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December 13, 1990

The Honorable Bobby B. Rabon
Judge of Probate, Sumter County
Room 206, Sumter County Courthouse
Sumter, South Carolina 29150

Dear Judge Rabon:

By your letter of November 8, 1990, you have asked for the opinion of this office as to when the new salaries of the Probate Judges, which are based upon the official United States census, will take effect for those judges who will move to a higher salary level. You have also asked whether the new salary will include only the base salary or, in the alternative, will such increase include the base salary plus cost of living increases imposed since the adoption of the statute concerning salaries.

S.C. Code Ann. §8-21-765 (1989 Cum. Supp.) establishes the salary schedule for Probate Judges; part (A) provides in relevant part: "The salary of the office of probate judge is based on a salary schedule which uses base salaries determined by population categories according to the latest official United States Decennial Census." Then follows the salary schedule based upon county population.

The census is taken every tenth year on April 1, such date to be known as the "decennial census date" according to 13 U.S.C. §141(a); that date was April 1, 1990. The tabulation of total population by states must be transmitted to the President of the United States by December 31, 1990, according to 13 U.S.C. §141(b). Census data are then transmitted to the states within one year after the decennial census date, according to 13 U.S.C. §141(c), which date would be, at the latest, March 31, 1991.

The federal statutes governing the taking of the census do not say specifically when the census becomes

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effective as to a particular jurisdiction. In a telephone conversation with an official at the Census Bureau's Regional Office in North Carolina, we were advised that the census becomes official when the census figures arrive in a particular state, probably in March 1991. The Bureau is considering a plan which would call for slightly earlier transmittal of census data to counties and municipalities, but whether the plan will be implemented is unknown at this time; if the plan is implemented, census data could arrive in the State in late February or early March 1991.

Conversations with the demographer in the Division of Research and Statistical Services of the State Budget and Control Board yielded the same conclusion, that the census figures will be effective under state law just as soon as they are effective under federal law. We were advised that while the General Assembly usually adopts the decennial census as the true and correct enumeration of the state and its subdivisions, see §1-1-730, such is not necessary to make the figures official in the state.

Additional research has turned up numerous cases which reach a variety of results as to the effective date of the census. As noted in 14 Am.Jur.2d Census §7, the courts in various jurisdictions have held that the census would not be effective

until the date of official publication, promulgation, or announcement, or date of final publication or announcement, and in other cases that it is not effective until the date of "legal ascertainment," the date when the census becomes "available," the date of the filing of the enumerator's list, the date of verified and certified enumeration, the date of certification or transmission by the secretary of state, or the date of the publishing and recording of a proclamation by the governor. However, in other cases it has been held that a census is effective from the date of preliminary publication or announcement, or the date or time of public notoriety. And where a statute provides for the taking of a census "as of" a certain date, it has been held in some cases that the census is effective

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as of that date, although there is authority to the contrary.

In Forde v. Owens, 160 S.C. 168, 158 S.E. 147 (1931), a decision involving salaries of municipal officials which were based on population of the municipalities, the municipal officials' salaries were to progress to the next level whenever the municipality attained the requisite population according to "the last preceding published United States census...." 160 S.C. at 171. The court construed "published" in its general sense of "making public." Publication of the census results in this case was accomplished by making known authentically the results by census officials to city officials and by bulletins published in the newspapers. Such would be consistent with advice given to this Office verbally by the state and federal officials noted above.

The effect of the foregoing on the salaries of Probate Judges which will increase as a result of a county's gain in population, in terms of a county's budget and appropriation process and any relevant constitutional considerations, must be examined.

Section 8-15-10 of the Code leaves the determination of compensation of officers and employees of a political subdivision to the political subdivision:

Except as otherwise provided or as prohibited by the Constitution of this State, the compensation of all officers and employees of ... any political subdivision, department or agency thereof shall be as from time to time provided by the General Assembly or the particular political subdivision, department or agency concerned, as the case may be.

In addition, a provision of home rule, §4-9-30(7), provides in relevant part that the "salary of those officials elected by the people may be increased but shall not be reduced during the terms for which they are elected...." The county budget process is specified in §4-9-140, which section provides for supplemental appropriations after the county's annual budget has been adopted. Probate Judges in those counties which will move to a higher population category as a result of the recent census may wish to begin working now with their county councils toward

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implementation of the salary increases when the official figures are received in this State.1/

Whether the increase in salary for Probate Judges in the affected counties would be retroactive to April 1, 1990 (the decennial census date) or July 1, 1990 (the beginning of the counties' current fiscal year) is doubtful. Article III, §30 of the State Constitutional provides that the "General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered, or contract made...." This Office has opined previously that such provision would also apply to political subdivisions such as counties and school districts. See Ops. Atty. Gen. dated July 19, 1979; July 14, 1958; August 23, 1979; September 29, 1981; and February 25, 1955, as examples.2/ Thus, we are of the opinion that the salary increases would become effective whenever the census figures become official and would be prospective rather than retroactive, since retroactive application would effectively result in additional compensation being paid after services have been rendered.

Finally, whether the salary increase will include the base salary as stated in §8-21-765, or the base salary plus cost of living increases imposed since the adoption of §8-21-765, must be addressed. In an opinion of this Office dated April 23, 1990 (copy enclosed), is stated the following:

1/ South Carolina Court Administration is "charged with monitoring compliance" of §8-21-765, by §8-21-765(B). Most probably that agency will be able to offer assistance to Probate Judges who need assistance when the official census figures become available.

2/ Though the Supreme Court did not decide whether Article III, §30 would apply to counties, the court stated in Bales v. Aughtry, S.C. , 395 S.E.2d 177 (1990), in footnote 2, "The parties do not argue and we need not address whether this constitutional prohibition applies to county government in view of its express reference to the General Assembly." 395 S.E.2d at 179.

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You asked "if population figures shift a county from one salary level to a higher level, is it correct to say that the base figure now listed in the statute for the higher level must be adjusted for any cost of living increases granted since implementation of the statute, thereby creating a new base figure every time a cost of living allowance (COLA) is granted?" You gave as an example a new base figure under Section 22-8-40(B)(1)(C) of the Code of \$27,040 after taking into consideration a 1989 four (4%) per cent adjustment and a 1990 four (4%) adjustment.[sic.]

As stated, Section 22-8-40(E) provides for the annual adjustment of the base salaries established in subsection (B) in accordance with the cost of living increase provided. Therefore any base salary figure established by such provision would be adjusted in accordance with cost of living increases granted since the statute was implemented.

While this opinion dealt with magistrates' salaries, both magistrates' salaries and the salaries of Probate Judges were established by Act No. 678 of 1988 in accordance with populations of the respective counties. Just as §22-8-40 requires annual cost of living adjustments for salaries of magistrates, §8-21-765(B)(last paragraph) requires such adjustments for Probate Judges. Thus, the base salaries for Probate Judges whose county populations rise to the next level would not actually be the dollar amount specified in §8-21-765(A), but would be the amount as it has been adjusted for cost of living increases since §8-21-765 was implemented. Of course, a county council could establish a higher salary if it wished; the amounts specified in §8-21-765, as adjusted, are only minimum salary levels.

We trust that the foregoing has satisfactorily

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responded to your inquiry. Please advise me if
clarification or additional assistance should be needed.
With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:gmb
Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

ROBERT D. COOK
Executive Assistant for Opinions