

OPINION
73-222

September 24, 1973 (OPINION)

The Honorable Arthur A. Link
Governor
State Capitol
Bismarck, North Dakota 58501

Dear Governor Link:

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

"I have designated December 4, 1973, as the date for a special election on referred House Bill 1042 and the initiated constitutional amendment. Due to the possibility that a special session of the legislative assembly may be required prior to 1975, I plan to call for a special election on that same date in five districts to fill the vacancies created by the deaths of Senator John Coughlin, Representative Norman Livingston, Representative Henry Ganser, Representative Floyd Poyzer; and the resignation of Representative Don Jacob.

"Therefore, I have prepared the enclosed Writs of Election. Your opinion is requested as to whether the signing and delivery of subject writs meet the requirements of state law for the calling of such a special election pursuant to section 16-07-09 of the North Dakota Century Code and/or other applicable statutes."

We presume your request for an opinion at least in part arises because of the three judge federal district court order dated June 29, 1972, in which the court adopted a reapportionment plan "for the 1972 election only", and because of the provision of section 16-07-09. The federal district court fashioned plan is the plan which is in operation now because the term for which the senators and representatives were elected in 1972 is still current. We are aware that the court in the aforementioned opinion also stated the following:

"We add a caveat regarding the candidates for state senate filing for a four-year term in the 1972 elections. In the event that we hereafter adopt a different plan of reapportionment which substantially changes the boundaries of legislative districts, it may be necessary to require that all state senators stand for election in 1974 as was the case in Paulson v. Meier".

The North Dakota legislature passed a reapportionment plan, which was referred to the electorate pursuant to the provision of section 25 of the North Dakota Constitution. The plan passed by the legislature will not become law unless it is approved by the electorate. A special election has been called for the purpose of submitting House Bill 1042 to the electorate for its approval or disapproval. Other measures and issues, if eligible, may be placed on the ballot or disposed of at the same election.

A motion was made before the federal district court to rule on the validity of the legislative passed plan, but the court refused to act and held the matter in abeyance until October 1 or until further order of the court. Conceivably, the court may expand the language in its June 29 Memorandum Opinion at a future date.

Because the legislature is on the of separate coequal branches of government, it is inconceivable that the state would be left in a situation in which one of the necessary coequal branches of government be left nonoperative or nonfunctioning because of an inadvertent technicality. We therefore believe that the language of the federal district court merely meant that the plan fashioned by the court would be used for the current term only, meaning the term for which the election was held in 1972. This would include the filling of vacancies occurring during such term.

We are of the opinion that the court order does not prohibit the filling of such vacancies.

The calling of a special election to fill a vacancy is generally controlled by section 16-07-09. On May 24, 1973, we advised your office that "it is not necessary for you to call a special election to fill the vacancy now existing". Such conclusion was reached because of the following provision in section 16-07-09:

"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."

All of the vacancies involved, both in the Senate and the House of Representatives, involve terms which would expire prior to the next regular session of the legislative assembly. Consequently, a special election is not required to be held. In the aforementioned letter, we also express the belief that the term "session" as used in section 16-07-09, refers to a regular session as distinguished for a special session. We have no reason to modify this concept.

Recognizing the basic concept of representation in the legislature, we have some reservations as to the specific meaning of the last sentence of section 16-07-09, particularly the closing phrase which provides that "no election shall be held to fill such vacancy" if the term of office is to expire prior to the next legislative assembly. The 1943 revisor's notes state as follows:

"This present section is a part only of C.L. 1913, s. 1033, revised for separate statement and for clarity without change in meaning. This present section is revised to show that a special writ is required even when such election to fill such vacancy is a general election. This is the method in which this has been handled." (underscoring ours)

If the language is taken literally without any concern for the

overall purpose of representative form of government, it would suggest the conclusion that the last sentence is mandatory. However, in examining the history of this section, we find that there was a substantial change in language, but apparently not with the intent to change the concept. The original provisions which has not been amended except by code revision, 1943 Code and carried forward in the Century Code, provided as follows:

"If there is no session of the legislative assembly between the time such vacancy occurs and the time of holding the next general election, it shall not be necessary to order a special election to fill such vacancy;"

Taking into account the revisor's notes (1943) Code and the basic concepts of representation, we believe the last sentence of section 16-07-09 must be construed as directory rather than mandatory. Such construction would be in harmony with the basic laws from which section 16-07-09 evolved.

It also appears that the legislature, in enacting laws pertaining to vacancies in the legislature, was concerned in requiring the calling of special elections incurring the expenses of such election where the individual elected would not serve in the representative capacity. However, special sessions are, as a matter of fact, called. Under the present constitutional provision, the Governor would be more aware of whether a special session will be called than any other persons because the authority to call such session is vested in him.

It is our opinion that the last sentence of section 16-07-09 must be construed that a special election to fill a vacancy is not required, but may be held.

It is our further opinion that the writs of election to fill vacancies in the House of Representatives and in the Senate are proper as to form and would be legal and that those persons elected will be able to serve in the representative capacity during the remainder of the current term of office.

As to any other questions that may arise, the answers would be conditional and speculative at this time. Any further discussion of conditional or speculative situations would at this time serve no useful purpose.

Sincerely yours,

Helgi Johanneson

Attorney General