

**OPINION
71-196**

August 9, 1971 (OPINION)

The Honorable William L. Guy

Governor

RE: Legislature - Senate - Filling of Vacancies

This is in response to your letter in which you ask the following questions:

1. Is the Governor required to fill any State Senate vacancies prior to a special session of the Legislature.
2. If he is required to do so, could any such vacancy be filled at the time of a special election, such as a referral election?"

These questions involve the interpretation and construction of Section 16-07-09 which provides as follows:

VACANCY EXISTING IN OFFICE OF MEMBER OF LEGISLATIVE ASSEMBLY - SPECIAL ELECTION TO FILL. Whenever a vacancy in the office of a member of the legislative assembly occurs by death, resignation, or otherwise, the county auditor of the county in which such former member resides or resided, officially shall notify the governor thereof. Upon receiving such notification, the governor, if there is a session of the legislative assembly between the time such vacancy occurs and the time of the holding of the next general election, shall issue a writ of election directed to the auditor of such county commanding him to notify the several boards of election in the county or district in which the vacancy occurs to hold a special election at a time designated by the governor to fill such vacancy. If there is no session of the legislative assembly between the time such vacancy occurs and the time of the holding of the next general election, the special election shall be held at the same time as the general election. If the term of office of the member whose office is vacated expires prior to the next session of the legislative assembly, no election shall be held to fill such vacancy." (emphasis ours)

Under the mandates of the foregoing section, if there is a session of the North Dakota Legislature before the next general election, a special election would have to be called to fill such vacancy.

The foregoing section uses the term "session" without qualification or description. While the Legislature may have had in mind regularly scheduled sessions as provided for in the Constitution, nevertheless, by using the term "session" without qualifying it with the further description of being a regular or special session, we must conclude that such term includes both a regular and special session.

We are aware that a regular session will not occur until after the

next general election. On such basis, pursuant to the provisions of Section 16-07-09, no special election is required to fill a vacancy. However, the prerogative of calling a special session rests solely with the Governor. If the Governor is reasonably certain that a special session will be called before the next general election, then a special election may be called to fill such vacancy.

The provisions of Section 16-07-09 and other related statutes clearly indicate that legislative districts should be fully represented at all sessions of the Legislature. In this respect, we call your attention to an opinion issued by this office on February 18, 1971, to Governor William L. Guy, a copy of which is enclosed.

In direct response to question number one, the Governor is not required to call a special election to fill a vacancy in the state senate because such office will be up for election at the next general election, and as of now no session is planned before the election. However, if the Governor has good reason and cause to believe that he will call a special session before the next general election, we believe that he may call a special election to fill the vacancy in the Senate. Only the Governor has the authority to call a special session; consequently, he would be the person who could determine whether or not a special session would be called before the next general election. If a special session is called, it would be incumbent upon the Governor to cause the vacancy to be filled.

As to question number two, a special election to fill a Senate vacancy could be held in conjunction with an election on a referral matter. These would be two separate elections and each election would have to be treated separately, but the same election board and clerical personnel could serve the needs of both elections.

The authority to call a special election to fill a vacancy in the Legislature arises only after the Governor has been notified by the county auditor of the county located within the legislative district in which a vacancy exists.

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