

The State of South Carolina



Office of the Attorney General

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March 6, 1990

The Honorable John Drummond
Senator, District No. 10
213 Gressette Building
Columbia, S. C. 29202

Dear Senator Drummond:

You have questioned the manner of procedure as to the appointment of magistrates in McCormick County. 1/ I understand that questions are being raised in light of the provisions of Act No. 678 of 1988 which provide for the appointment of magistrates in each county, a means of determining the number of magistrates for each county and the designation of magistrates as either full-time or part-time. See: Sections 22-1-10 et seq. of the Code. However, as expressed in a prior opinion of this Office dated December 22, 1988, legislative clarification should be provided which would detail more precisely the manner of proceeding as to the appointment of magistrates. The opinion noted that Act No. 678 is ambiguous in several regards and legislative clarification would be advantageous.

Pursuant to Section 22-1-10,

(t)he Governor, by and with the advice and consent of the Senate, may appoint magistrates in each county of the State who shall hold their office for the term of four years and until their successors are appointed and qualified. Magistrates serving the counties of ... McCormick ... shall serve terms of four years commencing May 1, 1990....

I understand you are questioning the manner of proceeding as to magistrates to be appointed effective May 1, 1990.

1/ Pursuant to Act No. 819 of 1966, three magistrates for McCormick County were provided. Act No. 248 of 1983 provided for an additional magisterial position. I understand that there are currently four magistrates serving McCormick County.

Section 22-8-40 provides that

(t)he maximum number of magistrates in each county is the greater of that number determined by taking one magistrate for every twenty-eight thousand persons in each county or that number determined by taking the average of the ratio of one magistrate for every twenty-eight thousand persons in each county as provided by item (2) of this section and the ratio of one magistrate for every one hundred fifty square miles of area in each county as provided in item (3) of this section. However, no county is required to have fewer than the equivalent of one full-time magistrate and one part-time magistrate. If a fraction of a magistrate results, the county must round off the fraction, establishing an additional part-time magistrate. No additional magistrates may be added until a county has less than the ratio. 2/

2/ An ambiguity may exist in light of the language of Section 22-1-10, also a provision of Act No. 678 of 1988, which states

(t)he number of magistrates to be appointed for each county and their territorial jurisdiction are as prescribed by law before March 2, 1897, for trial justices in respective counties of the State, except as otherwise provided in this section.

However, any ambiguity may be resolved by the rule of statutory construction that all parts of a statute should be construed together but if an irreconcilable conflict exists, the statute later in time (or position), if within the same act, will prevail as the later expression of legislative will. See: Feldman v. S. C. Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943); Jolly v. Atlantic Greyhound Corporation, 207 S.C. 1, 35 S.E.2d 42 (1945). The provision codified as Section 22-1-10 was set forth as Section 4 of Act No. 678 while Section 22-8-40 was included in the Act as Section 7. Therefore, the latter provision arguably would prevail. As to any questions regarding Section 22-2-40 of the Code, a provision of Act No. 164 of 1979, which states "(t)he General Assembly shall provide for the number ... of magistrates in each county...." the provisions of Section 22-8-40 would again prevail as the latest legislative expression in this regard.

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By subsection (C) of such provision, part-time magistrates are to be computed at a four to one ratio whereby four part-time magistrates equals one full-time magistrate. Subsection (L) of such provision indicates that the State Court Administration Office is to monitor compliance with Section 22-8-40. Pursuant to subsection (A), it is the responsibility of the county governing body to designate magistrates as either full-time or part-time. It is my understanding that pursuant to the ratio, McCormick County is entitled to 1.5 magistrates. 3/

Prior opinions have commented on the construction of Act No. 678 as to magistrates serving on the effective date of such legislation, January 1, 1989. In an opinion dated December 9, 1988, it was stated it was our understanding that

... (w)hile a maximum number of magistrates for each county was established by the legislation, it was the legislative intent that no magistrates currently serving on the effective date of Act No. 678 would lose their positions. Instead, 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. Also, presumably, such maximum number would be considered in making appointments to new terms. (Emphasis added.)

The opinion further noted that because the referenced legislative intent was not clearly set forth, legislative clarification was desirable. Another opinion of this Office dated December 22, 1988

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A further consideration is that pursuant to Section 22-2-190 of the Code, jury areas are established in each county. Section 22-2-170 of the Code states that "(c)riminal cases shall be tried in the Jury Area where the offense was committed...." Three jury areas are established for McCormick County. It is recommended that legislation be sought to clarify any questions regarding jury areas.

3/ As indicated, it is within the discretion of the county to designate magistrates as part-time or full-time. It is my understanding that as to McCormick County, 1 full-time and 1 part-time magistrate are being recommended. In light of the provision that 4 part-time magistrates equals 1 full-time magistrate, arguably the county would still be entitled to an additional part-time magistrate.

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commented on the fact that magisterial terms will expire on the effective date of the new terms as set forth in Section 22-1-10. The opinion stated:

... for any magisterial appointments where the expiration dates for such terms extend beyond the expiration dates set by Section 22-1-10 ... such terms must be considered as having been limited ... so that these terms would expire at the commencement dates of the terms established by Section 22-1-10.

As to the appointment of magistrates in McCormick County, again it is my understanding that the County will be entitled to 1.5 magistrates and it has been recommended by the County that one full-time and one part-time magistrate be appointed. As stated, it is also our understanding that four individuals are presently serving. Typically, magistrates serve "until their successors are appointed and qualified." However, it appears incongruous that magistrates should continue to serve indefinitely. As a result, it is the conclusion of this Office that upon commencement of the terms for McCormick County magistrates on May 1, 1990, the present magisterial positions should be considered technically vacant. Such determination is consistent with our understanding that the intent of Act No. 678, and specifically Section 22-1-10, was to provide for uniform terms for magisterial offices. Such is also consistent with the provisions of Section 22-8-40 which provide a new means for determining the number of magistrates authorized for a county and which will in certain counties reduce the number of magistrates serving in a particular county. Inasmuch as vacancies will exist in these offices, it is incumbent that the appointment and qualification of individuals for all authorized magisterial positions for the terms to commence on the effective date be finalized.

In the event that all magisterial positions available are not properly filled by May 1, 1990, it would be necessary to provide for continuation of magisterial duties and responsibilities in the county. As a result, holding over by all magistrates presently serving would be authorized. 4/ As recognized by the State Supreme Court

4/ Such is consistent with language in the prior opinion of this Office dated December 22, 1988 which stated

... magistrates in holdover status as of January 1, 1989 ... (the effective date of Act No. 678) ... apparently would remain in holdover status. Therefore, their terms would not be terminated by the recent legislation. Also,

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in Bradford et al. v. Brynes, 221 S.C. 255, 70 S.E.2d 228 (1952), even where there are no relevant statutory or constitutional provisions

... public officers hold over de facto until their successors are appointed or elected and qualify. Vacancy, nevertheless exists in the sense that successors may be appointed or elected as may be provided by law, qualify and take the offices; but meanwhile the "holdovers" are entitled to retain their offices ... The word "vacancy" as applied to a public office, has no technical meaning, and is not to be taken in a strict technical sense in every case ... A vacancy in office may exist where there is a newly created office....

221 S.C. at 262-263. This construction is consistent with the decision in Westphal v. City of Council Bluffs, 275 N.W.2d 439 (Iowa 1975) that an incumbent becomes a holdover officeholder upon the expiration of his term. See also: Grooms v. LaVale Zoning Board, 340 A.2d 385 (Md. 1975) (an officer may remain in office upon the expiration of his term regardless of whether such is specifically provided); State Board of Education v. Commission of Finance, 247 P.2d 435 (Utah 1952).

4/ Continued from Page 4

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.

Admittedly, such holdover status may have a financial impact on counties in light of the salary structure provided for magistrates by Act No. 678 if the number of positions continuing to be occupied exceed what was anticipated under the new ratio formula. However, the continuation of magisterial duties and responsibilities is necessary if the magisterial positions authorized are not properly filled as of May 1, 1990. This problem, however, would be resolved by the appointment and qualification of individuals for the terms commencing on that date. Legislative clarification could also resolve any ambiguities.

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Any holdover magistrate(s) is a de facto holder of the office(s) being phased out whose temporary occupation of that magisterial position does not affect the vacancies created by the new magisterial offices created by Act No. 678 which are subject to filling by proper appointment. See: 67 C.J.S. Officers, Section 71, p. 381. As recognized in a prior opinion of this Office dated June 24, 1986, in such a situation, a technical vacancy exists inasmuch as the holdover magistrate(s) is not serving in the office(s) created by Act No. 678. I would further advise that as to any magistrate(s) holding over, such does not affect the term of an office (which begins on May 1) but merely shortens the period of service of the magistrate(s) appointed to an office created by Act No. 678. See: State ex rel. Spaeth v. Olson ex rel. Sinner, 359 N.W.2d 876 (N. Dak. 1985); Gillson v. Heffernan, 192 A.2d 577 (N.J. 1963).

In conclusion, as of May 1, 1990, the General Assembly has mandated that the offices of magistrates presently serving in McCormick County will end unless operating as a holdover as hereinabove set forth and their positions should be considered vacant. Therefore, appointments for the offices established by Act No. 678 commencing May 1, 1990 should be concluded. Of course, the decision as to which magistrates are appointed for the new terms is a decision for the appropriate appointing authority and is not a matter for resolution by an opinion of this Office. Moreover, as to any ambiguities or problems referenced herein, or which may be identified, legislative clarification would be in order.

If there is anything further, please advise.

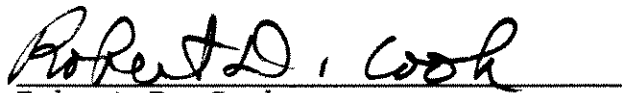
Sincerely,



Charles H. Richardson
Assistant Attorney General

CHR/lm

REVIEWED AND APPROVED BY:



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