The State of South Carolina

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The Honorable Carroll G. Morrow
Magistrate, Greenville County
4798 Jordan Road
Greer, South Carolina 29651

Dear Magistrate Morrow:

In a letter to this Office you indicated that you have been appointed to a part-time magisterial position in Greenville County. You stated that while a base salary has been established you would like to work for less salary for retirement benefits and to save the County money. You questioned whether you could serve for less salary than the base salary established.

Section 22-8-10 of the Code defines a part-time magistrate as one who regularly works less than forty hours a week. Section 22-8-40(B) of the Code which provides for the designation of magistrates as full-time or part-time further states that all magistrates must be paid the base salary as established by such provision. As to part-time magistrates, such provision states

> (C) (p)art-time magistrates are to be computed at a ratio of four part-time magistrates equals one full-time magistrate;
>
> (D) (p)art-time magistrates are entitled to a proportionate percentage of the salary provided for full-time magistrates. This percentage is computed by dividing by forty the number of hours a week the part-time magistrates spends in the performance of his duties. The number of hours a week that a part-time magistrate spends in the exercise of the judicial function, and scheduled to be spent on call, must be the average number of hours worked and is fixed by the county governing body upon the recommendation of the chief magistrate.

In a prior opinion of this Office dated February 16, 1988 it was stated that pursuant to such provision, part-time magistrates may work any period of time as long as it is less than forty hours a week. The opinion further commented that pursuant to Section 22-8-40(D)

> ...part-time magistrates are entitled to a proportionate percentage of the salary provided full-time magistrates. Again, such percentage is computed by dividing by forty the number of hours the part-time magistrate spends performing his duties.

A further provision, Section 2-8-40(J), specifically states

> (n)o county may pay a magistrate lower than the base salary established for that county by the provisions of subsection (B) of this section. (Emphasis added.)

The provisions of subsection (D) dealing with the computation of the salary of part-time magistrates should be read together with the provisions of subsection (J). Such is consistent with the principal of statutory construction that all provisions of a statute must be read in pari materia with one another and harmonized together. Moreover in determining the meaning of a statute, all parts must be given force and effect. See: Atty. Gen. Ops. September 7, 1988 and May 25, 1988.

Generally, where a statute is clear and unambiguous, there is no room for construction. Duke Power Co. v. S.C. Tax Commission, 292 S.C. 64, 354 S.E.2d 902 (1987). On the face of the provisions of Section 22-8-40, it would be concluded that a county could not pay a part-time magistrate less than the sum statutorily authorized for the hours worked.

As to whether a part-time magistrate could agree to work for less than the salary set forth by Section 22-8-40, it has been stated that "(a)s a general rule, where the compensation of a public officer is established by law, he cannot accept less...." 67 C.J.S. Officers, Section 237 p. 753. In Salley v. McCoy, 182 S.C. 249, 189 S.E.2d 196 (1936) the South Carolina Supreme Court in adopting the lower court's degree recognized:

> With practical uniformity the courts have held that a contract whereby a public officer agrees to accept some other compensation for his services than that provided by law, whether it be more or less, or whether the comparative

> value be uncertain, is against public policy and, therefore, void. I do not find that the question has been decided by our court, but the weight of authority from other jurisdictions is overwhelming and the public policy involved is plain.
>
> Under our scheme of government it is for the Legislature to fix plaintiff's compensation by proper enactment. It must be supposed that its action in this regard will be for the public good. If plaintiff could be bound by a contract entered into in respect to his compensation, the authority of the Legislature could be overthrown by "a few strokes of the pen." If by contract the compensation of a public officer could be reduced, then by contract it could be increased.

182 S.C. at 281-2, 189 S.E. at 211.

It has been further recognized that:

> [a] number of courts, influenced by the view as to the invalidity of the agreement to accept a lesser compensation, allow the public officer or employee to recover his full compensation despite an agreement by him to accept, or acceptance of, a smaller amount either by completely omitting any reference or discussion as to the effect of the doctrines of estoppel, waiver, or donation, or in open refusal to permit those doctrines to interfere with the operation of the rule declaring such an agreement invalid and therefore allowing full recovery, or by taking the view that the surrounding facts and circumstances were not sufficient to call into operation those doctrines. But other decisions have not permitted elements of waiver, estoppel, or laches on the part of the officer in accepting or agreeing to accept without protest the lesser compensation in full payment from preventing recovery of an officer or employee for the balance of his compensation. Other cases have reached a contrary result on the theory that there has been a valid voluntary gift or donation of a public or charitable nature, precluding recovery by the officer or employee.

63A Am. Jur. 2d Public Officers and Employees, Section 466.

As stated by the Massachusetts Supreme Judicial Council in Allen v. City of Lawrence, 61 N.E.2d 133 (1945)

> By the great weight of authority, where the compensation of a public officer has been established by law, a contract in which he agrees to accept a less amount is invalid as contrary to public policy... Attempts have been made to circumvent this rule on the doctrine of estoppel or waiver; but usually without success... The reasons for the rule are obvious. Where the compensation for an office has been fixed by law, it would be detrimental to the public service if the office could be let out to the lowest bidder. Laws designed to attract competent persons to the public office by providing them with adequate compensation could be set at naught at the caprice of those charged with their administration. The effects on the efficiency and morale of the public service, if this were permitted, are not difficult to imagine...

It has been further stated that to permit a candidate for office to promise to accept less, or no compensation if elected, could tend to establish an "auction method" for choosing a public officer whereby a candidate could "purchase an election by making the most extravagant bid. See: Sparks v. Boggs, 339 S.W.2d 480 (Ky. 1960). Moreover, in Brown v. State Department of Military Affairs, 191 N.W.2d 347 at 350-351 (1971), the Supreme Court of Michigan stated

> (s)alaries of public offices which are established by law are not determined by contract or agreement between the parties... A waiver of statutory salary by a public officer is void and against public policy.

Of course, the General Assembly, if it so desired, could expressly authorize by statute such contracts. As the Court stated in Quayle v. City of New York, 278 N.Y. 19, 14 N.E.2d 835 (1938), so long as the statute does not violate either the state or federal constitution, it is valid. The Court in Quayle upheld a New York statute authorizing the reduction of the salary of city employees. By enacting this type of statute, the court concluded that "the legislature has defined for the future the public policy of the state." 14 N.E.2d at 837. See also, memorandum opinion, June 15, 1964.

While the above general authority appears to indicate that a public official may not refuse to accept an established salary, there have been no recent decisions of the State Supreme Court commenting on the question. Therefore, this Office cannot advise that in every instance a public official would be prevented from waiving his salary. However, as to the narrow question of whether a magistrate could refuse a salary, in light of the provisions of Section 22-8-40, there is a basis for not authorizing such a decrease by a magistrate. This response, however, would only be applicable to the circumstances affecting magistrates and we are making no comment generally as to the right of public officials to waive established salaries in other circumstances. I would note additionally, that if a part-time magistrate wishes to decrease the amount of his compensation, consideration should be given to decreasing the number of hours worked. As provided by Section 22-8-40, the salary of a part-time magistrate is determined by the number of hours worked.

With best wishes, I am

Very truly yours,

Charles H. Richardson
Assistant Attorney General

CHR/nnw

REVIEWED AND APPROVED BY:

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