



WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706

December 23, 1975

FILE NO. S-1022

OFFICERS:
Vacancies in Office of Circuit
Court Judge Caused by Mandatory
Retirement

Honorable Martin Rudman
State's Attorney of Will County
Courthouse
Joliet, Illinois 60431

Dear Mr. Rudman:

I am in receipt of your letter wherein you pose
the following questions:

"1. When a Circuit Judge is subject to mandatory retirement in December, 1976, and an election is held to fill that Judicial post in November, 1976, is there a vacancy to be filled in that particular post? (If there is a vacancy, it would appear that Johnson v. State Board of Elections would apply). If there is not a vacancy, since there is never an interruption in office, how would you term the situation that presents itself?

Honorable Martin Rudman - 2.

2. If the situation created by a mandatory or elective retirement is not a vacancy, would the elections to fill such Judicial offices be controlled by the Johnson case upon a head-on-head basis or on a field basis?"

Since you frame your questions in relation to non-resident circuit court judges, I will address this opinion to that office. Vacancies in the office of resident circuit court judge are filled in accordance with "AN ACT relating to vacancies in the office of judge". Ill. Rev. Stat. 1973, ch. 37, pars. 72.41-1 et seq.

Circuit court judges are mandatorily retired in accordance with "AN ACT relating to the compulsory retirement of judges". (Ill. Rev. Stat. 1973, ch. 37, pars. 23.71 and 23.72.) Under both sections, the effective date of retirement is on the first Monday in December following the general election in November at which circuit court judges are elected. (Ill. Rev. Stat. 1973, ch. 46, par. 2-7.2; ch. 37, par. 72.2.) You state that a non-resident circuit judge is subject to mandatory retirement upon December 6, 1976. It is clear, that under section 12(b) of article VI of the Illinois Constitution of 1970, a vacancy will occur upon the effective date of a non-

Honorable Martin Rudman - 3.

resident circuit judge's mandatory retirement; for this section states that the office of a judge is vacant upon his retirement. Section 12(c) of article VI of the Illinois Constitution of 1970 speaks in reference to vacancies in the office of a judge as follows:

"(c) A vacancy occurring in the office of Supreme, Appellate or Circuit Judge shall be filled as the General Assembly may provide by law. In the absence of a law, vacancies may be filled by appointment by the Supreme Court. A person appointed to fill a vacancy 60 or more days prior to the next primary election to nominate Judges shall serve until the vacancy is filled for a term at the next general or judicial election. A person appointed to fill a vacancy less than 60 days prior to the next primary election to nominate Judges shall serve until the vacancy is filled at the second general or judicial election following such appointment." (emphasis added.)

The General Assembly has not passed legislation providing for the filling of vacancies in the office of non-resident circuit court judge. Therefore, the method of filling such vacancies that is prescribed by section 12(c) of article VI is applicable.

At first blush, it would seem that pursuant to section 12(c) the Illinois Supreme Court would on December 6, 1976, be empowered to fill the vacancy. Mandatory retirement, however,

Honorable Martin Rudman - 4.

creates a unique situation; a vacancy may, thus, be anticipated. Section 12(c) empowers the Illinois Supreme Court to appoint someone to fill a vacancy in the office of non-resident circuit court judge only on an interim basis until an election can be held. It seems clear that the thrust of section 12(c) is to provide for ultimately filling vacancies by election. The November, 1976 general election serves as an appropriate method for filling the vacancy in question.

The logic of anticipating the December 6 vacancy at the November general election is inescapable; for the effective date of retirement (December 6, 1976) precisely coincides with the commencement of a new term of a judge elected in November of 1976. Indeed this fact is a strong indication that the legislative intent behind setting the effective date of mandatory retirement at the first Monday in December following the general election in November, was that the vacancies caused thereby could be anticipated at the November election next preceding retirement. Furthermore, the underlying constitutional policy, as enunciated in section 12(a) of article VI of the Illinois Constitution of 1970 is that circuit court judges are

Honorable Martin Rudman - 5.

to be chosen by popular election rather than by appointment. This very issue was submitted to the voters of Illinois when they passed upon the adoption of the Constitution of 1970. (Propositions 2A and 2B as submitted within the proposed Constitution of 1970.) Furthermore, as I noted above, the Supreme Court has the power to appoint circuit judges only when no other method is available and such appointments shall last only until a successor can be elected. It is therefore appropriate to elect a judge in November of 1976 to replace the incumbent who retires in December of 1976.

I am of the opinion that a vacancy in the office of non-resident circuit judge to occur pursuant to mandatory retirement upon December 6, 1976, may be anticipated and an election held in November of 1976 to fill such vacancy.

As you noted in your letter, the Illinois Supreme Court held in Johnson v. State Bd. of Elections, 57 Ill. 2d 205, 213:

"In the absence of definitive legislation to the contrary elections to fill vacancies in judicial offices are to be conducted upon a head-on-head basis."

Honorable Martin Rudman - 6,

Although the case arose from a contest for filling vacancies of resident circuit court judges, the court did not limit its reasoning nor its holding to that type of judge; it spoke in general terms of judicial officers. Furthermore, the court reached its conclusion after weighing the relative merits of "head-on-head" and "field" elections respectively. Its conclusion is based upon these considerations and not upon any distinctions between non-resident and resident circuit court judges.

Observe that the court conditioned its holding on the absence of any "definitive legislation to the contrary". My research indicates that there is yet to be enacted any such "definitive legislation". Therefore, the holding in the Johnson case, supra, would still apply.

For the foregoing reasons, it is my opinion then that when a circuit court judge is subject to mandatory retirement in December of 1976, an election may be held to fill that post in November of 1976, and that there is a vacancy to be filled

Honorable Martin Rudman - 7.

in that particular office. Johnson v. State Bd. of Elections,
57 Ill. 2d 205, would apply and therefore would require that
vacancies in judicial offices be filled at the November election
on a "head-on-head" basis.

Very truly yours,

A T T O R N E Y G E N E R A L