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Motte L. Talley, Esquire
South Carolina Court Administration
P. O. Box 50447
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Dear Motte:

In a letter to this Office you questioned whether State law mandates retirement by magistrates by the end of the fiscal year of their seventy-second birthday. Such question involves an analysis of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq., by which employers cannot enforce mandatory retirement unless the employee comes within a specified exemption and State statutory provisions.

Prior opinions of this Office construed State statutes as requiring a magistrate to mandatorily retire by age 72. See: Opins. of the Atty. Gen. dated June 8, 1972, April 3, 1978, March 11, 1980 and February 4, 1980. These opinions involved the construction of S. C. Code Section 9-1-1530 which required the mandatory retirement of an "employee ... no later than the end of the fiscal year in which he reaches his seventy-second birthday." However, an opinion of this Office dated January 13, 1987 determined that pursuant to the ADEA, as of January 1, 1987, State judges who reached retirement age after that date were as a matter of federal law not required to retire at age 70 (or 72). The opinion dealt principally with the question as expressed on page 5 as to "whether exceptions to or exemptions from the ... (the ADEA's) ... applicability would be relevant with respect to the state judiciary." Such analysis dealt with the questions of whether a judge should be considered an "employee" under the ADEA and whether the "bona fide occupational qualification" exemption set forth in 29 U.S.C. § 623(f) or the "bona fide executive or high policymaking position" exemption set forth in 29 U.S.C. 631(c)(1) would be applicable to judges. As to the latter exemption, 29 U.S.C. § 631(c)(1) as quoted at page 13 of the opinion provides:

> Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65

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> years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of the employer of the employee which equals, in the aggregate, at least $44,000. (emphasis added).

Therefore, pursuant to such provision, two requirements must be met in order for an employee to be forced to retire, the employee must have served in a "bona fide executive" or "high policymaking position" within the two year period before retirement and the employee must be "entitled" to the "immediate, nonforfeitable annual retirement benefit" of at least $44,000.00. In determining that the referenced exemption for a "bona fide executive or high policymaking position" would be inapplicable, the opinion in a footnote to page 18 stated:

> As to whether the $44,000 figure is met, such obviously would depend upon the individual factual situation. The $44,000 retirement figure referred to in 29 U.S.C. § 631 (c) (1) must be calculated pursuant to the formula provided in 29 C.F.R. 1627.17. That regulation requires that, where employees make contributions to the retirement plan, the $44,000 figure must be adjusted "so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no roll over contributions are made."

The opinion stated:

> In conclusion, Congress has now removed the ADEA's upper age limit for those scheduled to retire after the effective date of the Act, January 1, 1987. While arguments can be made as to the possible applicability of the various exemptions contained in the ADEA, and only a court can ultimately decide the question, it is our opinion that, effective January 1, 1987, South Carolina judges who reach retirement age after that date are, as a matter of federal law, no longer required to retire at age 70 (or 72). This conclusion would be applicable to justices of the Supreme Court, including the Chief Justice, judges of the Court of Appeals, circuit court judges, family

> court judges, masters in equity, special referees, magistrates and municipal judges. Probate judges, who are elected officials, remain unaffected by the ADEA; however, since South Carolina's mandatory retirement law has long exempted probate judges as elected officials, they continue to be exempt from mandatory retirement requirements as before. (emphasis added)

In 1991 the United States Supreme Court in Gregory v. Ashcroft, 115 L.Ed.2d 410 (1991) determined that appointed State judges in Missouri were not covered by the ADEA. As a result, that State's mandatory retirement requirement for judges did not violate the ADEA. As referenced by the Supreme Court in Gregory, the ADEA was extended by Congress in 1974 to include the States as employers. At such time, the definition of "employee" was amended to exclude all elected and most high-ranking government officials. Pursuant to 29 U.S.C. § 630(f),

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. (emphasis added.)

As to the contention that § 630(f) in excluding certain public officials also excludes judges, the Court in Gregory held:

> We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included. This does not mean that the Act must mention judges explicitly, though it does not ... Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, "appointee on the policymaking level" is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

115 L.Ed.2d at 428.

In a letter dated February 19, 1992, your office referenced

> Your office issued Opinions dated March 11, 1980, February 4, 1980, April 3, 1978, and June 8, 1972, which construed § 9-1-1530 of the South Carolina Code of Laws (Supp. 1991), and its predecessor, § 61-103 of the South Carolina Code of Laws (1962), so as to require that a magistrate mandatorily retire at age 72. In an Opinion dated January 13, 1987, your office reversed its position on this issue, stating that federal law now prohibited the state from enforcing mandatory retirement laws with respect to South Carolina judges. The change was due to an amendment to the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, §§ 621-634, which deleted the upper age limit of protection, with certain exceptions.
>
> On June 20, 1991, in Gregory and Nugent v. Ashcroft, 1992 WL 105229 (U.S.), the United States Supreme Court held that appointed judges are appointees on the policymaking level and are, therefore, specifically excepted from ADEA coverage. In Nugent, the Court upheld legislation similar to § 9-1-1530 with respect to judges.
>
> In light of the Nugent decision, do you wish to withdraw your 1987 Opinion and re-instate your earlier Opinions concerning the mandatory retirement of magistrates?

Such question was interpreted by this Office as requesting clarification regarding the impact of the decision in Gregory v. Ashcroft on the referenced January 13, 1987 opinion. In an opinion of this Office dated April 2, 1992, it was stated:

> In light of the decision in Gregory, the 1987 opinion should no longer be considered the opinion of this Office. Therefore, consistent with the earlier referenced opinions of this Office, a magistrate must retire by the end of the fiscal year of his 72nd birthday.

Section 9-1-1530 was amended in 1988 to reference provisions consistent with the ADEA. Such provision states:

> It shall be mandatory for any employee, described in Section 1-13-80(h)(8)(10), or (12) ... to retire no later than the end of the fiscal year in which he reaches his seventy-second birthday.

For purposes of magistrates' retirement, Section 1-13-80(h)(8) was applicable. Such provision states:

> Nothing in this chapter may be construed to prohibit compulsory retirement of any employee who has attained sixty-five years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or high policy making position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of the employee, which equals, in aggregate, at least forty-four thousand dollars.

Such provision is similar to the provision in the ADEA noted previously, 29 U.S.C. § 631(c)(1). As noted in the prior opinion of this Office dated January 13, 1987 noted above, "(a)s to whether the $44,000 figure is met, such obviously would depend upon the individual factual situation." Therefore, while in light of the decision in Gregory, a magistrate would not be covered by the ADEA so as to preclude retirement at age 72, reference would have been made to the provisions of Section 9-1-1530 which refer to Section 1-13-80(h)(8) to determine the applicability of the mandatory retirement provision of Section 9-1-1530 as to individual magistrates.

Pursuant to the foregoing analysis, this Office informally advised you that mandatory retirement of magistrates may no longer be required.

However, before our informal advice could be reduced to a formal opinion, it was learned that the General Assembly enacted a statute to be codified as § 22-1-25 which provides:

> Notwithstanding the provisions of Section 9-1-1530 or Section 1-13-80(h)(8), (10) or (12); it shall be mandatory for a magistrate to retire not later than the end of the fiscal year in

> which he reaches his seventy-second birthday. Any magistrate serving in office on the effective date of this section who has attained the age of seventy-two years prior to July 1, 1993, may continue to serve until June 30, 1994.

As a result, the General Assembly has mandated that a magistrate must retire not later than the end of the fiscal year of his or her seventy-second birthday. However, the General Assembly did authorize a magistrate in office as of the effective date of the legislation and who has reached seventy-two years of age prior to July 1, 1993 to continue to serve until June 30, 1994. Please be advised that the foregoing is a policy decision mandated by the General Assembly, and this Office has no discretion to interpret this clear and unambiguous provision of law to the contrary.

This letter should not be construed as reviewing further the applicability of the ADEA to the question of magisterial retirement. This response therefore assumes that a court would, consistent with the decision in Gregory, construe a magistrate as constituting an "appointee on the policymaking level" so as to be excepted from ADEA coverage. Further clarification may be requested from the federal Equal Employment Opportunity Commission.

With kind regards, I am

Very truly yours,

Charles H. Richardson /rap

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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