

ADVISORY 2009-06

July 8, 2009

To: All County Boards of Elections

Re: Circulator Requirements for State Initiative Petitions

The purpose of this advisory is to address questions that have been raised by Ohio boards of elections regarding (1) whether a person whose permanent address is outside of Ohio may circulate part-petitions for a state initiative petition and (2) actions that the boards of elections must take in reviewing circulator statements.

(1) Out-of-State Circulators. In *Nader v. Blackwell*, 545 F.3d 459 (C.A.6 2008), the U.S. Court of Appeals for the Sixth Circuit held that the requirements of R.C. 3503.06 that circulators of candidate petitions be Ohio electors and Ohio residents were unconstitutional. In Advisory 2009-04, the Secretary of State applied the *Nader* decision to R.C. 3503.06(B) and concluded that the requirement that circulators of initiative and referendum petitions be Ohio residents is also unconstitutional. Thus, in Directive 2009-10 and in the instructions provided with the directive, Ohio boards of elections were instructed not to invalidate any part-petition because a circulator listed a permanent residence address outside the state of Ohio.

The form for a constitutional amendment initiative petition is provided in R.C. 3519.05. That form instructs circulators to provide their “permanent residence in this state.” However, given the *Nader* decision, Advisory 2009-04, and the instructions given with Directive 2009-10, **circulators may list on a part-petition a permanent residence outside of the state of Ohio.**

(2) Issues Concerning A Circulator’s Address. Several boards have sought advice from this office concerning a letter received by them from the law firm of Bricker and Eckler, a law firm that represents opponents of the proposed constitutional amendment. The letter suggests that certain casino issue part-petition circulators, whose names are included on lists attached to the letter, did not provide on the circulator statement their actual permanent residence addresses.

Clearly, if the board of elections discovers as part of its process of determining validity of a part-petition as provided in R.C. 3519.05 that it is facially invalid, the board must not verify that the part-petition is valid. Similarly, if the board determines as part of its process of determining validity that fraud exists in connection with a part-petition (such as a circulator listing a permanent address in your county that does not exist) the board must not verify that the part-petition is valid.

R.C. 3519.06 identifies circumstances that preclude verification of validity for an initiative or referendum part-petition (including part-petitions to place a constitutional amendment on the ballot). Under R.C. 3519.06(D), a board of elections may not verify the validity of a part-petition if “satisfactory evidence” is presented to the board of elections “[t]hat the statement is false in any respect.”

In Ohio all circulator statements are signed under penalty of election falsification. In accordance with R.C. 3519.05 the statement “Whoever commits election falsification is guilty of a felony of the fifth degree” appears prominently on the casino issue part-petitions directly below the circulator statement signature line. Under R.C. 3519.06 and the instructions provided with Directive 2009-10, and in light of the fact that circulators provide their permanent residence address under penalty of law for misrepresenting their address, a board of elections may generally presume that the permanent residence address provided by a circulator is valid if such an address exists in the county. This presumption of validity is overcome where “satisfactory evidence” exists that a circulator falsely represented his or her permanent address. To overcome the presumption of validity, an individual questioning the validity of the permanent residence address of a circulator has the burden of providing to the board “satisfactory evidence” that the listed address is false.

An example of “satisfactory evidence” of a false address includes (but is not limited to) an affidavit of an individual with personal knowledge that the circulator did not live at the residence address listed on the part-petition. **An unsworn document or written assertion that speculates that a circulator may have listed a false permanent address does not, standing alone, constitute “satisfactory evidence” of a false permanent address precluding verification by a board.**

Of course, the board is fully empowered, pursuant to R.C. 3501.11(J) to investigate irregularities or violations of Title XXXV of the Revised Code and report its findings to the prosecuting attorney or the secretary of state. Pursuant to Directive 2009-10, however, **every Ohio board must complete its review of the part-petitions according to the instructions given with Directive 2009-10 and submit a copy of its certification form to this office no later than July 16, 2009.** This deadline is necessary to enable the secretary to meet her July 21 constitutional deadline for determining the sufficiency of part-petition signatures.

Boards are also reminded that, pursuant to Article II, Section 1 of the Ohio Constitution, as amended in 2008, the Supreme Court of Ohio has original and exclusive jurisdiction over all challenges to state issue petitions and the signatures on the petitions.

If you have any questions, please contact your assigned elections attorney at 614-466-2585.

Sincerely,

Jennifer Brunner