3830 Judiciary

The State of South Carolina

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The Honorable James L. Solomon, Jr.
Commissioner, South Carolina
Department of Social Services
Post Office Box 1520
Columbia, South Carolina 29202-1520

Dear Commissioner Solomon:

By your letter of October 2, 1989, you have asked for the opinion of this Office on two questions pertaining to compensation of members of county boards of social services. First, in light of Section 43-3-20 of the Code of Laws of South Carolina (1976), you have asked about the continued viability of an opinion of this Office dated November 29, 1973, which basically concluded that Section 43-3-20 had been impliedly repealed by that fiscal year's appropriations act. Your second question is whether a county governing body may supplement the compensation of a county board member beyond the compensation already provided at the expense of the State Board of Social Services.

History of Section 43-3-20

Section 43-3-20 of the Code was amended most recently by Act No. 506 of 1978 to provide the following:

> Members of the county boards shall receive the same mileage as is provided by law for state boards, committees and commissions for travel in attending meetings and a per diem, the total per diem not to exceed seventy-five dollars per year.

The 1978 amendment removed a ceiling of five cents per mile for mileage, replacing that figure with "the same mileage as is provided by law for state boards, committees and commissions... ."

The original enactment is found in section 9 of Act 319 of 1937, codified as Section 4996-9 of the 1942 Code of Laws. A mileage reimbursement rate of five cents (5¢) per mile was established, and a per diem of three dollars ($3.00) per day was set, not to exceed $120.00 in the first year or $75.00 per year for succeeding years. (Thus, the first year's figures would permit compensation, by per diem, for forty meetings; the second year, for twenty-five.)

In 1951, Act No. 331 was adopted relative to compensation of all officers or employees of the state or a political subdivision thereof. Section 1 provided that

> ...except as otherwise provided, or as prohibited by the Constitution of this State, the compensation of all officers and employees of the state, or any political subdivision, department or agency thereof, shall be as from time to time provided by the General Assembly of the State of South Carolina or the particular political subdivision, department or agency concerned, as the case may be.

Section 2 of this act directed the Code Commissioner to delete from the 1952 Code being prepared, all provisions providing compensation of all such officers and employees.

In the 1952 and 1962 Codes of Laws, Section 71-32 in each Code provided, for county board members, mileage at five cents (5¢) per mile and a per diem, the total not to exceed $75.00 per year. Because no act modifying these terms expressly has been identified, it is assumed that deletion of the three-dollar per diem figure was made by the Code Commissioner as directed in Act No. 331 of 1951. This Act No. 331 is the status of the statute when the aforementioned opinion dated November 29, 1973 was rendered in 1978, as noted previously.

Reconsideration of Prior Opinion

The issue addressed by the opinion of November 29, 1973 was whether the mileage and per diem paid to county board members should be computed according to provisions of Section 71-32 of the 1962 Code (now Section 43-3-20 of the 1976 Code) or according to provisions of the annual appropriations act, Act No. 354 of 1973.

The opinion stated:

> When conflicting provisions are found in different statutes, the last in point of time prevails. Feldman v. S.C. Tax Commission, 203 S.C. 49 (1943). In accordance with this general

> rule, the provisions of §§92 and 94 of Part I of the 1973-74 Appropriations Act are controlling as this Act represents the last expression of legislative will. Provisions of Sections 92 and 94 will continue to prevail during the period of its effectiveness, the current fiscal year.
>
> In the opinion of this Office, members of county DSS boards are entitled to a mileage allowance at the rate of $.12 per mile and a per diem allowance of $25.00 as provided in Sections 92 and 94 of Part I of the 1973-74 Appropriation Act.

It may be noted that petroleum products such as oil and gasoline were in short supply and great demand, and prices therefor were rising rapidly during the 1973-74 fiscal year. There is no doubt that the cost of operating an automobile rose drastically during that time. While the actual rationale of the opinion is lost to history, it may be speculated that economics of the times dictated such a result. Such is, of course, only speculation; whether the opinion is clearly erroneous is the determination to be made by this Office.

Provisions of Appropriations Acts

The 1973-74 Appropriations Act, Act No. 354 of 1973, provided in section 92 of Part I: "When an employee of the State shall use his or her personal automobile in traveling on necessary official business, a charge of twelve cents per mile will be allowed for the use of such automobile... ." Section 94 of Part I provided: "That the per diem allowance of all boards, commissions and committees shall be at the rate of Twenty Five ($25.00) Dollars per day. ..."

In succeeding years, the amount of mileage reimbursement has fluctuated; it is presently twenty-one cents per mile. See Part I, Section 129.11 of Act No. 189 of 1989. Per diem paid to members of boards, commissions, and committees was increased to thirty-five dollars in Part I, Section 132 of Act No. 219 of 1977; that is the rate of per diem currently paid. See Part I, Section 129.12 of Act No. 189 of 1989. Nowhere in the cited provisions concerning mileage or per diem were county boards of social services specifically mentioned.

Rules of Statutory Construction

As noted in the opinion of November 29, 1973, one rule of statutory construction provides that when conflicting provisions are found in different statutes, the last in point of time prevails. Feldman v. S.C. Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943). This is, however, a purely arbitrary rule, to be applied only where there is an irreconcilable conflict and all other means

of interpretation have been exhausted. Id. If there is a way to construe seemingly irreconcilable provisions harmoniously, such will be done, to effectuate both provisions. Purdy v. Strother, 184 S.C. 210, 192 S.E. 159 (1937).

Where both a general law and a specific law exist with respect to a common subject, the Supreme Court has said:

> There is a rule of statutory construction which affords further reason why the subsequent enabling act of the [Public Service] Authority obviates the necessity of procurement by it of a certificate from the Public Service Commission to extend its transmission lines. The prior Act of 1932 relating to the powers and jurisdiction of the Commission is a general act and applicable to all privately owned utilities and to those municipally owned to the extent of the latters' operations beyond their respective municipal limits. The enabling act of the Authority is special in its nature and refers only to the creation, operation and functions of the Authority. If there be conflict between a general law and a special law on the same subject, the latter will prevail. ...This rule is close akin to another which is to the effect that an inconsistent statute dealing with common subject matter in a minute way will prevail over a general statute relating to the same subject matter. ...

S.C. Electric & Gas Co. v. S.C. Public Service Authority, 215 S.C. 193, 208-9, 54 S.E.2d 777 (1949).

Finally, implied repeal of a statute is not favored. In Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980). It is preferable that a repealing act specifically refer to the statute which is being repealed, particularly when a general statute is repealing a more specific statute, unless the legislature's intent to repeal the specific statute is explicitly implied therein. State v. Harrelson, 211 S.C. 11, 43 S.E.2d 593 (1947).

Discussion

In consideration of the foregoing, the following observations may be made. After the opinion of November 29, 1973 was rendered, the General Assembly amended Section 43-3-20 of the Code by Act No. 506 of 1978 to provide that members of county boards receive the same mileage as that provided for members of state boards, committees, or commissions, though the provisions concerning per diem were unchanged. It could be argued that the General Assembly was aware

of this opinion and amended the statute to conform with our interpretation as to mileage. Absence of amendment to the per diem provision subsequent to this Office's interpretation could suggest that the legislature agreed that the opinion was consistent with legislative intent. Scheff v. Township of Maple Shade, 149 N.J. Super. 448, 374 A.2d 43 (1977); Op.Atty.Gen. No. 84-69.

On the other hand, the General Assembly could have amended the per diem provisions at the same time the mileage provisions were amended, but such was not done. Readoption of the per diem portion unchanged, while amending the portion as to mileage could evidence an intent that the legislature intended the per diem to remain the same while modifying the mileage reimbursement. Cf., Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E. 2d 841 (1964). Arguably, then, that portion of the opinion of November 29, 1973 relative to per diem could be said to be consistent with Section 43-3-20 since such has been amended to reflect the mileage currently paid to members of boards, committees, and commissions as expressed in the current appropriations act; indeed, the opinion could be said to be superseded, as to mileage, by Act No. 506 of 1978.

Whether the opinion is clearly erroneous as to its conclusions regarding per diem, presents a closer question. The provisions of a current appropriations act and Section 43-3-20 could be construed so that both are given effect: per diem in the amount of thirty-five ($35.00) dollars per day could be paid, with a limit of seventy-five ($75.00) dollars per year, for example. If, however, the general statute is not viewed as repealing, by implication, the special statute, the rate of per diem would not be specified but the annual limit of seventy-five ($75.00) dollars would be applicable. 1/

On the other hand, the language in the appropriations act, "all boards, commissions and committees," is extremely broad. Such language could arguably supersede other statutes which make different provisions for compensation of various board members. If that be the case, then the opinion of November 29, 1973, would not be clearly erroneous.

1/ We understand that the State Department of Social Services has a policy on reimbursements to county boards, number 1008, which permits a per diem of $6.25 per monthly meeting, the maximum not to exceed seventy-five ($75.00) dollars annually. This policy references the predecessor statute to Section 43-3-20. An agency's interpretation of its relevant statutes is entitled to great respect and should not be disregarded absent cogent reason. Faile v. S.C. Emp. Security Comm'n, 267 S.C. 536, 230 S.E.2d 291 (1976).

Because the opinion previously issued is not clearly erroneous and further because there is more than one interpretation to be made of the relevant statutes, obtaining clarification from the General Assembly might be wise. In the event that the per diem payments are not handled uniformly among the counties due to the varying interpretations which may be made, legislative clarification would assist in unifying the practices among the counties.

Supplements

You have also asked whether the limitations on per diem and mileage in Section 43-3-20 and/or the annual appropriations act would preclude counties from paying additional compensation which they would characterize as something other than per diem or mileage. We believe that such additional compensation could possibly violate Article III, Section 30 of the State Constitution, which prohibits additional compensation after services rendered. See Op.Atty.Gen. dated April 3, 1989. Additionally, adoption of such a policy would possibly be viewed as modification of a general law (either Section 43-3-20 or the relevant provisos of the annual appropriations acts) by a county; absent authorization to supersede general law, such a county action would most likely be void. Cf., Central Realty Corp. v. Allison, 218 S.C. 435, 63 S.E.2d 153 (1951); Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928). Prior to a county undertaking such an action, it would be preferable to seek authorization from the General Assembly.

I trust that the foregoing has satisfactorily responded to your inquiry. If clarification or additional assistance should be needed, please advise.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook

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