

**LETTER OPINION
2001-L-15**

May 1, 2001

Honorable Gary Nelson
State Senator
PO Box 945
Casselton, ND 58012-0945

Dear Senator Nelson:

Toward the end of the legislative session you requested my office to conduct some preliminary research regarding vacancies in legislative positions. Late last week you asked for a formal opinion regarding this issue. You specifically asked for my opinion on the correct procedure to follow when filling the vacancy created by your resignation from the office of state senator in light of the recent changes to the applicable North Dakota constitutional and statutory provisions.

Prior to the primary election in June of 2000, Article IV, Section 11 of the North Dakota Constitution provided that the "governor shall issue writs of election to fill such vacancies as may occur in either house of the legislative assembly." As a result of passage of a measure placed on the ballot by the Legislative Assembly, this section of the Constitution was changed to provide that the Legislative Assembly "may provide by law a procedure to fill vacancies occurring in either house of the legislative assembly." See 1999 N.D. Sess. Laws ch. 571. In response to the constitutional change, Senate Bill 2230 was passed by the Legislative Assembly and signed by the Governor on March 22, 2001. The bill changes the method for filling legislative vacancies from special elections called by the Governor to filling the vacancies by appointment by district committees of the vacating member's political party, or, in the case of an independent candidate or a failure of the district committee to appoint, appointment of a resident of the district by the chairman of the Legislative Council. See Senate Bill 2230, § 1, amending N.D.C.C. § 16.1-13-10. Although the bill carried an emergency clause, the clause failed in the House. House Journal at 766. Consequently, the bill will not take effect until August 1.

You indicated in your letter that you intend to resign at the conclusion of the regular session of the Fifty-seventh Legislative Assembly. It is my understanding that you have now done so. The Legislative Assembly has also adjourned sine die,¹ with the possibility that it may reconvene sometime this fall to address legislative redistricting following a study by the

¹ "[I]n 1981 and 1991, the legislature didn't adjourn sine die, but rather called a recess." Committee discussion regarding HB 1435 before Senate Government and Veterans Affairs Committee (March 15, 1995).

Legislative Council. See House Concurrent Resolution 3003. The term “sine die” has been defined to mean “[w]ithout day; without assigning a day for a further meeting or hearing. Hence, a legislative body adjourns sine die when it adjourns without appointing a day on which to appear or assemble again.” Black’s Law Dictionary 1385 (6th ed. 1990). This does not mean the Legislature ceases to exist upon adjournment sine die. It can be reconvened or called back in special session. See Verry v. Trenbeath, 148 N.W.2d 567, 573 (N.D. 1967). Article V, Section 7 of the North Dakota Constitution provides that the Governor may convene a special session of the Legislative Assembly. Further, under N.D.C.C. § 54-03-02(3), the Legislative Assembly may reconvene if so determined by the Legislative Council even if the Legislative Assembly adjourned sine die. See also N.D.C.C. § 54-35-16, providing that the Legislative Council “may exercise this authority [to reconvene], and the legislative assembly shall meet, regardless of whether the motion to close the regular session of the legislative assembly was to recess to a time certain, adjourn to a time certain, or adjourn sine die.”

A member of the Legislative Assembly may resign by presenting a written resignation to the presiding officer of the branch of which the legislator is a member when in session and, when not in session, to the Governor. N.D.C.C. § 44-02-02(3).²

The current version of N.D.C.C. § 16.1-13-10 dealing with special elections to fill legislative vacancies provides as follows:

Whenever a vacancy in the office of a member of the legislative assembly occurs, the county auditor of the county in which such former member resides or resided shall notify the governor of the vacancy. The county auditor need not notify the governor of the resignation of a member of the legislative assembly when the resignation was made pursuant to section 44-02-02. 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 each affected county commanding the auditor to notify the several boards of election in the county or district in which the vacancy exists to hold a special election to fill such vacancy at a time designated by the governor. 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 must be held at the same time as the general election. If

² This statute is also amended effective August 1, 2001, by Senate Bill 2230. The resignation of a member of the Legislative Assembly under the amended version would have the resignation tendered to the chairman of the Legislative Council rather than the Governor. See Senate Bill 2230, § 2.

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.³

(Emphasis supplied.)

Thus, under provisions of current law it is critical to determine if there is an intervening session of the Legislative Assembly between the time the vacancy occurs and the time of the holding of the next general election in November 2002. See 1980 N.D. Op. Att'y Gen. 86 (next general election in statute providing for filling of vacancy refers to November general election).

At this point, no date for a special session of the Legislature has been set. The Legislature has, however, passed House Concurrent Resolution 3003. This resolution was filed with the Secretary of State on March 12. See House Journal at 872. This resolution recites that the results of the 2000 federal decennial census would not be available to the Legislative Assembly in time for it to consider a redistricting plan during the regular session of the Fifty-seventh Legislative Assembly. The resolution further states that the Legislative Council develop redistricting "plans for use in the 2002 primary election" and that "the Legislative Council report its findings and recommendations, together with any legislation necessary to implement the recommendations, to a reconvened or special session of the Fifty-seventh Legislative Assembly." Id.

This raises the initial question of whether a reconvened or special session of the Fifty-seventh Legislative Assembly to consider redistricting would constitute a "session of the legislative assembly" within the meaning of the current version of N.D.C.C.

³ It might be questioned whether the passage of the constitutional amendment in June of 2001 to Article IV, Section 11 of the Constitution impliedly repeals the current version of N.D.C.C. § 16.1-13-10 or calls that section into constitutional question. However, implied repeals of statutes by constitutional amendment are not favored in the law, particularly where the constitutional amendment is not self-executing, as here. See 1995 N.D. Op. Att'y Gen. 01. In addition, statutes carry the conclusive presumption of constitutionality, e.g., Menz v. Coyle, 117 N.W.2d 290 (N.D. 1962). Further, the amendments to the Constitution did not prohibit the Governor from calling elections to fill legislative vacancies; rather, they just permit the Legislature to provide by law for filling legislative vacancies. Presumably, the Legislature could have continued the present provisions or allowed the Governor to appoint rather than the district political committees or director of the Legislative Council. There is not a compelling reason to believe that the passage of this constitutional amendment necessarily repealed or called into constitutional question N.D.C.C. § 16.1-13-10.

§ 16.1-13-10. In State ex rel. Langer v. Olson, 176 N.W. 528 (N.D. 1920), the Court stated in its syllabus that a special session of the Legislative Assembly pursuant to the Constitution is a session of the Legislative Assembly. Thus, it would appear that if a special session of the Legislative Assembly to consider redistricting is held, it would be a session of the Legislative Assembly within the meaning of the current version of N.D.C.C. § 16.1-13-10. If the Legislative Council reconvenes the 2001 Legislative Assembly, the reconvening is a regular session of the Legislature. N.D.C.C. §§ 54-03-02(3) and 54-03-02.1(2).

Another question that must be addressed concerns the time frame for redistricting if the redistricting session is not held prior to the 2002 primary election as contemplated by HCR 3003.

In the absence of restrictive or mandatory provisions in a state constitution as to the time when and how often the legislature must or may make a representative apportionment, the legislature may, in its discretion, make apportionments as often as it wills, although limitations in the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system. The federal constitution does not require reapportionment within any specific period, so long as a state has a reasonably conceived plan for periodic readjustment of legislative representation; in this connection, decennial reapportionment is said to be a rational approach to readjustment of legislative representation to take into account population shifts and growth. . . . [I]t is a requirement in some state constitutions that the reapportionment take place at least once in a decade.

25 Am.Jur.2d Elections § 8 (1996).

Article IV, Section 2 of the North Dakota Constitution provides, in part:

The legislative assembly shall fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators. The districts thus ascertained and determined after the 1990 federal decennial census shall continue until the adjournment of the first regular session after each federal decennial census, or until changed by law.

This would seem to indicate an intent by the drafters of the Constitution that reapportionment occur after each federal decennial census, but without specifying exactly when. Article IV, Section 2 has its genesis, in part, in former Section 11 of former Article IV which, in turn, had its source in the Constitution of 1889, Article II, Section 35. See note

following Article IV, Section 2. In a case interpreting the former Section 35, the North Dakota Supreme Court construed that provision to require reapportionment at regular intervals. See State ex rel. Williams v. Meyer, 127 N.W. 834 (N.D. 1910). The North Dakota Supreme Court also held in a case construing an earlier provision of what is now Article IV, Section 2 that the duty of the Legislature to apportion is mandatory and continues until it is performed. See State ex rel. Lein v. Sathre, 113 N.W.2d 679 (N.D. 1962). See also 1991 N.D. Op. Att'y Gen. 15 ("the constitution of the state of North Dakota requires that the Legislative Assembly adopt legislation establishing appropriate state legislative districts.").

Thus, while it appears that the Legislature must redistrict at some point following the federal decennial census, there does not appear to be any specific time period in state law other than the reference in Article IV, Section 2 to the districts continuing until adjournment of the first regular session after each federal decennial census. While the Legislature has indicated an intent in House Concurrent Resolution 3003 to redistrict for use in the 2002 primary election, it is possible the resolution might not be followed or it may not be prioritized by the Legislative Council. Whether the resolution will be prioritized by the Legislative Council is speculative at this time. Even if the resolution is prioritized for study, the study in and of itself does not establish a time certain for the reconvening of a special session of the Legislative Assembly.

Although in 1981 and 1991⁴ the Legislative Assembly considered and passed reapportionment plans in special session, historically, redistricting plans have not been accomplished during special sessions. See generally Note, Apportionment in North Dakota: The Saga of Continuing Controversy, 57 N.D.L.Rev. 447, 455-71 (1981).

The next question is whether the redistricting session contemplated by HCR 3003 would occur between the vacancy and the time of holding of the next general election, as provided in the third sentence of current N.D.C.C. § 16.1-13-10 in order to trigger the requirement that the Governor call a special election.

Upon receiving the notification of your resignation, the Governor must determine if there is a date certain established for the next session of the Legislative Assembly. If a date for reconvening or a special session of the Legislative Assembly is set before August 1, 2001, the Governor must issue a writ of election to hold a special election at the time designated by the Governor. N.D.C.C. § 16.1-13-10.⁵

⁴ See note 1 supra.

⁵ Of course, it is also possible the Governor could exercise his constitutional authority to call a special session of the Legislative Assembly to be held after the vacancy and before

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If at the time of the vacancy and prior to August 1, 2001,⁶ a date certain for an intervening redistricting session is set, it is my opinion that the current version of N.D.C.C. § 16.1-13-10 should be followed, and the Governor must call a special election.

If prior to August 1, 2001, no date for an intervening redistricting session has been established, a special election would be obviated. If no special election is ordered to fill a legislative vacancy before the effective date of Senate Bill 2230, a vacancy occurring before that date under prior law would still be a circumstance to be dealt with under the law as it exists on August 1, 2001. Therefore, it is my further opinion that if a previously occurring legislative vacancy still exists on August 1, 2001, the provisions of N.D.C.C. § 16.1-13-10 effective on that date will apply to it.⁷ If on that date a legislative vacancy exists in fact, and the chairman of the Legislative Council has not been notified of it by the legislator in question, the county auditor in question is required to notify the chairman of the Legislative Council, who would then proceed under N.D.C.C. § 16.1-13-10.

Sincerely,

Wayne Stenehjem
Attorney General

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the next general election which could also result in a special election to fill the vacancy. See N.D. Const. art. V, § 7; N.D.C.C. § 16.1-13-10.

⁶ This is the effective date of SB 2230 when the gubernatorial authority to call such special elections expires.

⁷ SB 2230 contains no transition provisions for vacancies occurring after its passage but before its effective date, especially where no special election would be called by the Governor. If there is no intervening session of the Legislature before the November 2002 general election, the current version of N.D.C.C. § 16.1-13-10 would not permit the vacancy to be filled until the November 2002 general election. This would be inconsistent with the intent of the Legislature as expressed in the terms of SB 2230 that legislative vacancies be filled expeditiously by appointment. Applying the current version of the statute in that circumstance would also be inconsistent with the recent constitutional change to Article IV, Section 11 which favors the Legislative Assembly's determining how and when legislative vacancies are to be filled.