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# The State of South Carolina



## Office of the Attorney General

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September 30, 1991

The Honorable Michael T. Rose  
Senator, District No. 38  
P. O. Drawer 1709  
Summerville, South Carolina 29485

Dear Senator Rose:

In a letter to this Office you questioned whether a part-time magistrate currently in a holdover capacity who has attained the age of seventy years may be reappointed to a four year term as a part-time magistrate. Section 9-1-1530 of the Code provides:

Any employee or teacher in service who has attained the age of seventy years shall be retired forthwith, except that:

- (1) With the approval of his employer he may remain in service until the end of the year following the date on which he attains the age of seventy years;
- (2) With the approval of his employer and the Board he may, upon his request therefor, be continued in service for a period of one year following each such request until such employee has reached the age of seventy-two years; and
- (3) With the approval of his employer, upon his request therefor, be continued in service for such period of time as may be necessary for such employee to qualify for coverage under the old age and survivors insurance provision of Title II of the Federal Social Security Act, as amended.

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It 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 ...

Provided, however, that excepting constitutional offices, this section shall not apply to appointive offices receiving per diem or travel allowances as total compensation or to employees of the State Court System when such court employees are employed on a part-time basis.

Prior opinions of this Office have determined that consistent with such provision it is mandatory that a magistrate retire by the end of the fiscal year of his seventy-second birthday. See: Ops. dated September 23, 1980, February 4, 1980, October 7, 1970. An opinion of this Office dated August 23, 1984 indicated that

... the policy of Section 9-1-1530 is obviously to require mandatory retirement in nearly every situation, and the few exceptions to it should be narrowly read to effectuate that broad policy.

The opinion concluded that court officers, such as judges, were not exempt from the mandatory retirement requirement. See also: Gregory v. Ashcroft, 115 L.Ed.2d 410 (1991). <sup>1/</sup> The 1984 opinion also cited an opinion of this Office dated February 4, 1980 which stated that "... magistrates would not be covered by the 1978 amendment concerning part-time State Court System employees." However, opinions of this Office have also indicated that consistent with Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415 (1964) an incumbent magistrate is required to continue in office until his successor has been appointed and qualified. Therefore, while a magistrate who reaches seventy-two years of age is required to retire, he is obligated to continue in office until his successor is appointed and qualifies. See: Ops. dated September 23, 1980, July 28, 1980, and April 3, 1978.

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<sup>1/</sup> To the extent the conclusion reached in the 1984 opinion conflicts with an opinion of this Office dated May 29, 1990, the latter opinion is overruled.

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As to the question of whether a part-time magistrate who has attained the age of seventy may be reappointed to a four-year term which obviously would extend beyond his seventy-second birthday, an individual's eligibility to hold office is generally determined at the time of appointment. As referenced in an opinion of this Office dated July 1, 1983

... it has been held that the term "eligible" as used in a constitution or statute means capacity to be chosen, and that therefore the qualification must exist at the time of election or appointment, and also at the time when seeking to qualify by taking the oath of office.

Consistent with such, it appears that an individual, age seventy, who is otherwise qualified to serve as magistrate may be appointed for a four year term even though such term would extend beyond the age of mandatory retirement. Of course, at age seventy-two the individual would be required to retire.

If there is anything further, please advise.

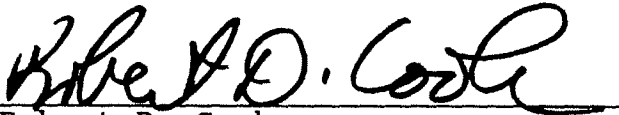
Sincerely,



Charles H. Richardson  
Assistant Attorney General

CHR/an

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