

**OPINION
71-200**

February 18, 1971 (OPINION)

The Honorable William L. Guy

Governor

RE: Legislature - Senate - Special Election to Fill Vacancy

This is in response to your letter in which you state:

Please advise me if I am required to call a special election to fill the vacancy resulting from the death of State Senator Kenneth C. Lowe.

If I am required to call a special election, please advise me of the procedures that should be followed by my office."

Senator Kenneth C. Lowe was a holdover senator, and that office would be up for election in the year 1972.

Section 16-07-09 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)

We must also take into account Section 16-07-10 which provides as follows:

VACANCY OCCURRING IN LEGISLATIVE ASSEMBLY DURING SESSION - DUTY OF GOVERNOR. If a vacancy occurs in the office of a member of the legislative assembly while it is in session, the governor, immediately upon receiving official notice thereof, shall proceed in the manner prescribed in section 16-07-09."

This section, however, relates back to Section 16-07-09. The provisions of the foregoing sections of law were designed to assure

that every legislative district is fully represented in the Legislature in its sessions.

The provisions of Section 16-07-09 are designed to assure that a special election is called and to assure that the legislative district is fully represented in every legislative session. In construing the provisions of Section 16-07-10 and 16-07-09 together, which we must do, it becomes clear that a special election need not be called to fill the vacancy if the person chosen to fill such vacancy will normally not be able to participate in the legislative session and a general election will be held between the filling of the vacancy and the next legislative session.

The time element involved in filling the vacancy will not permit the person chosen to fill the vacancy to participate in the Forty-second Legislative Assembly under normal situations.

Once the governor has been notified of the vacancy by the county auditor, it will take a minimum of 33 days to complete the process of electing a person to fill such vacancy. The Legislature is now in its thirty-seventh - thirty-eighth legislative day. The Legislature is limited to a sixty-day session. By the time the person is elected to fill the vacancy, the Forty-second Legislative Assembly in all probability will have adjourned sine die.

We are aware that a special session may be called by the governor and that such probability exists at any time. This is a matter which rests with the discretion of your office as governor. However, our answers will be based upon the sessions of the Legislature as designated by the constitutional provisions and statutes without regard to special sessions.

A similar question came up with regard to a vacancy in the House of Representatives on February 12, 1957. On February 14 this office, in an opinion to John E. Davis, advised that because the member which would be elected to fill the vacancy would not be able to serve during the then present session and that his office would become vacant prior to the next regularly scheduled session of the Legislature, the law would not require that a special election be held to fill the vacancy. On February 9, 1963, in an opinion addressed to the governor, in a similar question we concluded that in our opinion where it will be impossible for the newly elected representative to serve during the present session and where the term for which he will be elected will expire prior to the next regularly scheduled session, the law does not require that a special election be held to fill such vacancy at that time.

We are also aware that the Legislature is required to reapportion and redistrict. If this is accomplished, it is conceivable that all senators and representatives will be up for election in accordance with the new apportionment act adopted by the Legislature. Be that as it may, Senator Lowe, being a holdover for office, would be up for election in any event in 1972, which would be prior to the next regularly scheduled Legislative Assembly.

It is therefore our opinion that where it will be impossible for the newly elected senator to serve during the present Forty-second

Legislative Assembly and where the office will be up for election prior to the next regularly scheduled session of the Legislative Assembly, the statutory provisions do not require that a special election be held at this time to fill such vacancy, and that you are not required to issue a writ for a special election at this time.

Copies of the opinions referred to are enclosed.

The manner in which a special election is called is set out in Section 16-07-09. Upon receiving notification from the county auditor that a vacancy exists, the governor shall issue a writ of election to the sheriff of the county or counties involved directing him to notify the various boards of election in the district to hold a special election at a time designated by the governor. The time would be specified in the writ and the writ should be filed with the Secretary of State. The time specified in the writ should be no less than 33 days from the date of issuance of the writ.

HELGI JOHANNESON

Attorney General