

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Jared Hendrix, as Chairman of the North
Dakota for Term Limits Sponsoring
Committee, and North Dakota for Term
Limits,

Petitioners,

v.

Alvin A. Jaeger, in his official capacity as
North Dakota Secretary of State,

Respondent,

**North Dakota Supreme Court
Case No. 20220233**

**ORDER REGARDING FACTUAL
FINDINGS REGARDING
RESPONDENT'S DISQUALIFICATION
OF PETITION SIGNATURES**

Background

[¶1] This matter is before the Court on assignment from the North Dakota Supreme Court with instructions dated August 18, 2022. The Supreme Court directed this Court to “hold an evidentiary hearing and make findings of fact on the following issue: the Respondent’s disqualification of petition signatures”. The Supreme Court ordered that findings be submitted to the Supreme Court no later than August 26, 2022.

[¶2] The Order of the North Dakota Supreme Court came after the Petitioners filed a Request for a Writ of Mandamus on August 12, 2022, directing the Office of the North Dakota Secretary of State to accept the valid signatures in support of the Term Limits Initiative. The Petitioners attached 422 pages of exhibits with their petition. The same attachments were presented to the district court for consideration.

[¶3] This Court held the ordered evidentiary hearing on August 23, 2022, at 9:00 AM, at the

Burleigh County Courthouse. It was the first available date on the calendar. Attorney Jesse H. Walstad, Bismarck, ND, represented Petitioners at the hearing. Attorneys Edward D. Greim and Matthew Mueller, who appeared pro hac vice, also represented Petitioners.

[¶4] Respondent Alvin Jaeger appeared with Attorneys David Phillips and Matthew Sagsveen and gave testimony.

[¶5] It was an in-person hearing. There has been a request by Petitioners to allow for a hearing by reliable electronic means. Petitioners made the request at approximately 3:25 PM on Monday, August 22, 2022. It was by email directed to the Court. There had also been a request by the parties to meet by telephone that same afternoon to discuss logistics. The Court granted the request for a conference.

[¶6] The Court held a ZOOM pre-hearing conference at 3:30 PM on August 22, 2022. Attorney Phillips appeared representing the Respondents. Attorneys Walstad and Greim appeared on behalf of the Petitioners. The Court denied the request for a hearing by reliable electronic means. The hearing was set as an in-person hearing and the parties were advised that all witnesses would have to appear in person unless otherwise stipulated. Courtroom 100 in the Burleigh County Courthouse is not equipped to hold a hybrid hearing. It was the only courtroom available for this hearing. The Court deemed it appropriate given the urgency of the hearing to maintain it as an in-person hearing.

[¶7] Petitioners also sent the Court, by e-mail, late in the afternoon on Monday, August 22, 2022 what they labeled a *Motion In limine Re: Scope of Admissible Evidence and Relevance*. It was a nine (9) page document and attached multiple documents. The Court denied the motion on the record. It was untimely and the time of its filing provided no time for the Respondents to answer. Consideration of this motion, formally under Rule 3.2, N.D.R.Court, would force a delay. Based upon the schedule set by the North Dakota Supreme Court this evidentiary hearing could

not be continued. The motion went towards admissibility and relevance of anticipated exhibits. The Court informed the parties that they were to meet at 8:00 AM on Tuesday, August 23, 2022, in Courtroom 100, Burleigh County Courthouse to discuss admissibility of exhibits. Whatever exhibit that could not be stipulated to would be offered the Court for a ruling on admissibility. The parties were advised that the hearing was set for two hours with each side taking one-hour to present their case.

[¶8] This Court heard testimony from the following witnesses: Secretary of State Alvin Jaeger and Lee Ann Oliver. The Court also received dozens of exhibits into evidence, many of which had been marked by the Petitioners and filed into the North Dakota Supreme Court record. It has taken many hours to digest the extensive proffered exhibits in an extraordinarily compressed time period. The Court has done its best to do so.

[¶9] Petitioners did not offer live witness testimony in the hearing. They offered instead, pursuant to stipulation, a series of affidavits from proposed witness. These included affidavits from their principal witnesses, Zeph Toe and Chloe Lloyd. Based on the stipulation between the parties the Court accepted that testimony by affidavit. The Court did the same for the Respondent notwithstanding the fact that Petitioners objected to affidavits from the Respondents. Although Secretary of State Alvin Jaeger and Lee Ann Oliver did testify, their affidavits were also offered and admitted. [R-1, R-32] They stated under oath that the statements in their respective affidavits were truthful. They were subject to cross-examination. The affidavits were inherently reliable. This was a court-tried matter. The Court was well versed in discerning whether the affidavits proffered inadmissible hearsay. The Court also received an affidavit of Mark Nickel, North Dakota Bureau of Criminal Investigation. [R-38] The acceptance of the affidavits was a product of time restrictions. Obviously, without witnesses testifying, credibility was difficult to assess. However,

the practicality of the hearing timeline dictated these measures. The hearing was for the basis of making findings regarding “the Respondent’s disqualification of petition signatures.” The two principal witnesses on that issue (Jaeger and Oliver) did appear in person. They were subject to cross-examination. Their courtroom demeanor and the totality of their in-court testimony and statements in their respective affidavits made both strong witnesses. Their knowledge of North Dakota election law was extensive. The Court viewed both with a high degree of credibility.

[¶10] Following the hearing, the Court took the matter under advisement. It has reviewed the voluminous exhibits offered and received at the hearing. It now makes the following factual findings regarding the issue specifically assigned to the Court by the North Dakota Supreme Court.

FACTS

[¶11] The following findings of fact are based upon the testimony heard and the exhibits received by the Court at the August 23, 2022, evidentiary hearing record.

[¶12] Respondent Alvin A. Jaeger [“Secretary Jaeger”] is the elected North Dakota Secretary of State, and was so at all times relevant to this petition. He acted in is official capacity at all times with respect to this matter. Secretary Jaeger has held his position as Secretary of State for the last thirty (30) years.

[¶13] Petitioner Jared Hendrix, [“Hendrix”] is a North Dakota resident and a “qualified elector” under the North Dakota State Constitution, N.D. Const. Art II. Hendrix is “chairman” of Petitioner North Dakota for Term Limits, the Sponsoring Committee of the Term Limits Initiative [“Committee”].

[¶14] On July 1, 2021, the Committee submitted to Secretary Jaeger a Term Limits Initiative Petition [“Petition”] for review and approval. The propose initiative would impose term limits on the Governor and North Dakota State Legislature.

[¶15] On July 16, 2021, Secretary Jaeger approved the petition for circulation. By law, valid signatures in support of the Term Limits Initiative were due to the Office of the Secretary of State by July 11, 2022. In order to place the Term Limits Initiative on the ballot in 2022, the Committee was required to gather 31,164 the qualified signatures.

[¶16] On February 15, 2022, the Office of the ND Secretary of State received from the Committee 1,441 petition packets, which was represented by the Committee to contain 46,366 valid signatures by North Dakota voters supporting the Term Limits Initiative. If approved, this number would exceed the number of qualified signatures required to place the Term Limits Initiative on the November 2022 ballot by 15,202.

[¶17] On March 17, 2022, a meeting took place at the Office of the North Dakota Secretary of State. Secretary Jaeger called the meeting to discuss the Term Limits Initiative petitions submitted by the Committee. Petitioner Hendrix was requested to attend. He did so. In addition to Secretary Jaeger, Deputy Secretary Jim Silrum, election specialist Lee Ann Oliver, a North Dakota deputy attorney general, and a Bureau of Criminal Investigation investigator attended the meeting. Attorney General Drew Wrigley joined the meeting after it had started. At the conclusion of the meeting, Attorney General Wrigley invited Hendrix and the Committee to withdraw the petitions in order to avoid negative publicity. The Committee declined the “invitation” to withdraw the petitions.

[¶18] At the March 17, 2022, meeting, Hendrix was informed that a decision had been made by Secretary Jaeger by that date to invalidate at least 7,240 signatures that had been submitted. Secretary Jaeger also made clear that the review process was ongoing and he (Jaeger) expected the ongoing review to invalidate additional signatures.

[¶19] On March 22, 2022, Secretary Jaeger notified the Term Limits Initiative Committee by

letter that it had failed to submit enough valid signatures to place the Terms Limits Initiative on the November ballot. Secretary Jaeger, in his official capacity, determined that only 17,265 signatures of the 47,366 signatures were valid and qualified signatures.

[¶20] Secretary Jaeger found that 29,101 signatures were not valid signatures and, therefore, would not be counted towards certifying the Petition. Without them, the Petition did not have a sufficient number of valid signatures to be on the November ballot. Secretary Jaeger informed the Committee that he would not certify the petition for placement on the November ballot. He also informed Hendrix that “as required by N.D.C.C. § 16.1-01-10, I must report the violations to the Attorney General. Attached to the March 22, 2022, letter was a *Summary of Rejected Signatures*.

[¶21] The Committee asked for the opportunity to review the petitions and the basis for rejection. The Office of the ND Secretary of State returned the petitions to the Committee. That occurred between March 28, 2022, and April 6, 2022.

[¶22] On April 5, 2022, Secretary Jaeger provided a one-hundred twenty-five (125) page spreadsheet outlining the reason(s) for excluding each of the invalidated signatures. Secretary Jaeger outlined a multitude of reasons for rejecting the 29,101 signatures. The Court finds, based upon the record, the reasons outlined were statutorily valid and the Secretary of State was within his authority to make the findings he did which led to disqualification of the petitions.

[¶23] The Term Limits Initiative Committee filed a *Petition for a Writ of Mandamus* with the North Dakota Supreme Court on August 12, 2022, asking that the Supreme Court issue a Writ of Mandamus requiring the Secretary of State to place the Term Limits Initiative on the November 8, 2022, ballot. The brief and attachments numbered 491 pages. The Supreme Court on August 17, 2022, issued *the Order on Procedure*.

[¶24] **Category One-“Likely Forged” Signatures**: The Secretary of State followed the

language of N.D.C.C. § 16.1-01-09 in review of the submitted petitions. Secretary Jaeger, in his statutory review process, determined that based upon, “a review of the petitions by my office **and an investigation by the Attorney General’s Bureau of Criminal Investigation**, that the petitions do not have a sufficient number of valid signatures”. [emphasis added]

[¶25] In the first category, Secretary Jaeger invalidated every signature notarized by an individual by the name of, “Zeph Toe”, a North Dakota notary. Secretary Jaeger found that “[s]everal signatures of circulators were likely forged in the presence of a notary public.” Toe notarized 751 petition packets, which contained of 21,684 signatures. Without those 21,684 signatures, the Term Limits Initiative fails.

[¶26] Secretary Jaeger testified extensively about the procedure and his reasoning for invalidating the signatures gathered by the Committee. He testified that when signers sign the various petitions, circulators observe each signature and then must sign an affidavit authenticating those signatures in front of a notary, who then notarizes the circulator’s affidavit. Secretary Jaeger outlined numerous concerns he had pertaining to the petitions submitted by the Committee, including the petitions containing out of state address, duplications, pay-per-signature issues, and, most notably, serious concerns with Notary Zeph Toe.

[¶27] Zeph Toe is, and at all times relevant to this matter was, a notary in North Dakota. He notarized over 700 petitions for the Committee. During the review of all of the petitions, Secretary Jaeger and his office isolated for separate circulators, signed off by Toe, which contained numerous discrepancies. Initially there were only two circulators which raised red flags to the Secretary of State – Chloe Lloyd and Romana Morris. After the initial review of the petitions and after Secretary Jaeger’s decision to invalidate the signatures, two other circulators were called into question – Wayne Williams and Ritchell Aboah.

[¶28] With regards to the petitions circulated by Lloyd, Secretary Jaeger determined her signatures were inconsistent amongst numerous petitions, and ultimately, concluded that the signatures contained on her petitions were invalid. The petitions, which contained the invalidated signatures of Lloyd, were all notarized by Toe. Lloyd had other petitions notarized by other notaries; however, all of those petitions contained substantially similar signatures. Only the petitions notarized by Toe contained signatures which were not substantially similar to one another, even signatures signed by Lloyd on the same day. Because of these discrepancies on Lloyd's signature, Secretary Jaeger had significant concerns that Lloyd did not sign the petitions in front of Toe when he notarized them.

[¶29] Secretary Jaeger also testified to inconsistencies between other notarized petitions by Toe which included addresses of circulators not in the circulator's handwriting or one affidavit containing "St." and another "Ave." for the same circulator. In his affidavit, Secretary Jaeger notes that these inconsistencies concerned him because it was unlikely that the circulators would not know their own address and this pointed towards the circulators not being in Toe's presence when he executed the notarial certificate. At the end of the day, all of the inconsistencies across all of the petitions and affidavits raised sufficient concern on the part of Secretary Jaeger about Toe's proper execution of his notary duties. Such inconsistencies indicated to Secretary Jaeger that Toe's notarizations of the petitions to be likely fraudulent.

[¶30] Secretary Jaeger was cross-examined extensively about his process in determining whether the petitions were valid. Secretary Jaeger testified that although he is not a handwriting expert, he has been a part of dozens of initiated measures over the last thirty (30) years and his staff has extensive experience ascertaining the validity of signatures and petitions, with having reviewed over one million signatures. Numerous people in Secretary Jaeger's office reviewed the various

petition affidavits in question. After the review and taking into account the work of his office in the review process, Secretary Jaeger concluded the signatures were likely fraudulent. Based on the totality of the information available to the Office of Secretary of State at the time of review, this Court agrees with that finding by the Secretary of State.

[¶31] Secretary Jaeger found irregularities in the circulator's name and address on the affidavits and concluded that the circulator affidavits notarized by Toe were "likely forged". In numerous instances, the handwriting of the city, state, and zip code appeared different from the street address listed. Zeph Toe notarized several petitions despite the fact that the signatures of the same circulator were different on a number of the petitions supposedly circulated by the same person.

[¶32] By a review of the subject petitions, the Court finds that these actions by Secretary Jaeger are factually substantiated. Most notably, Secretary Jaeger testified that these numerous errors were more than he had ever seen by a single notary in his thirty years as Secretary of State. Because of these obvious errors, Secretary Jaeger could not, with confidence, state that the other petitions notarized by Toe were without errors or fraud. Therefore, he determined all affidavits notarized by Toe were untrustworthy and none of them could be counted.

[¶33] Secretary Jaeger provided sufficient testimony and evidence to outline and explain his decision to invalidate the suspected fraudulent petitions notarized by Toe. The Court finds that the rejection by the Secretary of State of the entirety of the affidavits notarized by Toe was within the power of Secretary Jaeger. The Court further finds that his action was based upon the facts known to him at the time of his review undertaken in the timeline set by statute review and was based upon North Dakota law.

[¶34] Additionally, Secretary Jaeger also found in the first instance, that 5,944 of the 21,684 signatures submitted were deficient for issues which would render them invalid even absent the

exclusion of the entirety of all of the “Zeph Toe” signatures. (i.e. invalid signature columns).

[¶35] The decision of the Secretary of State was based upon review by his office of the petitions actually submitted to his office and existing North Dakota law. No attestations from circulators nor declarations of notary publics were attached to the signatures and notarizations at that time. That is not provided for in North Dakota law. The Secretary of State performs his statutory duty upon review of the submitted petitions. There is no statutory provision in North Dakota for an “after-the-fact explanation” of the petition gathering process as appears suggested by Hendrix through offering affidavits and declarations of circulators and the subject notary. Secretary Jaeger rejected those affidavits as also being untruthful. This Court does as well, based on the record in this case.

[¶36] For the above reasons, the Court finds the exclusion of the entirety of the Toe’s notarized petitions was appropriate. The Court finds that the numerous errors contained within Toe’s notarized petitions show likely fraud. Their exclusion was appropriate.

[¶37] **Category Two-Signature Level Issues:** In a second category, Secretary Jaeger excluded a number of signatures containing, what he identified as, “signature level issues”. In his review of the entirety of the signatures submitted, he identified 4,537 signatures contained flaws which rendered them invalid. The reasons for invalidation were numerous, including: (1.) failure to include a direction with a street name (i.e. N.E.S.W.); (2.) failure to include a suffix (i.e. St. Dr. etc.) with a street name; printed names that were not clearly printed; (3.) signatures which too closely resembled the printed name; college, dorm used as an address; and (4.) omission of a city or zip code, or an incorrect zip code. The Secretary also found some circulators were not North Dakota qualified electors as required by North Dakota law, and some of those individuals were not citizens of the United States.

[¶38] During the evaluation of the petitions and signature, Secretary Jaeger and his office created numerous spreadsheets. These spreadsheets outline the various reasons why certain signatures or petitions were deemed insufficient by Secretary Jaeger and therefore, invalid towards the total for the signatures required for the initiative to be placed on the ballot. The Court finds these spreadsheets helpful and accurate. Upon review of the various documents admitted into evidence, the Court concludes that the various petitions did contain errors outlined above which would invalidate the individual signatures.

[¶39] Although not testified to at length during the evidentiary hearing, in every instance, the record did, and continues, to support the reasons cited by Secretary Jagger. He was factually correct in his analysis. Therefore, the Court finds that the 4,537 signatures containing flaws were properly excluded.

[¶40] **Category Three-Pay Per Signature Violations:** The third category of signatures that Secretary Jaeger rejected was based upon his conclusion that they were collected in violation of North Dakota's *Pay Per Signature Ban*. N.D.C.C. § 16.1-01-12(1)(j). Secretary Jaeger rejected 7,793 signatures on this basis.

[¶41] In February 2022, the Committee was forewarned of the requirements of law. North Dakota law prohibited circulator being paid upon the number of signatures obtained or by bonus for the number of signatures gathered. [R-37] The Committee had an obligation to know the law. The Court finds that the Committee did not comply with N.D.C.C. § 16.1-01-12(1)(j).

[¶42] Secretary Jaeger offered exhibits R-41 through R-49 at the evidentiary hearing. Such exhibits contained documents seized by the Bureau of Criminal Investigation and their investigation into Charles Tuttle. Petitioners objected to the admission of the documents under North Dakota Rules of Evidence Rule 403 and 404. The Court reserved the ruling on the

admissibility of these exhibits. The search, which produced the documents, took place after the initiative petitions were rejected by Secretary Jaeger.

[¶43] The Court finds that notwithstanding when they were obtained, Exhibits R-41 through R-49 are relevant to the issue of a potential violation of North Dakota's *Pay Per Signature Ban*, N.D.C.C. § 16.1-01-12(1)(j). This was one of the reasons Secretary Jaeger rejected the petitions. Therefore, the Court receives Exhibits R-41 through R-49 into evidence. The objection goes to weight not admissibility. The Court is obligated to weigh the relevance of exhibits to the issues before this Court. The Court finds these exhibits substantiate the position taken by the Secretary of State.

[¶44] The Court finds (as did the Secretary of State in his review process) that a sampling of the eighty-seven (87) circulators indicated that several were offered, or paid bonuses, based upon the number of signatures they obtained. This is prohibited by N.D.C.C. § 16.1-01-12 (1)(j). The Court finds that any signature obtained in violation of this statute is void.

[¶45] The Court finds that the action of the Secretary of State excluding the 7,793 signatures on this basis was appropriate. It was a factual based decision within the authority of the North Dakota Secretary of State based upon credible evidence.

Conclusion

[¶46] According to the North Dakota Constitution, Article III, Section 3, initiative petitions may only be circulated by electors, and each elector must swear that the signatures were affixed in their presence. The Court finds by the credible evidence that this was not the case here.

[¶47] According to state law, N.D.C.C. § 16.1-01-10, the Secretary of State has a reasonable period, not to exceed thirty-five days, to pass on the sufficiency of the submitted petitions. The Court finds that the Secretary of State met that requirement.


[¶48] Based upon a review of the submitted petitions by the ND Secretary of State and an investigation by the Attorney General's Bureau of Criminal Investigation, Secretary Jaeger found that the petitions submitted by the Committee did not have a sufficient number of valid signatures. Excluding the invalid signatures, the petitions submitted by the Committee only contained 17,265 valid signatures. The Court finds that the credible facts support the decision of the Secretary not to certify the Term Limits Initiative.

[¶49] This Court finds that the decision of the North Dakota Secretary of State to not certify the Terms Limit Initiative was supported by the facts and prevailing law.

IT IS SO ORDERED.

Dated this 25th day of August, 2022.

BY THE COURT:

Handwritten signature of James S. Hill in cursive script.

James S. Hill, District Judge
South Central Judicial District