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The State of South Carolina

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Dear George:

In a letter to this Office you raised several questions regarding provisions of recently-enacted Act No. 678 of 1988 which will become effective January 1, 1989. The responses set forth hereafter are first impressions by this Office as to how the referenced legislation might be interpreted. Legislative clarification could be sought which would detail precisely as to how the matters addressed in this opinion should be handled. Moreover, such clarification is in fact probably preferable where major ambiguities are present.

In your first question you referenced that currently due to local legislation there are varying terms of offices for magistrates, both as to length and commencement dates. Pursuant to the provision of Act No. 678 to be codified as Section 22-1-10, four year terms of office with terms to commence May 1, 1990 and May 1, 1991 are provided. You have asked how appointments should be made after January 1, 1989 but before commencement dates for the terms set by Section 22-1-10. You also questioned the effect of any local legislation which provides an expiration date for a term of a magistrate which is beyond the commencement dates required by Section 22-1-10. You asked whether the term would automatically expire at the commencement of terms established by Section 22-1-10. You further asked whether the Governor may appoint magistrates for terms to expire April 30, 1990 or 1991 even though local legislation would have authorized a longer term.

As you are aware, Act No. 678 while providing for uniform magisterial terms beginning in 1990 and 1991 does not specifically provide a procedure for magisterial appointments after the effective date of such provision, January 1, 1989, but prior to the commencement of such uniform terms. Also, I am unaware of any legislative

history which comments on the procedure to be followed during such interim period. There are no provisions for magistrates in such legislation similar to that for masters-in-equity. See: Part II, Section 2 ("(t)he master-in-equity for each county presently holding office continues to serve as master-in-equity until the expiration of his term of office at which time his successor may be selected as provided by law.") Obviously, this is a matter which could be resolved by legislative clarification. Since there is no legislative history which sheds light on this obvious ambiguity, the conclusions set forth hereafter in response to your questions concerning these terms are only interpretations by this Office as to how these issues probably should be resolved and cannot be considered as being free from doubt.

Generally, pursuant to current Section 22-1-10 of the Code, magistrates hold office for two years and "until their successors are appointed and qualified." 1/ Such holdover language is also set forth in Act No. 678. Citing the decision of the State Supreme Court in Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415 (1964), prior opinions of this Office have determined that such language mandates that an incumbent magistrate is obligated to continue to discharge the duties of his office until his successor is appointed and qualifies. See: Opinions dated September 23, 1980; April 14, 1980; August 30, 1971. Consistent with such, any magistrates currently in office should continue to hold office until their successors are appointed and qualified.

The provisions of Section 22-1-10 as set forth in Act No. 678 are quite clear in indicating that the four year terms are prospective, commencing in 1990 and 1991. Prior opinions of this Office have recognized the authority of the General Assembly to change the term of an office that is not governed by constitutional provisions. See: Opinions dated October 12, 1981; June 15, 1981; October 3, 1973. In 67 C.J.S. Officers, Section 70 it is stated that

> (t)he sovereign power creating an office may change its tenure in the absence of constitutional restriction ... Accordingly, the legislature may change the term of an office during the term of an incumbent ...

1/ As you referenced, local legislation has been enacted which provides for varying lengths of terms for magistrates in particular counties. See, e. g., Act No. 572 of 1960 (four year terms for Lexington County magistrates).

In Ward v. Waters, 184 S.C. 353, 192 S.E. 410 (1937), the Supreme Court quoting with approval from State v. Hough, 103 S.C. 87, 87 S.E. 437, held that the term of office in the county government in Florence County could be extended by the General Assembly inasmuch as

> [t]hose holding offices created by the legislature hold them subject to the legislative will. The power that creates an office can impose such limitations and conditions upon the manner of filling it, and the tenure and the exercise of the duties of the office, and may modify or abolish any of these ...
> Ward, supra, at 360-361.

In Wapole v. Wall, 153 S.C. 106, 150 S.E. 760 (1929), the Court reviewed a case where a suit has been brought contesting whether or not members of a board of trustees had been legislated out of office by newly enacted legislation. The court stated that

> [s]chool trustees are legislative, not constitutional, officers whose terms may be ended or extended at the will of the Legislature.
> Wapole, supra at 117. See also: 1936 Atty. Gen. Op. No. 137.

Therefore, the General Assembly can end or extend the term of any office created by that body.

However, in an opinion of this Office dated January 31, 1978 reference was made to legislation providing for four year terms of office for Colleton County magistrates. The question was raised as to the effect of such legislation on the terms of incumbent magistrates serving on the date of the act. The opinion concluded that the legislation was prospective in operation and therefore did not affect the terms of incumbent magistrates. The opinion cited the decision by the State Supreme Court in Ward v. Waters, supra, where the Court construed as retroactive language in other legislation providing four year terms of office for other office holders. The opinion, however, noted that as to the legislation pertaining to Colleton County magistrates, the intent to make it applicable to incumbent magistrates was "not clear." In making such determination, the opinion cited the rule that "(s)tatutes will not be construed to change the terms of incumbent officers unless the intent is plainly and clearly expressed."

Consistent with such opinion, it appears that in the absence of a clear legislative expression that terms of magistrates currently in office should be extended, any such terms should not be construed as having been lengthened by Act No. 678. Moreover, the provisions of Section 22-1-10 as set forth in such legislation are quite clear in indicating that the four year terms are prospective, commencing in 1990 and 1991 and, therefore, do not affect the terms of incumbent magistrates or magistrates appointed prior to such dates.

In addition to there being no clear legislative intent to lengthen magisterial terms prior to the dates for the four year terms set forth in Act No. 678, there is a consideration that to allow magistrates to continue to holdover in office beyond their regular terms until 1990 and 1991 would prevent the Governor from exercising his authority to make magisterial appointments prior to such time. It is generally recognized that the exercise of appointment powers is preferable to continued holdovers. See: Opinion of the N. Y. Atty. Gen. dated January 21, 1979; Kelley v. Riley, 332 N.W.2d 353 (Mich. 1983). The South Carolina Supreme Court has also recognized the paramount authority of Governors in this State to make magisterial appointments in striking down procedures which were construed as chilling the discretionary power of the Governor to appoint magistrates. State ex rel. Riley v. Pechilis, 273 S.C. 628, 258 S.E.2d 433 (1979). Therefore, it appears that the better construction would support the Governor's continued authority to make appointments until the time for the commencement of the terms set forth in Act No. 678, namely, May 1, 1990 and May 1, 1991, for the respective counties. Of course, this issue regarding magisterial appointments could be clarified by further legislation so as to resolve any ambiguity as to the status of incumbent magistrates whose terms expire prior to the uniform terms established by Act No. 678.

Concerning your question regarding terms which extend beyond the dates set forth in Section 22-1-10, as indicated previously, this Office has recognized the authority of the General Assembly to alter terms of statutorily-created offices, including the authority to shorten such terms. Therefore, it appears that for any magisterial appointments where the expiration dates for such terms would extend beyond the expiration dates set by Section 22-1-10 in Act No. 678, such terms must be considered as having been limited by this legislation so that these terms would expire at the commencement dates of the terms established by Section 22-1-10. The Governor could note such dates in making any future appointments. Such a construction would support the intention of the General Assembly to establish uniform terms for magistrates statewide.

You also referenced the situation involving magisterial appointments made before January 1, 1989 with expiration dates which extend

beyond the commencement dates set forth in Section 22-1-10 of Act No. 678. You questioned whether the terms automatically expire upon the commencement of terms required by Section 22-1-10. Consistent with the previous response, such terms should be considered as having been limited by Act No. 678. Therefore, such terms would also expire upon the commencement dates of the terms established by such provision.

You also referenced that Section 22-8-40 (B) (3) of Act No. 678 provides for a maximum number of magistrates for each county. You also stated that it appears to be the legislative intent that no magistrates currently serving on the effective date of Act No. 678, January 1, 1989, lose their positions. Instead, you suggested that the mechanism for reaching the designated number in counties where the number of magistrates presently exceeds the maximum number would be by factors such as death or resignation. Support for such understanding is the provision in Section 22-8-40 (B) (3) that "(n)o additional magistrates may be added until a county has less than the ratio." You questioned the status of magistrates in holdover status as of January 1, 1989. You specifically asked whether these magistrates continue in holdover status or are their terms ended by Act No. 678. You also questioned whether they may continue in holdover status beyond commencement dates for terms set forth in Section 22-1-10 of Act No. 678.

In a prior opinion of this Office dated August 20, 1980 quoted the general law that

> ... (t)he period between the expiration of an officer's term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed constitutional or statutory period.

See also: Opinions of the Atty. Gen. dated November 5, 1984 and September 21, 1979. The State Supreme Court in Bradford v. Byrnes, 221 S.C. 255, 261, 70 S.E.2d 228 (1952) recognized the principle of a holdover in office as "... the continuity of governmental service and the protection of the public in dealing with officers ...." Also, as previously referenced, magistrates are to hold office "until their successors are appointed and qualified." Therefore, a magistrate typically is to remain in office until such time as his successor is appointed and qualifies.

A review of Act No. 678 fails to provide a clear answer to your questions. Moreover, while assertions may be made that some magisterial positions are eliminated by the legislation, there is the further problem that if positions were eliminated, there is no specific indication as to which magisterial position in a particular county would be lost. This Office therefore must conclude that if it is

the intention that magisterial positions are to be eliminated, legislation should be enacted specifically stating such intentions.

Consistent with such, magistrates in holdover status as of January 1, 1989 apparently would remain in holdover status. Therefore, their terms would not be terminated by the recent legislation. Also, these holdover magistrates would continue in office even beyond commencement dates for terms set forth in Section 22-1-10 of Act No. 678 if no further appointments are made for such positions.

You also asked whether the Governor may reappoint magistrates whose terms expire on dates after January 1, 1989 even if the reappointments would result in a county continuing to have more than the maximum number of magistrates contemplated by Section 22-8-40 (B)(3). Again, a review of the legislation does not expressly comment on this situation. However, as stated, it is the understanding of this Office that it was the intention of the General Assembly that magisterial positions would become vacant only through factors such as death or resignation. Based on such understanding, magistrates whose terms expire on dates after January 1, 1989 may be reappointed even if such reappointments would cause a county to continue to exceed the maximum number of magistrates established by Act No. 678.

Of course, this is also a matter that could be resolved by further legislation. Also, presumably the matter of future magisterial appointments would be considered by county governing bodies and the respective county legislative delegations. In making recommendations for appointment, consideration could be given to the opportunity to designate magistrates as full-time or part-time which, pursuant to Section 22-8-40 of Act No. 678, is within the responsibility of county governing bodies.

You commented that pursuant to the Orders of the Chief Justice, chief magistrates are directed to establish a schedule so that a magistrate will be available in person or "on call" at all times. You have questioned whether Act No. 678 requires counties to pay part-time magistrates for time spent "on call" or only for the average number of hours worked.

You have supplied this Office with a letter from your Office to Magistrate T. Belk Ingram dated December 5, 1988. In such letter you indicated that an interpretation which requires counties to pay magistrates for time spent "on call" appeared to be "defective". In making such conclusion you referenced that

> ...(t)he "exercise of the judicial function "as defined in Section 22-8-20:
>
> > "involves the examination of facts leading to findings, the application of law to those findings, and the

> ascertainment of the appropriate remedy. . . . [it] also includes time spent performing ministerial duties necessary for the exercise of the magistrates' judicial powers, as well as necessary travel and training time. In the case of chief magistrates . . . [it] includes time necessary to perform the administrative and other duties required. . ."

This definition does not include time spent "on call" ... Section 22-8-40, in describing the duties and hours a week for which a part-time magistrate is to be paid, includes time to be spent on call as well as time spent "in the exercise of the judicial function", but qualifies both by requiring that the hours must be the "average number of hours worked". 2/

You also indicated that to construe the legislation to require payment "on call" and to comply with the Order of the Chief Justice would require at a minimum four (4) full-time and one (1) part-time magistrate or five (5) part-time magistrates each being paid 33.6 hours per week in each county of the State. You indicated that the legislation requires such number of magistrates or more in only twelve (12) of the forty-six (46) counties.

Therefore, your conclusion that the legislation probably does not require payment for time spent "on-call" appears correct. As you indicated, this would be a matter for further clarification by the General Assembly.

Sections 22-8-40 (E) and 8-21-765 (B) provide for cost of living raises for magistrates and probate judges "... in the amount provided classified state employees in the annual state general appropriations act of the previous fiscal year." You have asked when such raises become effective and whether the four (4%) percent cost of living increase for state employees effective July 1, 1988 is applicable to magistrates and probate judges. If applicable, you asked whether such increase is effective January 1, 1989 or July 1, 1989.

2/ I would further note that Section 22-8-20 states that as to magistrates "... the hours they spend in the performance of their official duties are hours spent in the exercise of their judicial function."

In establishing the referenced cost of living raises for magistrates and probate judges, no specific date was established when such raises would be effective. Again, this is a matter that may be considered for future legislative clarification. However, in the absence of such clarification, consideration should be given to the provision of Section 4-9-140 of the Code which states in part

> (t)he fiscal year of the county government shall begin on the first day of July of each year and shall end on the thirtieth day of June next following, and the fiscal year shall constitute the budget year of the county government.

As expressed in prior opinions of this Office dated January 21, 1987 and September 26, 1984, the General Assembly is presumed to act with full knowledge of the effect of an act and with full information as to the existing conditions and relevant facts. Also, the General Assembly is presumed to have knowledge of prior legislation when any subsequent legislation is enacted. See: Bell v. S. C. Highway Department, 204 S.C. 462, 30 S.E.2d 65 (1943); 82 C.J.S. Statutes, Section 316.

Presumably, therefore, the General Assembly was aware that the fiscal year for counties runs from July 1 to June 30. Consistent with such, it appears that the better reading of the referenced legislation supports making cost of living raises effective July 1, 1989. Also, making such raises effective on July 1, 1989, the first day of a new fiscal year after the effective date of Act No. 678 (January 1, 1989), would be consistent with the language in Sections 22-8-40 (E) and 8-21-765 (B) that raises are based on the increases given state employees "the previous fiscal year."

You referenced that the amount of the cost of living increase for state employees effective July 1, 1988 was four (4%) per cent. Consistent with the language in Sections 22-8-40 (E) and 8-21-765 (B) that the amount of the increase is the amount paid state employees in the "previous fiscal year", the amount payable to magistrates and masters-in-equity would be four (4%) per cent payable effective July 1, 1989. Therefore, this Office is in agreement with a memorandum from your office concerning these raises dated October 25, 1988. 3/

3/ In a telephone call you indicated that the reference to "1990" in the memorandum should have read "1989."

Pursuant to Section 22-8-40 (F), a full-time chief magistrate must be paid a yearly supplement of three thousand dollars. However, you indicated that many counties have not paid chief magistrates a supplement in the past. You indicated that many of these chief magistrates are presently being paid a salary which in itself exceeds the total of the minimum base salary for magistrates in that county plus the supplement for chief magistrates or a salary which is less than the total of the minimum base salary plus the full chief magistrate's supplement but more than the minimum base salary. You asked what if any supplement should a county add to such a chief magistrate's salary to comply with Act No. 678 in both of the situations referenced.

Again, this is a question where legislative clarification would be helpful. However, a literal reading of the referenced provisions indicates that a full-time chief magistrate "must be paid" a supplement each year of three thousand dollars. As stated in People v. Brown, 459 N.E.2d 1175 (Ill. 1984) the word "must" is generally regarded as mandatory language. See also: Tranen v. Aziz, 476 A.2d 1170 (Md. 1984) ("the term 'must' imposes a positive, absolute duty."); Op. of the Atty. Gen. dated June 15, 1987 (the $1575.00 supplement for sheriffs included in the State Appropriations Act must be paid to the sheriffs of the various counties.) Also, as you noted, Section 22-8-40 (1) states that

> (a) magistrate who is receiving a salary greater than provided for his position under the provisions of this chapter must not be reduced in salary during his tenure in office.

Moreover, Section 22-8-40 (K) states that nothing in Act No. 678 should be interpreted so to prohibit a county from paying any magistrate a sum in excess of the base salary established by the legislation.

Reading these provisions together results in the conclusion that counties are probably obligated to pay the three thousand dollar supplement to chief magistrates who have not been paid a supplement as chief magistrates in the past. This conclusion would be applicable to chief magistrates now being paid a salary which exceeds the total of the minimum base salary for magistrates plus the supplement as well as to chief magistrates who are paid a sum less than the total of the minimum base salary plus the full supplement but more than the minimum base salary. Of course, legislative clarification could be sought if this conclusion is considered as giving any magistrate an unintentional "windfall."

You referenced that pursuant to Sections 8-21-760 and 22-8-40 (I) counties are prohibited from reducing the salaries of magistrates or probate judges during their terms of office. You asked whether counties are required to pay cost of living supplements to a judge who is now being paid a salary which in itself exceeds the total of the minimum base salary for a judge in that county, plus the cost of living increase, or to a judge who is being paid a salary which is less than the total of the minimum base salary and the full cost of living supplement but more than the minimum base salary.

Sections 22-8-40 (E) (for magistrates) and 8-21-765 (for probate judges) state that

> (a) cost of living increase must be paid by the county in the amount provided classified state employees in the annual state general appropriations act of the previous fiscal year. (emphasis added)

Generally, the primary consideration in statutory construction is the intention of the legislature. Citizens and Southern Systems Inc. v. S. C. Tax Commission, 280 S.C. 138, 311 S.E.2d 717 (1984). Moreover, words must be given their plain and ordinary meaning. McCollum v. Snipes, 213 S.C. 254, 49 S.E.2d 12 (1948). Where a statute is clear and unambiguous, there is no room for construction and the terms of the statute must be given their literal meaning. Duke Power Co. v. S. C. Tax Commission, 292 S.C. 64, 354 S.E.2d 902 (1987). Applying these rules of statutory construction along with the previously referenced definition of the term "must", it appears that magistrates and probate judges should receive a cost of living increase in the amount specified in both situations referenced above.

You also asked if a judge is in "hold-over" status as of January 1, 1989, may the county reduce his salary to the minimum base salary assuming that he earned more than the base salary in 1988. As stated in a prior opinion of this Office dated August 20, 1980, "... (t)he period between the expiration of an officer's term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed constitutional or statutory period." Moreover, as referenced previously, Section 22-8-40 (I) states that "(a) magistrate who is receiving a salary greater than provided for his position under the provisions of this chapter must not be reduced in salary during his tenure in office...." Inasmuch as a holdover period is part of a magistrate's term, a county would not be authorized to reduce the magistrate's salary below that what he was earning previously.

You further referenced that Section 22-8-40 (D) of Act No. 678 provides that "(p)art-time magistrates are entitled to a proportionate percentage of the salary provided for full-time magistrates." You indicated that salaries of all full-time magistrates may not be the same because of longevity benefits or because of past inequities "grandfathered" in by Section 22-8-40 (I). Also, you indicated that even if a county has only one full-time magistrate, his salary, which is not subject to reduction, may be higher than the minimum base salary set by Act No. 678. You have asked which full-time magistrate salary should be used as a bench mark in setting salaries for part-time magistrates.

Of course, in computing any salary, there must be adherence to the provisions of Section 22-8-40 (I) which again mandate that a magistrate's salary may not be reduced during his tenure. No distinction is made as to whether the magisterial position is full-time or part-time. Assuming compliance with such provision, it appears that in order to achieve the concept of uniformity in magisterial salaries, the minimum base salary should be used as a bench mark.

Again however, this is a matter where legislative clarification could be sought to resolve the matter. Also, this may be a matter which ultimately would be resolved by judicial review pursuant to Section 22-8-50 if any redress of salary is sought.

If there are any further questions, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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