evidence which, if the statutes are followed, raises a presumption of validity, or a presumption that each person so signing is a qualified elector.

Therefore, in most instances, it would seem logical to require that the rule set forth in the statutes be followed, otherwise the petitioners are obligated to prove by additional evidence his right to sign such petitions.

The Secretary of State has conceded that of those petitions filed on July 3rd, before 5 p.m., there were 43,964. In addition respondents have agreed that there were 2,494 signatures contained on the petitions filed after 5 p.m. July 3rd, which would have been valid except for the "late filing." The Court having already overruled the Secretary of State's contention as to the "late filing" the additional 2,494 signatures are added to the total as having been valid.

Category 3a objections relate to an incomplete or missing date opposite a particular signature. In practically every instance this occurred between two correctly stated dates. In other words, the incomplete date following for example June 3, 1968 and also being followed by June 3, 1968, which would make it readily apparent that the missing date was in fact June 3rd. This, the Court feels, is a technical objection which should not stand, and accordingly the signatures so objected to should have been declared valid.

Category 3b objections related to the date having been written in by someone other than the signor. There appears no mandatory requirement directing that those dates must be inserted by the signer, and therefore the Court has validated the signatures contained in this category.

Respondent's Objections 3c, 3d, 3E and 3F are sustained.

Objections in the complete 4 category have to do with the signature of the petitioners, the bulk of them relating to the signing by initials only, or the signing by a married woman using her husband's name rather than her own. This is contrary to the

plain words of the statutes, and any person so signing is not entitled to the benefit of the presumption of validity, and therefore these objections are sustained and the signatures not counted.

Category 5 objections relate generally to missing or incomplete addresses. The statutes require very plainly either a street address, a rural route number, or a precinct number. Again, if the signer of the petition has neglected to insert this bit of information there is no presumption of validity, and in the absence of additional proof the signatures should be rejected. A slight deviation from this particular rule would seem to be in order, if the address given was that of a well known apartment house, trailer court, or the like, which sufficiently identified the signer's residence. However, from all appearances, there were an insignificant number falling into this category, and no finding has been made by the Court in this instance.

6a objections relate to the failure of the signer to show a city of residence. This objection is good.

6b objections state that the city of residence is shown by "ditto" marks. "Ditto" marks are an accepted method, and the signatures in which the address was so stated should have been counted.

6c objections have to do with the city of residence having been written by someone other than the signer, and again the Court finds in that connection that the objection is not good, and those signatures should have been counted.

The Court therefore finds that of the total number of signatures declared invalid by the Secretary of State contained in Categories 3, 4, 5 and 6, there were 958 good signatures, for the reasons cited above, which have been added to the total.

Respondent had rejected all petitions obtained by John Sims, which contained in excess of one thousand signatures, of which 755 were conceded by the Secretary of State to be otherwise valid. The challenge which the State has made to the John Sims petitions were that he himself had twice signed similar petitions, one as a resident of Grand Island, and the other as a resident of Omaha, and therefore having violated the law "falsus in uno, falsus in omnibus." There is a line of cases which indicate if there has been fraud proven in the obtaining of one or more petitions by a circulator, that all petitions obtained by him should be thrown out. However, this is a somewhat different situation. There has been no fraud or irregularity shown on the part of Mr. Sims in his circulation of the petitions and therefore the Court feels that whatever mistake he made as an individual signer should not taint the petitions circulated by him. Accordingly, the Court has validated and added to the total those 755 signatures.

Objections were made by the Secretary of State as to those petitions where the circulator had signed by initials only. His theory was that a circulator is required to be an elector, and therefore to have the presumption in his favor he must also sign his full name. Evidence was adduced which indicated that W. C. Fitzwater and A. J. Troeller did use as their legal signatures in their home communities, the initials by which they signed as circulator. Furthermore, it seems to the Court that a circulator is in a somewhat different position than a signer in that he, the circulator, has sworn under oath before a Notary Public that the facts are true as alleged thereon, and one of these facts is that he is a circulator, and a legal elector. For these reasons, the Court has validated and added to the total the 471 signatures obtained by Mr. Fitzwater and the 380 signatures obtained by Mr. Trueller.

Finally, the Secretary of State has challenged those signatures appearing in Sarpy County petitions wherein the signor indicated an Omaha address. The theory of this objection is that Omaha is in Douglas County, and a Douglas County resident cannot sign a Sarpy County petition. However, it is a well known fact and the Court can probably take judicial notice of the fact that there are many who have Omaha addresses who actually live in Sarpy County. In addition, there was sufficient evidence adduced by the relator to substantiate this fact. Therefore, the 191 Sarpy County signatures rejected by the State are validated and have been added to the total.

The total number of signatures which the Court herein finds as valid is a minimum figure only, and amounts to 49,213 which is in excess of the 48,640 required.

In making the above findings the Court does not intend to find necessarily that all of the individual objections by number count made by the Secretary of State are accurate. In other words, time did not permit the individual examination of each petition, and so there may be additional valid signatures which the Court cannot verify in the time allotted. Additionally, there were a number of petitions which were objected to because the Notary Public had failed to sign his name or to affix his seal. Again, these omissions prevent the presumption of validity, and before those signatures could have been counted, additional evidence would have to have been submitted by the relator establishing that the affidavit was in fact made before a legally qualified Notary Public.

No objection was raised by the Secretary of State that the constitutional requirements that 5% of the signatures be from two-fifths of the counties was lacking. However, from the evidence introduced, the Court finds that this requirement was met.

As indicated by the above findings, the Court is of the opinion that the State has failed to show cause why a preemptory writs of mandamus should not issue, and conversely the relator has maintained the burden of proof in establishing a sufficient number of valid signatures to require that the question, as stated in the petition, be placed on the ballot. Therefore, the preemptory writ of mandamus should be and hereby is ordered issued, commanding the Secretary of State to take the necessary steps to place said issue on the November 5, 1968, general election ballot.

Dated at Lincoln, Lancaster County, Nebraska, this 16th day of September, 1968.

BY THE COURT:

DISTRICT Judge.