

1980 WL 120890 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 23, 1980

***1 RE: Judge Claude A. Patton Route 2 Fountain Inn, SC 29644**

Senator David A. Taylor
P. O. Box 46
Laurens, SC 29360

Dear Senator Taylor:

In a letter to this Office, you indicated that the State Court Administrator, citing an opinion of this Office, has asked that Laurens County Magistrate Claude A. Patton submit his resignation to the Governor since he has reached the age of seventy-two years. You indicate that Magistrate Patton had been appointed for a term of office which does not end until April 29, 1981. You further stated that you had advised Judge Patton not to resign based on the fact that he was appointed for a definite term and that this Office has indicated in prior opinions that certain officers are required to hold over until their successors are named and qualified. Furthermore, you indicated that should Magistrate Patton resign, there would be a vacancy in the office since the General Assembly is not in session.

This Office has in fact issued several opinions, copies of which are enclosed, which have held that a magistrate is required to retire at the end of the fiscal year in which he reaches his seventy-second birthday. Such opinions are based on [Section 9-1-1530, Code of Laws of South Carolina, 1976](#), as amended, which provides in part that:

‘(i)t shall be mandatory for any employee or teacher whether or not appointed and regardless of whether or not a member of the South Carolina Retirement System to retire no later than the end of the fiscal year in which he reaches his seventy-second birthday’.

When a statute is plain and unambiguous, there is no occasion for statutory construction. [University of South Carolina v. Batson](#), 271 S.C. 242, 246 S.E.2d 882, 883 (1978).

As to a situation where a magistrate refuses to voluntarily submit his resignation at the end of the fiscal year in which he reaches his seventy-second birthday, it appears that as to the office occupied by such a magistrate, such office may be determined to be vacant. It has been stated that:

‘(m)atters which create a vacancy in a judicial office generally depend on the terms and construction of the particular constitutional or statutory provisions. Ordinarily, a vacancy may be created by . . . (the incumbent's) . . . reaching the age of compulsory retirement. . . . 48 C.J.S. [Judges](#), Section 31, p. 982. See also: [State ex rel. Williams v. Cage](#), 196 La. 341, 199 So. 209 (1940); [State ex rel. McCormick v. Appling](#), 236 Or. 485, 389 P.2d 677 (1964).

It has also been stated that:

‘(a)n office is vacant when it is without an incumbent who is legally qualified to hold it or the incumbent has no right to exercise its functions or receive the emoluments thereof.’ [Hancock v. Queenan](#), — Ky. —, 294 S.W.2d 92, 96 (1956).

[Section 9-1-1530](#), [supra](#), is quite specific as to its requirement of mandatory retirement.

As to any vacancy which may occur in a particular magisterial office when the General Assembly is not in session, [Section 1-3-210, Code of Laws of South Carolina, 1976](#), provides that:

*2 '(a)ny vacancies which may happen in any of the following offices during the recess of the Senate may be filled by the Governor, who shall report the appointment to the Senate at its next session: . . . (4) Magistrates . . . If the Senate does not advise and consent thereto at such next session, the office shall be vacant.'

Thus, pursuant to such provision, a magisterial office determined to be vacant because of the incumbent's having reached the mandatory retirement age as set forth in [Section 9-1-1530, supra](#), could be filled by gubernatorial appointment even though the General Assembly is not currently in session.

As you indicated in your letter, this Office in an earlier opinion indicated that pursuant to the decision of the South Carolina Supreme Court in [Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415 \(1964\)](#), an incumbent magistrate is obligated to continue to discharge the duties of his office until his successor has been appointed and has qualified. (See: 1970 Opinion of the Attorney General No. 2994, p. 273). In [Rogers](#), the Supreme Court held that the attempted resignation by certain county election commissioners was not effective and their tenure in office along with their duties and responsibilities continued until their successors were appointed and qualified. The Court held that:

'(t)his is in accord with the general rule that a public officer does not cease to be such even when his resignation is accepted, but continues in office until a successor is qualified where the statute or Constitution so provides.' [245 S.C. 34](#)

[Section 22-1-10, Code of Laws of South Carolina, 1976](#), specifically provides that magistrates shall continue in office 'until their successors are appointed and qualified'.

Referencing the above discussion, it appears that since Magistrate Patton has reached the age of seventy-two years, which I assume was prior to the end of this past fiscal year, he is required to retire. However, as also indicated, he is obligated to continue to discharge the duties of his office until the Governor acts to appoint a successor and such successor qualifies.

If there are any further questions, please contact me.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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