



Fig. 5110

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 1, 1995

The Honorable Frances P. Smith
Edgefield County Magistrate
P. O. Box 664
Edgefield, South Carolina 29824

Re: Informal Opinion

Dear Judge Smith:

You have asked whether there is any absolute prohibition to your waiving a portion of your salary as magistrate in order to save the county money and for retirement purposes. The concern is whether S.C. Code Ann. Section 22-8-40 prohibits a magistrate from voluntarily accepting less than the salary to which he or she is entitled. You further state that the decision to waive a portion of your salary is yours alone and that no pressure has been asserted upon you in this regard.

Section 22-8-40 (B) provides that "[a]ll magistrates in this State must be paid the base salary" as determined by certain factors designated. Subsection (J) states that "[n]o county may pay a magistrate lower than the base salary."

The primary function in interpreting a statute is to ascertain the intention of the legislature. Multi-Cinema Ltd. v. S.C. Tax Comm., 292 S.C. 411, 357 S.E.2d 6 (1987). The statute must receive a practical reasonable and fair interpretation consonant with the purpose design and policy of the lawmakers. Browning v. Hartvigsen, 414 S.E.2d 115 (1992). Courts are not always confined to the literal meaning of a statute and the real purpose and intent of the lawmakers will prevail over the literal import of the words. Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 42 S.E.2d 390 (1947). A particular clause must not only be construed in light of its express language, but also in conjunction with the purpose of the whole statute and in light of its object in policy of the law. S.C. Coastal Council v. S.C. State Ethics Comm., 410 S.E.2d 245 (1991).

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Here, the obvious intent of Section 22-8-40 is to insure that magistrates are paid a certain minimum salary. Section 22-8-40 was enacted in 1988, as part of the Magistrates Pay Act. Our Supreme Court has described the Act's purpose as one which

... defines "part-time" and "full-time" magistrates and provides the minimum compensation a county must pay its magistrates, depending upon population. (emphasis added).

Ramsey v. County of McCormick, 306 S.C. 393, 396, 412 S.E.2d 408, 410 (1991). Moreover, Subsections (K) and (L) of Section 22-8-40 make it clear that nothing therein prevents a county from paying a magistrate more than the base salary established. As we indicated in Op. Atty. Gen., December 22, 1988, the statute is aimed at prohibiting the government body which is providing compensation to a magistrate, from reducing such compensation below the designated level.

However, it is an entirely different question whether the magistrate can make the personal choice to waive a part or all of his salary. I can discern from Section 22-8-40 no such constraint upon a magistrate's personal decision to voluntarily give up or refuse all or part of his or her salary for the county's benefit. While Subsection (J) of Section 22-8-40 literally states that "[n]o county may pay a magistrate lower than the base salary," I would construe that phrase as meaning that the county could not refuse to pay the base salary, but as not affecting the magistrate's own decision to receive less than the base amount.

Instructive in this regard is Taylor v. Phil, 126 Pa.Super. 196, 200, 201, 210, 190 A. 663, 669 (1937), affd., per curiam 328 Pa. 383, 196 A. 64 (1938). In that case, a statute specifically precluded a public officer's salary from being diminished during that officer's term. Nevertheless, the Court determined that such prohibition must be distinguished from the officer's decision to waive a portion of his salary for the good of the public. The Court reasoned as follows:

[w]e know of no public policy of this commonwealth which prevents a municipal or state officer in times of great public distress, from voluntarily donating to his city, county, or state such part of his salary or emoluments of office as he sees fit to give up for the relief of the municipality or state. While his salary may not be diminished during his term of office, he can do what he will with his own, and if he chooses to devote part of it to the relief of the city or state, and the latter accepts his voluntary donation, no public policy forbids it ...

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The transaction is most clearly exhibited by the municipality or state paying the officer his full salary and the latter then paying back, by check, so much thereof as he chooses to devote to the relief of city or state. But that is not the only way of accomplishing the desired result, and any form may be adopted which carries out the intention of the parties, provided it is established to be the voluntary act of the officer, and clearly definitively proved to be such, and is to continue only so long as he wishes.

See also, Harley v. Passaic County, 121 N.J.C. 44, 1 A.2d 454 (1938) [judge voluntarily agreed to a reduction of salary to assist county].

Likewise, in Op. No. 88-146 the Arkansas Attorney General construed a statute prohibiting reduction of an official's salary during his term as not interfering with the officer's personal decision to reduce the salary in a revenue shortage. The Attorney General of Arkansas opined:

[i]t should be noted, however, that A.C.A. s 14-42-113 would not appear to impact the official's personal decision with respect to retention of salary payments. This Code provision is, instead, directed toward action taken by the city in affecting a salary decrease. (emphasis added)

Similarly, on at least two previous occasions, this Office has recognized that a public officer may voluntarily agree to a reduction in salary. In an opinion dated December 3, 1981, we stated that "[t]here is no prohibition on [state] employees voluntarily accepting a reduction in pay." And in Op. No. 1118 (May 29, 1961), we found that an individual who has retired under the provisions of the South Carolina Retirement Act, was free to waive a portion or all of his supplemental allowance paid from the general funds of the State "[i]n order to avoid being deprived of benefits under pension plans." We thus concluded:

[i]t is the opinion of this office, that those eligible for such supplemental allowance may waive the same. A public officer or public employee by appropriate action may, in general, waive his right to the full amount of his allowance as fixed by law. 66 C.J.S. "Officers", paragraphs 93 and 98. See also Salley v. McCoy, 182 S.C. 249, 189 S.E. 196.

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This opinion makes good sense and I agree with it. It is in accord with the other authorities referenced above. In that regard, I recognize that there is a split of authority in other jurisdictions as to the ability of a public official to waive his salary or a portion thereof. See, 63A Am.Jur.2d, Public Officers and Employees § 466. And I am also cognizant that there is one previous opinion of this Office that seems to conclude that Section 22-8-40 may preclude such waiver. Op. Atty. Gen. No. 89-136 (November 22, 1989). That opinion relies primarily upon Salley v. McCoy, supra and the body of law which concludes that such waiver is against public policy. On the other hand, the 1989 opinion fully recognized that there existed contrary authority elsewhere and further reasoned that the conclusion therein was tentative at best. It was specifically noted:

[w]hile the above general authority appears to indicate that a public official may not refuse to accept an established salary, there have been no recent decisions of the State Supreme Court commenting on the question. Therefore, this Office cannot advise that in every instance a public official would be prevented from waiving his salary. However, as to the narrow question of whether a magistrate could refuse a salary, in light of the provisions of Section 22-8-40, there is a basis for not authorizing such a decrease by a magistrate. This response, however, would only be applicable to the circumstances affecting magistrates and we are making no comment generally as to the right of public officials to waive established salaries in other circumstances. (emphasis added).

The way I read this opinion, its author did not believe there was definitive law in South Carolina on the question, but that any refusal by the county to accept a magistrate's voluntary reduction or waiver would have a legitimate basis. However, the two earlier opinions of this Office seem to me instructive as to the position of this Office. And while I believe the 1989 opinion well summarizes the law in other jurisdictions, the principle that infringements upon the freedom to contract must be strictly construed, Branham v. Miller Electric Co., 237 S.C. 540, 118 S.E.2d 167 (1961), must also be considered. Therefore, it is my opinion that in your situation you may voluntarily agree to waive or give up a portion of or all of your salary for the benefit of the county. Of course, I assume that such waiver is truly voluntary on your part and if such is the case, the county would be authorized to accept your decision. Moreover, any authorization as to voluntary waiver in no way is deemed to alter this Office's firm position with regard to the county's obligation to provide the minimum base salary pursuant to Section 22-8-40. Clearly, a county may not use the magistrate's base salary as any sort of coercion, or inducement or pressure upon the magistrate. But where any waiver by the magistrate is

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the magistrate's own personal decision, as it apparently is here, such would, in my judgment be authorized. Obviously, such situation depends on its facts. I would point you to the following language in the 1961 opinion referenced above for general guidance:

[w]e suggest that a written waiver be obtained reciting that the individual desires to receive a lesser [amount] ... in order to take advantage of some other pension plan or retirement benefit. Such action should serve to preclude an individual accepting less than the amount allowed from thereafter seeking to recover the amount waived by him.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an