

CITIES, TOWNS & VILLAGES:
STATE AUDITOR:
PETITIONS:

The state auditor should not
make an audit of a city in
which a petition has been
presented to him under the

provisions of Section 29.230, RSMo Supp. 1967, such petition pur-
portedly containing enough signatures to authorize him to make an
audit of such city, when he also receives sworn statements from
individuals who allegedly signed the original petition stating
under oath that they did not sign such petition, such withdrawn
signatures being of sufficient number to reduce the signatures
below the number necessary to authorize the state auditor to make
such audit.

March 19, 1970

OPINION NO. 190

Honorable Haskell Holman
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is in reply to your request for an official opinion of
this office concerning the question whether the state auditor
should make an audit of a city in which a petition has been pre-
sented to him purportedly containing enough signatures to autho-
rize him to make an audit of such city when he receives sworn
statements from individuals who allegedly signed the original
petition stating under oath that they did not sign such petition,
such withdrawn signatures being of sufficient number to reduce
the signatures below the number necessary to authorize the state
auditor to make such audit.

Audits of cities by the state auditor are authorized by sub-
section 2 of Section 29.230, RSMo Supp. 1967, which reads as fol-
lows:

"The state auditor shall audit any political
subdivision of the state, including counties
having a county auditor, if requested to do
so by a petition signed by five per cent of
the qualified voters of the political sub-
division determined on the basis of the votes
cast for the office of governor in the last
election held prior to the filing of the
petition. The political subdivision shall

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pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

The question here, under the facts stated, is whether the state auditor should proceed with the audit in view of the conflicting petitions. That question depends on the nature of the duties of the state auditor under Section 29.230.

It is said in 67 C.J.S., Officers, Section 112:

"A duty is ministerial when it is a simple and definite duty imposed by law, arising under conditions admitted or proved to exist. A duty is discretionary when it requires the exercise of judgment."

In State ex rel. Folkers v. Welsch, 235 Mo.App.15, 124 S.W.2d 636, it was said that a ministerial act as applied to a public officer is an act or thing which he is required to perform by direction or legal authority upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in a particular case.

It is our opinion that the duties of the state auditor regarding when he shall audit a political subdivision under Section 29.230 are ministerial. Therefore, when a petition with the required number of signatures is presented to the state auditor he must conduct the audit. See Kaesser v. Becker, 295 Mo.932, 243 S.W.346 and State ex rel. Kemper v. Carter, 257 Mo.52, 165 S.W.773.

The point applicable here from the Kaesser case and the Kemper case is that where there is a prima facie showing of the facts required by the statute upon which the officer is to act, then he must act.

The problem at hand is whether there is prima facie evidence upon which the state auditor must make the requested audit.

The court in the Kaesser case stated, l.c. S.W.350:

"[2] III. Each petition, purporting to be signed by legal voters with addresses of the signers and supported by the statutory affidavit of the circular thereof and filed in the office of the secretary of state, is prima facie proof of the genuineness of such signatures, that the persons whose signatures appear thereon live at the addresses given, and that such persons are legal voters. Section 5907, R.S.1919; State ex rel. v. Carter, 257 Mo.loc.cit.78,165 S.W.773. Such prima facie character of such petitions continues in the suit to enjoin the secretary of state from submitting the act to a referendum, until it is

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overcome by the proof. Prima facie literally means at first view. In *Smith v. Burrus*, 106 loc.cit.100, 16 S.W.882, 13 L.R.A.59,27 Am.St. Rep.329, it is defined as:

'Such evidence as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose.'

"It is such proof as puts one contending against the truth of such prima facie showing to his own contrary proof, and, in the absence of such contrary proof, is sufficient to establish the fact finally. We quote from *Gilpin v. Railway Co.*, 197 Mo. at page 325, 94 S.W. at page 871 as follows:

'What is a prima facie case? The following answers have been given to that question: "A prima facie case is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side." 2 *Abbott's Law Dic.*312. "A prima facie case is that which is received or continues until the contrary is shown." 22 *Am.& Eng. Ency. Law* (2d Ed.) p.1294. Prima facie evidence. "It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." *Kelly v. Jackson*, 6 *Peters*, 632.'

"[3] The law presumes right conduct rather than otherwise. It presumes that men will not deliberately commit criminal acts. Applying such presumption concretely, when the circulator of a referendum petition makes the statutory affidavit thereto, the law accepts as true the statements made therein until the contrary is shown. This means that the genuineness of the signatures and the correctness of the addresses given and that the signers are legal voters are sufficiently shown by such affidavit to require the secretary of state to accept and file the petition, and that when any of the facts stated in such affidavit are questioned in court proceedings, those questioning the truth of such statements must produce testimony to overcome such prima facie case. When such proof is offered, it is the duty of the trier of the facts to determine the fact from all the proof, and such fact must be determined like any other issue of fact in a civil case from a fair preponderance of the evidence."

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In the instant situation the state auditor has been presented with a petition containing the number of signatures required by statute. On the basis of that petition alone, there would be a prima facie showing requiring the audit.

However, there has been presented to the state auditor an equally valid appearing petition of signatures stating they did not sign the first petition.

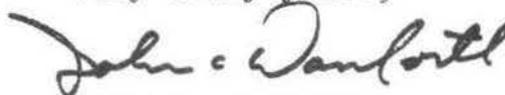
In this situation it is our opinion that there has not been a prima facie showing of the required number of signatures to cause the state auditor to make the audit under Section 29.230, and a court determination is necessary before an audit can be made.

CONCLUSION

It is the opinion of this office that the state auditor should not make an audit of a city in which a petition has been presented to him under the provisions of Section 29.230, RSMo Supp.1967, such petition purportedly containing enough signatures to authorize him to make an audit of such city, when he also receives sworn statements from individuals who allegedly signed the original petition stating under oath that they did not sign such petition, such withdrawn signatures being of sufficient number to reduce the signatures below the number necessary to authorize the state auditor to make such audit.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,



JOHN C. DANFORTH
Attorney General