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**PROSECUTING ATTORNEYS:** Vacancies in office

**ELECTIONS:** Vacancy in office of prosecuting attorney

**STATUTES:** Repeal by implication

A person appointed to fill a vacancy in the office of prosecuting attorney serves until his successor is elected and qualified. However if the next general election is to be held more than 150 days after the vacancy in such office occurs, he shall hold office until his successor is elected at such general election and qualifies for such office.

When two statutes on the same subject are in irreconcilable conflict, the later statute supersedes the former statute.

Opinion No. 4809

February 11, 1974.

Mr. John Smietanka  
Prosecuting Attorney  
Berrien County Courthouse  
St. Joseph, Michigan 49085

Your predecessor requested an opinion of the Attorney General regarding the term of office of a successor appointed to fill a vacancy in the office of prosecuting attorney. His letter referred to the apparent conflict between 1923 PA 199, § 5, MCLA 201.35; MSA 6.715, and 1954 PA 116, § 209, as amended by 1968 PA 156, MCLA 168.209; MSA 6.1209. MCLA 201.35; MSA 6.715 provides in part:

“When a vacancy shall occur in an elective office or appointive county office, it shall be filled in the following manner:

“1. If the vacancy shall be in the office of county clerk or prosecuting attorney it shall be filled by appointment by the judge or judges of that judicial circuit and the person appointed shall hold office for the remainder of the unexpired term.”

MCLA 168.209; MSA 6.1209 was originally identical in substance to the above-quoted section. However, the 1968 amendment created a conflict with MCLA 201.35; MSA 6.715. As amended in 1968, MCLA 168.209; MSA 6.1209 provides in relevant part as follows:

“When a vacancy shall occur in an elective or appointive county office, it shall be filled in the following manner:

“(1) If the vacancy shall be in the office of county clerk or prosecuting attorney, it shall be filled by appointment by the judge or judges of that judicial circuit.

\* \* \*

“(3) Any person so appointed shall take and subscribe to the oath as provided in section 1 of article 11 of the state constitution, give bond in the manner required by law and shall hold such office for the remainder of the unexpired term and until his successor shall have been elected and qualified. However, if the next general election is to be held more than 150 days after the vacancy occurs, and it is not the general election at which a successor in office would

be elected if there had been no vacancy, the person appointed shall hold office only until a successor is elected at such general election, held more than 150 days after the vacancy occurs, in the manner provided by law and qualifies for office. Such successor shall hold the office for the remainder of the unexpired term."

MCLA 201.35; MSA 6.715 and MCLA 168.209; MSA 6.1209 as originally enacted, were enacted at a time when prosecuting attorneys only served for two-year terms. Hence at that time it was impossible for an appointed prosecuting attorney to serve in such capacity for more than two years. Art 7, § 4, of the Michigan Constitution of 1963 increased the term of office for prosecuting attorneys from two to four years. As a result, prior to the 1968 amendment to MCLA 168.209; MSA 6.1209 it was possible for an appointed prosecuting attorney to serve in office for more than three years. The obvious intent of the legislature in amending this section was to eliminate such possibility.

Ordinarily when two statutes are in apparent conflict they must be construed, if possible, to be harmonious with each other. *State Highway Commissioner v Detroit City Controller*, 331 Mich 337; 49 NW2d 318 (1951). While the general rule of statutory construction is that two conflicting statutes should be construed so as to give both effect, it is obvious that this cannot be done in all cases. In the event that a harmonizing construction is not possible, then a later enacted statute on a particular subject is paramount and controlling insofar as it is in conflict with an older statute on the same subject. *Antrim County Social Welfare Board v Lapeer County Social Welfare Board*, 332 Mich 224; 50 NW2d 769 (1952).

In the case of MCLA 209.35; MSA 6.715 and MCLA 168.209; MSA 6.1209 a harmonizing construction appears to be impossible. The former section provides that when a vacancy occurs in the office of prosecuting attorney, the individual who is appointed shall serve the remainder of the unexpired term. The latter and later enacted section provides that if the next general election is to be held more than 150 days after the vacancy occurs and is not an election at which a prosecuting attorney would ordinarily be elected, then the appointed successor holds office only until this election at which time the successor, who shall hold office for the remainder of the unexpired term, is elected. Since the two sections are irreconcilable and since MCLA 168.209; MSA 6.1209, as amended in 1968, is the later enacted section, then under the rules of statutory construction, MCLA 168.209; MSA 6.1209 prevails.

It should be observed that the legislature in amending MCLA 168.209; MSA 6.1209 by means of 1968 PA 156 to limit the term of a person appointed to fill the vacancy occurring in the office of prosecuting attorney more than 150 days before a general election at which a successor in office would not be elected if there had been no vacancy, was not in any way mislead since the enactment of 1968 PA 156 to amend MCLA 168.209; MSA 6.1209 to shorten the terms of persons appointed to fill a vacancy in the office of prosecuting attorney more than 150 days before a general election at which a successor to such office is not elected, was in accord with the letter and spirit of Const 1963, art 4, § 25.

See *Alan v Wayne County*, 388 Mich 210, 285, 286; 200 NW2d 628 (1972).

The 1974 general election is not one at which a prosecutor would ordinarily be elected. Therefore, if the successor is appointed to fill the vacancy in the office of prosecuting attorney occurring more than 150 days before that election, such appointee will serve only until a successor is elected at the 1974 general election. The elected successor will serve for the remainder of the term to which the prosecutor was elected in 1972.

FRANK J. KELLEY,  
*Attorney General.*

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**RETIREMENT SYSTEMS: Benefits for city firemen and policemen**

The legislative body of a city or its electors with a retirement system for firemen and policemen under 1973 PA 345 may not adopt differential rates of retirement benefits for firemen and policemen.

Opinion No. 4811

February 12, 1974.

Honorable Gary M. Owen  
State Representative  
The Capitol  
Lansing, Michigan

You have requested my opinion on the following question:

May a city with a retirement system for firemen and policemen, established pursuant to 1937 PA 345, provide a retirement pension of 2½% of the average final compensation multiplied by the first 25 years of service for retired firemen, and a retirement pension of 2¼% of the average final compensation multiplied by the first 25 years of service for retired policemen?

1937 PA 345; MCLA 38.551 et seq.; MSA 5.3375(1) et seq., provides for the establishment, maintenance and administration of a system of pensions for the personnel of fire and police departments employed by cities, villages or municipalities having full paid members in such departments. At the outset, it should be noted that the act does not become effective in any city, village or municipality unless it is approved by its electors in accordance with section 11 of the act, *supra*.

Membership in the retirement system established by the city, village or municipality, in accordance with the provisions of 1937 PA 345, *supra*, "shall include all policemen and firemen employed by a city, village or municipality." 1937 PA 345, § 12, *supra*. This section also provides that membership in the retirement system shall not include volunteer firemen, privately employed policemen and firemen, persons temporarily employed during emergencies, and civilian employees of the police and fire departments, except certain policemen or firemen transferred to a civilian position within the police or fire department.