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February 16, 1989

George A. Markert, Assistant Director
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South Carolina Supreme Court
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Dear George:

You have raised several questions regarding provisions of recently-enacted Act No. 678 of 1988. The following are responses to those questions that were not answered in the opinions from this Office to you dated December 22, 1988. As stated in those opinions, due to ambiguities in such legislation, clarification by the General Assembly could be sought which would detail exactly how the situations you addressed should be handled.

You stated that Section 22-8-40(D) authorizes counties to fix the hours a week a part-time magistrate spends in the exercise of the judicial function "upon the recommendation of the chief magistrate." You asked whether counties may refuse to follow the recommendations of the chief magistrate.

The term "recommendation" has been referred to as an action which is advisory in nature rather than one which has any binding effect. People v. Gates, 116 Cal. Rptr. 172, 178 (1974). See also: Lucas v. Board of County Road Commissioners of Wayne County, 348 N.W.2d 660 (Mich. 1981). Consistent with such definition, it appears that counties would be authorized to refuse to follow the recommendation of a chief magistrate. Of course, while not bound, counties presumably would give strong consideration to such recommendations in fixing the hours of a part-time magistrate due to the responsibilities of the chief magistrate as set forth in the Order of the Chief Justice designating chief judges. These responsibilities include establishing a schedule so that a magistrate will be available in person or "on call" at all times in the county to issue warrants and conduct bail proceedings.

You next stated that Act No. 678 establishes certain educational or work experience requirements for eligibility for office for magistrates, masters-in-equity and probate judges. See: Sections 22-1-10(B), 14-11-20, and 14-23-1040. As to magistrates, it is stated that the referenced requirements "...do not apply to a magistrate serving on the effective date of this act during his tenure in office."1/ Similarly, it is stated that the requirements are inapplicable to probate judges "...presently holding office upon the effective date of this act." Act No 678 makes no provision for inapplicability to masters-in-equity. You have questioned whether a judge who fails to meet the eligibility requirements but continues to serve due to the referenced "grandfather" provisions is eligible to be reappointed or reelected after ceasing to hold office for a period of time or as you stated, must the judge hold office continuously to take advantage of the grandfather provisions.

The term "grandfather clause" is typically used to describe provisions that extend certain prerogatives to individuals who are established in a position affected by legislation at the time such legislation is adopted. Such clauses are inserted under the consideration that individuals who have served in a position for some time are presumed to be qualified in a manner that must be demonstrated by those who seek the same position at a later date. Kan. Atty. Gen. Op. No. 81-251.

It is generally stated that a "grandfather clause" "...must be construed strictly against the party who invokes it." 73 Am. Jur.2d Statutes, Section 313 p. 464. In Greenbaum v. Firestone, 455 So.2d 368 (Fla. 1984) the Florida Supreme Court considered a case involving a constitutional provision mandating retirement for judges when they reached the age of seventy. A "grandfather clause" exempted judges from the mandatory retirement provision who were holding office immediately after the constitutional provision became effective and who were also holding judicial office on July 1, 1957.

1/ Such provision does state, however, that magistrates "...presently holding office must achieve a high school education or the equivalent educational training...within two years of the effective date of this act..." A further exemption is provided for magistrates with at least five years' service on the effective date of the act.

Greenbaum involved an individual who was a municipal court judge from 1947 to July, 1972 when he became a circuit court judge. The Court held that the judicial office held in July, 1957 which was exempt from the mandatory requirement provision must be the same position held when the mandatory retirement age is reached. The Court noted that the "grandfather clause"

> ...protects incumbents from a change in the law which they could not have foreseen when they entered into their judicial offices.

455 So.2d at 370. The court stated that the particular individual was aware of the mandatory age retirement when he became a circuit judge and, therefore, was not exempt from the mandatory retirement provision.

In Guiden v. Town of Highland, 425 N.E.2d 731 (Ind. 1981) the Indiana Court of Appeals determined that a "grandfather clause" which only required law enforcement officers appointed on or after the effective date of an act to complete minimum basic training for officers did not exempt an officer who failed to complete the requirements where the officer terminated his employment prior to the effective date of the requirement but was later reappointed. The training regulation specified that such regulations "...shall not apply to any law enforcement officer appointed prior to July 1, 1972." 425 N.E.2d at 734. The officer at issue resigned in February, 1972 but was again employed as a law enforcement officer in 1976. The Court stated that upon being reappointed, the officer would be required to demonstrate his then present qualifications.

These case appear to indicate that "grandfather" clauses are only applicable to individuals who hold office on the effective date of the provisions which exempt them from some further requirement and only for the positions then being held. Therefore, as to your questions involving magistrates and probate judges, those judges who are "grandfathered in" by Act No. 678 would appear to be authorized to continue in office but would not be eligible to be reappointed or reelected if they cease to hold office prior to being reelected or reappointed at a later date. This reasoning would especially appear to be applicable to magistrates inasmuch as the referenced education and training requirements are not applicable to a magistrate "serving on the effective date of this act during his tenure in office." (emphasis added.) Of course, as stated previously, this interpretation is an indication on how this question probably should be resolved and should not be considered as being free from doubt. Legislative clarification could be sought which would resolve this matter with finality.

You also referenced that in computing the maximum number of magistrates in each county, Section 22-8-40(C) states "(p)art-time magistrates are to be computed at a ratio of four part-time magistrates equals one full-time magistrate." You have asked whether in setting the number of hours a week a part-time magistrate spends in the exercise of his judicial function, the factor which pursuant to Section 22-8-40(D) determines the magistrate's salary, is a county limited to establishing 10-hour work weeks for part-time magistrates or may it establish work weeks of any length up to 40 hours?

Pursuant to Section 22-8-10, a full-time magistrate regularly works forty hours a week performing his judicial duties; a part-time magistrate regularly works less than forty hours a week performing such duties. Also, pursuant to Section 22-8-40(D) the salary of a part-time magistrate is computed by dividing by forty the number of hours the magistrate spends performing his duties. I assume that the reference to forty is meant to reference the forty hours a week a full-time magistrate works. While part-time magistrates are to be computed at a ratio of four part-time magistrates equals one-full-time magistrate, these referenced provisions imply that part-time magistrates may work any period as long as it is less than forty hours a week. Therefore, it appears that counties are not limited to establishing 10-hour work weeks for magistrates.

You also noted that due to increased workloads because of factors such as illnesses of other magistrates, vacancies in office or leave requests of other magistrates in the same county, a chief magistrate may find it necessary to ask a part-time magistrate to work additional hours on a temporary basis. In such situation a county may wish to compensate the magistrate for the extra hours worked. You questioned whether the county may later set reduced work hours for the part-time magistrate, thereby reducing his total compensation, when the situation which required the additional assistance by such magistrate no longer exists. I assume that your question is raised in part due to Section 22-8-40(I) which, again, states (a) magistrate who is receiving a salary greater than provided for his position under the provision of this chapter must not be reduced in salary during his tenure in office."

As noted above, pursuant to Section 22-8-40(D) part-time magistrates are entitled to a proportionate percentage of the salary provided full-time magistrates. Again, such percentage is computed by dividing by forty the number of hours the part-time magistrates spends performing his duties. As noted, we are construing these provisions to indicate that these judges may work up to thirty-nine hours a week. I am unaware of any provision which states that the number of hours part-time magistrates work may not fluctuate.

As stated in the December 22, 1988 opinion to you, part-time magistrates are to be compensated only for the hours worked and are not to be compensated for the time spent "on call". Consistent with such, it appears that part-time magistrates' "salaries" should be considered on an hourly wage basis and not as a fixed sum received regardless of the number of hours worked. Therefore, counties may compensate part-time magistrates for any extra hours worked but later reduce these hours thereby reducing their total compensation.

You also asked whether the minimum base salaries established by Section 22-8-40(B) remain constant. You noted the example where presently a county has a population of less than thirty-five thousand. Pursuant to Section 22-8-40(B)(1)(f), the salary for magistrates in such county is $17,000.00. The salary became effective January 1, 1989. With a four (4%) per cent cost of living raise, on July 1, 1989 the magistrate's salary will be $17,680.00. You referenced the situation where the magistrate would resign and another individual would be appointed to replace him. You asked whether the income magistrate would be paid $17,000 or 17,680.

As has been stated, Section 22-8-40(I) prohibits a magistrate's salary from being reduced "during his tenure in office." It is further provided that tenure in office continues upon the expiration of a term if the incumbent magistrate is reelected. Also, pursuant to subsections (J) and (K) of Section 22-8-40, counties are prohibited from paying a magistrate a sum lower than the base salary established but may pay a magistrate more than such base salary.

In Feavel v. City of Appleton, 291 N.W. 830 (1940) the Wisconsin Supreme Court determined that the policy behind setting a base salary is to prevent the influence of partisanship and personal feelings in establishing salaries and to inform individuals seeking office what compensation is attached to a particular office. Such decision was cited by the Wisconsin Attorney General in his opinion number 1-80 which held that individuals who take office where a base salary is provided are not entitled to the same salaries, which included raises and supplements, which were received by their predecessors.

My review of Act No. 678 fails to disclose any provision which indicates that a magistrate who replaces another magistrate would be entitled to the base salary plus any raises or supplements granted his predecessor. Instead, it appears that the successor magistrate would initially be paid the base salary established by the referenced legislation for his particular county.

If there are any further questions, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

CHR:sds

REVIEWED AND APPROVED BY:

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