

**OPINION
70-100**

October 15, 1970(OPINION)

Mr. Richard B. Thomas
State's Attorney
Ward County

RE: Counties - Election of Commissioners - Number of Write-in Votes

This is in response to your letter in which you referred to the fact that one of the county commissioners resigned on September 28, 1970. You then ask if a person seeking to run by write-in votes for the unexpired term of the commissioner who just resigned will be required to secure a certain number of votes before he would be considered elected. Your question is related only to the unexpired term and not to the election of county commissioners at large at the general election. There are not names on the ballot in this instance.

Section 16-13-38 provides that the county auditor shall make out a certificate of election to each of the persons having the highest number of votes for county offices. This section has not been amended. However, Section 16-08-05 pertains specifically to offices under the no-party ballot. This section among other things provides as follows:

"NO-PARTY BALLOT AT GENERAL ELECTIONS - CONTENTS - DELIVERED TO ELECTOR - NUMBER OF VOTES REQUIRED. * * *The candidate or candidates to the number to be elected for each office receiving the highest number of votes shall be duly elected to such office, provided however, no person who was entitled to have his name appear on the primary election ballot, but whose name was not placed on the primary election ballot, shall be elected to a no-party office as a write-in candidate unless such person receives a number of votes equal to or more than the number of signatures which would have been required to have his name placed on the primary election ballot."

In this instance, the election is a special election. An opportunity to have the name placed on the primary election ballot was not available even though the individual might have sought to have his name placed on the primary ballot if there would have been a primary election. We do not believe that the provisions of Section 16-08-05 apply only in instances where a primary election was had.

The legislative purpose in enacting Chapter 158 of the 1965 Session Laws which amended Section 16-08-05 as stated above was to eliminate the situation where a person receiving one vote could be elected to an office where no names appeared on the ballot but resort to write-in vote is used. (See report by the committee of political subdivisions which made a study of the laws and ultimately recommended the language as now found in Section 16-08-05.)

Because Section 16-08-05 is a later enactment than Section 16-13-28 and is on specific offices we must conclude that the provisions of Section 16-08-05 would govern in your situation.

It is therefore our opinion that any candidate for the office of county commissioner for the unexpired term would have to receive a minimum number of votes comparable to the number of signatures which would have been required to have his name placed on the primary election ballot as set forth in Section 16-04-04.

On February 18, 1970, in an opinion to Senator Robert Melland, we construed the provisions of Section 16-04-04 as same would apply to the county commissioners, when same are elected at large. We concluded in said opinion that 2 percent of the combined vote of the sheriff and auditor divided by 2 and divided by the number of county commissioner offices would be the minimum number of signatures required. The conclusions reached in said opinion as to the number of signatures required to have the name placed on the primary ballot would apply to the number of votes a write-in candidate would have to receive to be declared elected for the unexpired term of county commissioner.

A copy of said opinion is enclosed.

HELGI JOHANNESON
Attorney General