

OFFICE OF THE ATTORNEY GENERAL



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Honorable Oliver Gilmore
Administrative Director of Courts
Administrative Office of Courts
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Supernumerary Status -
Retirement - Insurance -
Health Services

Supernumerary officials are
emeritus officers who, for
some purposes, must be
considered to be retired.

Dear Mr. Gilmore:

This opinion is issued in response to your request for
an opinion from the Attorney General.

QUESTION

Are supernumerary judicial officials and
employees to be treated as active officers
and employees for the purpose of determin-
ing health insurance premiums and coverage?

FACTS, LAW AND ANALYSIS

Your question arises because Section 98 of the 1901
Constitution of Alabama provides:

"The legislature shall not retire any officer on pay or part pay, or make any grant to such retiring officer . . ."¹

Amendment 328 to the 1901 Constitution of Alabama, Section 6.16, authorizes and requires that the legislature provide for the retirement of judges, which it did in the statute codified as §§ 12-18-1, et seq., Code of Alabama 1975.

In order to provide a mechanism by which certain other officers of the state could be allowed to assume emeritus status, the legislature created the supernumerary offices for district attorneys, sheriffs, court clerks, registers in chancery, tax assessors, tax collectors, tax commissioners and court reporters. These supernumerary officers are commissioned, take an oath of office and are subject to being required to fill a vacancy temporarily. See, § 12-17-216, Code, relating to district attorneys; § 12-17-141, Code, relating to clerks and registers; § 12-17-291, Code, relating to court reporters; § 36-22-65, Code, relating to sheriffs; § 40-6-2, Code, relating to tax officials. These statutes, in practical effect, provide for a retirement or pension plan for these officers, under which they are subject to return to active service under certain circumstances.

While this office does not ordinarily render opinions respecting interpretation and application of federal law, it appears clear to us that supernumerary officers are, under the terms of the Social Security Act, retired and payments to

¹Amendment 513, ratified in 1990, adds the phrase ". . . however, the legislature shall have the authority to provide that superintendents of education shall be eligible to participate in the Teachers' Retirement System of Alabama as the legislature may see fit."

them are not, for the purposes of that Act, wages or salary, but rather are retirement benefits. 42 U.S.C. §§ 401, et seq.

In a letter to the Alabama Comptroller dated March 19, 1984, the Acting Associate Commissioner of the Social Security Administration wrote:

"The provisions of Alabama State law regarding payments to supernumeraries all contain length of service and age or disability requirements in order to be eligible for the payments. These requirements are characteristic of retirement pay rather than standby pay. Moreover, we understand that although the payments are labelled 'salary,' in fact the supernumeraries are neither required nor expected to do any additional work after acquiring that status. Although some supernumeraries (e.g. district attorneys) may occasionally return to work, they do so entirely at their own option. Thus, we conclude that the employment relationship does not continue for supernumeraries, and the payments are excluded from wages under the 1983 amendments as payments from exempt governmental deferred compensation plans."

In an opinion addressed to Honorable Barry D. Vaughn, dated April 21, 1992, A.G. No. 92-00243, we held that a county may provide a supernumerary tax official the same health benefits as are provided active tax officials because of the supernumeraries' unique status. That opinion, its discussion, reasoning and results, are not inconsistent with the present opinion, but rather, it is illustrative of the ambiguous status of a supernumerary officer. Because of the provisions of Section 98 of the 1901 Constitution, these officers cannot be officially retired, but the practical effect of commissioning as a supernumerary officer as noted by the Social Security Administration results in a status which is a species of retirement.

Accordingly, it is the opinion of this office that supernumerary officers should, for insurance purposes, income tax purposes and social security purposes, be considered to be retired.

Honorable Oliver Gilmore
Page 4

CONCLUSION

The answer to your question is negative: supernumerary officers are not "active" for the purpose of determining premiums due, benefits afforded or tax status.

I hope this sufficiently answers your question. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS
Attorney General
By:


JAMES R. SOLOMON, JR.
Chief, Opinions Division

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