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HENRY McMASTER
ATTORNEY GENERAL

September 22, 2006

The Honorable Richard Eckstrom
Comptroller General, State of South Carolina
1200 Senate Street
305 Wade Hampton Office Building
Columbia, South Carolina 29201

Dear Mr. Eckstrom:

We received your request concerning the deputy auditor for Greenville County. In your letter, you provided us with the following information:

On September 6, 2006, the Greenville County Auditor, Mr. Ed Haskins passed away. Mr. Haskins was elected to a four-year term of office. Pursuant to S.C. Code Ann. § 4-11-10, Mr. Haskins' term will expire on June 30, 2007.

Prior to his death, Mr. Haskins appointed a deputy auditor, Mr. Warren Rollins, in accordance with the terms of S.C. Code Ann. § 12-39-40. A copy of Mr. Haskins' appointment letter sent to our Office on December 19, 2003 is attached. Pursuant to § 12-39-40(B): "If there is a vacancy in the office of county auditor by reason of death, resignation, or disqualification, the appointed deputy shall carry out the duties of the office until a successor is appointed or elected and qualified." The Governor has not appointed a successor county auditor in light of the fact the general election is upcoming and a new county auditor will be selected at that time

Two questions have been raised. S.C. Code Ann. § 8-15-65 provides for a state salary supplement appropriated by the General Assembly for various county officers, including the county auditors. The county auditors' salary supplement is paid by this Office in accordance with the same schedule and method of payment as state employees. The deputy auditor has asked if he is entitled to receive the state salary supplement during the time he is carrying out the duties of the county auditor. If he is entitled to receive this state salary supplement, is it

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paid to the deputy auditor until the new auditor is elected in November 2006 or until the new auditor is qualified and takes office in July 2007?

Law/Analysis

As you stated in your letter, section 8-15-65 of the South Carolina Code (Supp. 2005) provides annual state salary supplements to certain county officers, including county auditors. Thus, unquestionably Mr. Haskins was entitled to any supplement provided for under this statute during his terms as Greenville County Auditor, which runs through June 30, 2007.

As you mentioned, due to Mr. Haskins' recent passing, his appointed deputy auditor, Warren Rollins, assumed his duties pursuant to section 12-39-40 of the South Carolina Code (Supp. 2005). This provision states:

(A) A county auditor may appoint an employee in his office to be his deputy. The appointment must be filed with the Comptroller General and the governing body of that county. When the appointment is filed, the deputy may act for and on behalf of the county auditor when the auditor is incapacitated by reason of a physical or mental disability or during a temporary absence.

(B) If there is a vacancy in the office of county auditor by reason of death, resignation, or disqualification, the appointed deputy shall carry out the duties of the office until a successor is appointed or elected and qualified.

S.C. Code Ann. § 12-39-40.

In our research, we were unable to locate a South Carolina court decision discussing whether a deputy auditor, by assuming the auditor's duties pursuant to section 12-39-40, is entitled to receive state salary supplements provided under section 8-15-65. Furthermore, we were unable to locate a decision discussing generally whether the deputy auditor under these circumstances is entitled to receive the auditor's compensation. However, we discovered a South Carolina Supreme Court case and several opinions of this Office discussing the similar issue of a clerk of court's entitlement to a probated judge's compensation when he or she assumed the duties of a probate judge.

In Ridgill v. Clarendon County, 188 S.C. 460, 199 S.E. 683 (1938), the Court addressed whether the clerk of court for Clarendon County may receive the compensation generally afforded to the county probate judge after the Legislature passed an act abolishing the office of probate judge in Clarendon County and devolving all the duties formerly pertaining to the probate judge onto the

Clarendon County Clerk of Court. Distinguishing these circumstances from those in which an officer is elected or appointed to an office, the Court stated:

But if the office be one already established with well defined duties, responsibilities and jurisdiction, and the discharge of the duties, and the assumption of the jurisdiction and responsibilities of the office are devolved upon another, who holds another office of grave responsibilities and onerous and exacting duties, it is a logical implication that the emoluments and compensation attached to the abolished office still attach to the office to which its duties have been transferred. It may well be inferred that since the act which abolished the office of Probate Judge did not specifically name any compensation for the Clerk of Court as acting Judge of Probate that the General Assembly did not deem it necessary to do so, as the office already carried with it the costs and fees fixed by the statute.

Id. at 466-67, 199 S.E. at 686. The Court cited a statute pertaining to situations in which a vacancy exists in the office of probate judge. Id. at 468, 199 S.E. at 687. As provided by the Court, this statute stated as follows: "In case of any vacancy in the office of judge of probate, the clerk of County shall take charge of said office, and all papers therein, and discharge the same duties, receive the same fees, and be subject to the same liabilities, as by law provided for a judge of probate, until a judge of probate shall be appointed by the Governor or elected and commissioned for such county." Id. (citing S.C. Code § 3600 (1932)). Finding the duties of the probate judge were conferred upon the clerk of court either by the Legislature's abolishment of that office or in accordance with the statute, upon a vacancy in that office, the Court concluded the Clarendon County Clerk of Court was entitled to the compensation formerly appropriated to the Clarendon County Probate Judge. Id.

Numerous opinions of this Office reiterate the Court's findings in Rigdill. In an opinion issued in 1967, we addressed a situation in which the Governor suspended a county probate judge and appointed the county clerk of court to serve in his stead. Op. S.C. Atty. Gen., December 12, 1967. We noted the statute under which the Governor suspended the probate judge and appointed the clerk of court contains no provisions entitling the appointee to compensation. Id. However, citing the portion of Ridgill we included above, we determined: "It is our opinion that the logical inference is that the temporary appointee falls heir to the compensation attached to an office when he is appointed under Section 50-10." Id.

This Office issued several other opinions addressing a clerk of court's entitlement to a probate judge's compensation when the clerk of court assumed the duties of the probate judge, not by gubernatorial appointment, but pursuant to section 14-23-60 of the South Carolina Code (1976). See Ops. S.C. Atty. Gen., June 2, 2004; August 27, 2001; June 2, 1997. Section 14-23-60 states should a vacancy arise in the office of probate judge, the clerk of court shall take over the probate

judge's office and discharge the duties of the probate judge. S.C. Code Ann. § 14-23-60. This provision also provides the clerk of court shall "receive the same fees" as the probate judge until the vacancy is filled. Id. In our August 2001 opinion, we discussed the impact of this language contained in section 14-23-60 on our understanding of whether clerks of court shall be compensated when filling a vacancy in the office of probate judge. Op. S.C. Atty. Gen., August 27, 2001. We discussed the fact that this provision may be subject to two different interpretations, one entitling the clerk of court to the probate judge's salary and one simply allowing the clerk of court to charge and collect the fees associated with the business of the probate court. Id. Despite the possible interpretations of section 14-23-60, we concluded, consistent with our prior opinions, "the common law, if not necessarily section 14-23-60, requires [the clerk of court to receive the same salary as the probate judge]." Id. Reaching the same conclusion in a June 2, 2004 opinion, we cited a Wyoming Supreme Court case as additional support for our determination. Op. S.C. Atty. Gen., June 2, 2004. Chatterton v. Grant, 73 P. 470 (Wyo. 1903), "concluded that as to the situation where the Secretary of State, upon the death of the Governor, assumed the duties as Acting Governor, the Secretary of State would be entitled to the salary appropriated for both offices while performing the duties of both offices." Id.

In an opinion issued in October of 1986, we addressed a similar, but different issue of whether one serving as both coroner and sheriff is entitled to receive the salaries and benefits of both positions. Op. S.C. Atty. Gen., October 6, 1986. Apparently, the coroner assumed the position of sheriff after a vacancy in that office pursuant to section 23-11-50 of the South Carolina Code. Id. At the time of this opinion, section 23-11-50 stated as follows:

The coroner, during the continuance of any such vacancy and until the office is filled by appointment or election, shall assume the office, discharge its duties, incur its liabilities and be entitled to its fees and emoluments. He shall, for such purpose, take charge of the books and papers of the office and occupy the apartment allowed to the sheriff for transacting the business of his office.

S.C. Code Ann. § 23-11-50 (1976) (emphasis added). We relied on the portion of the statute entitling the coroner to the sheriff's fees and emolument and determined "[s]uch provision is clear in mandating that in acting as sheriff, as coroner, you are entitled to receive no more and no less than the salary and other benefits budgeted for the office of sheriff." Op. S.C. Atty. Gen., October 6, 1986. Furthermore, we stated we are "unaware of any basis by which the County may withhold the salary and benefits which you typically would have received by serving as coroner even though you are also receiving a salary and other benefits from the County by acting as sheriff." Id.

In August 24, 2004, we issued an opinion considering whether an interim Commissioner of Agriculture is entitled to receive the suspended Commissioner's salary and benefits. Op. S.C. Atty. Gen., August 24, 2004. Citing Ridgill, we concluded if the Governor were to appoint an interim Commissioner during the elected Commissioner's term of office, the appointee "would be entitled

to the salary and other benefits that a suspended incumbent would have been entitled to receive. Therefore, if the Governor makes an interim appointment, that appointee would be entitled to receive the Commissioner of Agriculture's salary and benefits during the period he or she serves as interim Commissioner." Id.

With regard to your first question of whether section 12-39-40 of the South Carolina Code allows a deputy county auditor to receive the salary supplements provided to the county auditor under section 8-15-65, we first look at the wording of section 12-39-40. As our courts recognize in interpreting a statute, "the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847,849 (2002). In a plain reading of section 12-39-40, we find no indication that this statute entitles a deputy county auditor to the compensation generally provided to a county auditor. Furthermore, section 12-39-40, unlike section 14-23-60 pertaining to a clerk of court's performance of a probate judge's duties or section 23-11-50 dealing with a coroner's service upon the vacancy of the office of sheriff, does not mention the deputy auditor's entitlement to "the same fees" or the auditor's "fees and emoluments." Additionally, the situation you describe is unlike our 1967 and 2004 opinions in which the Governor appointed individuals to fulfill the duties of an office. The Governor did not appoint Mr. Rollins to fill the remainder of Mr. Haskins' term. Mr. Rollins' performance of the auditor's duties is solely by virtue of section 12-39-40.

Despite these differences, Ridgill and our prior opinions recognize regardless of whether the statute allows for payment of the office's compensation to the individual performing the duties of the office, under common law, entitlement to compensation arises by virtue of the performance of the duties of the office. Moreover, this common law rule applies regardless of whether individual fulfilling the duties of the office is acting pursuant to an appointment by the Governor or in accordance with a statutory provision. Thus, we believe a court would find a deputy auditor, by his or her performance of the duties of the auditor in accordance with 12-39-40(B), is entitled to receive the auditor's compensation.

Finding a deputy auditor is generally entitled to receive the compensation of the auditor upon the performance of the auditor's duties, we next consider such a deputy auditor's entitlement to salary supplements provided under section 8-15-65. Although we were unable to locate case law particularly dealing with a deputy auditor's entitlement to the state supplements under this provision, this Office addressed a similar issue in a 1981 opinion. In that opinion, we addressed whether a clerk of court performing the duties of a probate judge was entitled to receive the salary supplement for probate judges contained in that year's House appropriations bill. Op. S.C. Atty. Gen., July 8, 1981. Again, citing Ridgill, we concluded: "It is the opinion of this office that the salary supplement provided by House Bill 2461 for the Probate Judge is to be paid to the Clerk of Clarendon County." Id. Although, this opinion did not specifically address section 8-15-65, as it was yet to be enacted by the Legislature, we believe it is applicable to the situation you describe. Thus, based on this opinion, we conclude like a clerk of court performing the duties of a probate judge, a deputy auditor

performing the duties of the auditor, is entitled to receive the salary supplement as provided for under section 8-15-65.

Answering your first question affirmatively, we address your second inquiry as to how long he may receive such compensation. You informed us that although a successor auditor is to be elected in November of this year, he or she will not take office until July 2007. Based on our findings above, when a deputy auditor's entitlement to the auditor's compensation ceases depends upon when he or she discontinues the performance of the auditor's duties. Thus, presumably Mr. Rollins will receive any salary supplements regularly afforded to the auditor until the elected auditor takes office.

In Florence County v. Moore, 344 S.C. 596, 545 S.E.2d 507 (2001), the South Carolina Supreme Court considered whether a gubernatorial appointee to the office of the treasurer of Florence County may continue to serve the remainder of his predecessor's term or should the newly elected treasurer serve the remainder of the term upon his election. The Court considered section 1-3-220(2) of the South Carolina Code (2002) stating gubernatorial appointees to county offices "shall hold office until the next general election and until his successor shall qualify." Id. at 600; 545 S.E.2d at 509. The Court also considered section 12-45-20 of the South Carolina Code (2002) stating the treasurer's term of office commences on the first day of July following his election and that if he or she fails to complete his or her term of office, a successor shall be appointed for the unexpired portion of his or her term. Id. Moreover, the Court cited to section 4-11-10 of the South Carolina Code (Supp. 2002) providing that a county treasurer's term of office commences on July 1, following his or her election. Id. Based on these statutes, the Court determined because the treasurer elect was not elected to fill the unexpired term, he "was not entitled to assume office of treasurer prior to July 1, 2001, the date the term to which he was elected commences." Id. at 601, 545 S.E.2d at 510. Citing the Texas Supreme Court Case of Ex parte Sanders, 215 S.W.2d 325 (Tex. 1948), the Court concluded the treasurer elect "cannot qualify before July 1, 2001, as he has 'no mandate by election or otherwise to do so.'" Id. at 603, 545 S.E.2d at 511.

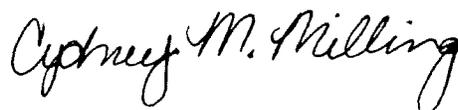
Section 12-39-40 of the South Carolina Code provides the deputy auditor continues to perform the duties of the auditor until "a successor is appointed or elected and qualified." Furthermore, section 4-11-10 of the South Carolina Code (Supp. 2005) states the term of office for a county auditor commences on July 1 of the year following the election. Thus, under the Court's holding in Florence County, unless the election you refer to is an election to fill the office of auditor for Mr. Haskins' unexpired term, the newly elected auditor may not assume his office until July 1, 2007. Accordingly, Mr. Rollins, by virtue of his performance of the auditor's duties until such time as the newly elected auditor assumes his or her office, is entitled to any state salary supplement that would be afforded to Mr. Haskins.

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Conclusion

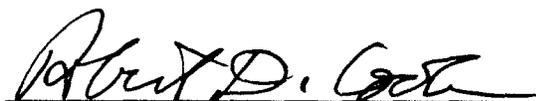
Section 12-39-40 of the South Carolina Code does not, in conveying the responsibilities of the county auditor to the deputy auditor in situations in which a vacancy in the office of the auditor exists, afford the auditor's compensation to the deputy. However, based upon the Supreme Court's decision in Ridgill and our prior opinions, we believe the deputy would be entitled to such compensation, including the salary supplements provided to the auditor pursuant to section 8-15-65. Furthermore, we believe such compensation shall be paid to the deputy auditor until such time as the elected auditor assumes the duties of the office.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General