Housing Authority, employee compensation

Number: INFORMAL

Date: January 16, 2008

Mr. Kevin D. Johnson
Attorney, Gainesville Housing Authority
Post Office Box 639
Tampa, Florida 33601

Dear Mr. Johnson:

On behalf of the Gainesville Housing Authority, you ask whether the Gainesville Housing Authority is authorized to pay the bar dues of its attorney and whether the authority may enter into a multi-year employment contract with its executive director and its attorney and provide a severance pay package.

The Gainesville Housing Authority (GHA) is a dependent special district created pursuant to Chapter 421, Florida Statutes, by municipal resolution.[1] According to your letter, GHA's contract with its attorney provides that "in order for the Attorney to lawfully perform the legal duties required under his employment agreement that the Attorney must remain at all times a duly licensed, member in good standing of the Florida Bar, and the same shall constitute a mandatory condition of the Attorney's continued employment under this agreement." You state that GHA has been paying the Florida Bar dues for the attorney since 2000.

According to your letter, the Jacksonville office of the United States Department of Housing and Urban Development (HUD) has performed an on-site review of the GHA and issued a report expressing concerns about the employment contract with the authority's executive director and the authority's attorney. The HUD audit states that "based on [the] employment agreement, maintenance of a license is a condition of employment and as such must be paid by the employee." HUD has ordered GHA to cease paying the attorney's bar dues and ordered the attorney to reimburse GHA for dues paid on his behalf since 2000.

You also state that the HUD review declares that the employment contracts between GHA and the executive director and the attorney "contain questionable benefits that appear to be excessive." You indicate, however, the HUD review only refers to the severance packages and term of contract. The contract with the executive director is for a term of three years; the contracts with the executive director and the staff attorney contain severance packages.

The Attorney General is statutorily authorized to render opinions on questions involving the interpretation of state law. Questions regarding the interpretation of federal law, however, should be addressed to the federal agency charged with the administration of those laws. Thus, this office will not comment on the interpretation of federal law that may be applicable to the housing authority. Moreover, it appears from your letter that HUD is questioning the interpretation of a provision of the contract and the validity of several provisions contained in the employment contracts. This office does not interpret contractual agreements nor is it authorized to comment

upon the validity of an existing contract. Rather it must presume the validity of such agreement until determined otherwise by a court of competent jurisdiction.

In an effort to be of some assistance, I would generally note the following.

While this office had previously questioned the authority of a state agency to pay the Florida Bar dues of attorneys in state agencies in the absence of an appropriation,[2] the Florida Legislature has in the past several years appropriated funds for the payment of such dues for attorneys employed by the state.[3] Thus, the Legislature has made a determination that payment of these dues for attorneys employed by the state as legal staff serves a state public purpose.

Counties and municipalities have home rule powers and thus have the full power to carry out their respective duties unless preempted by the state.[4] Thus, this office concluded in Attorney General Opinion 05-46 that a noncharter county is authorized, pursuant to its home rule powers, to expend county funds to pay the Florida Bar dues for county officers and employees if the county commission makes findings that such an expenditure serves a county purpose and appropriately budgets funds to make such payments. Similarly, a municipality would appear to have the authority under home rule powers in the absence of a statute to pay such dues provided that a determination is made that such an expenditure serves a public purpose and funds are appropriately budgeted.

A special district does not possess home rule powers. It may exercise only those powers expressly granted by statute or necessarily implied therefrom.[5] Section 421.05(2), Florida Statutes, provides in part that a housing authority

"may employ a secretary, who shall be the executive director, technical experts, and such other officers, agents, and employees, permanent and temporary, as it may require and shall determine their qualifications, duties, and compensation. For such legal services as it may require, an authority may call upon the chief law officer of the city or may employ its own counsel and legal staff."

The term compensation is generally considered to be broader than the term salary and includes "payment in money or other benefit which will compensate in the strict sense, that is, make even, or be measurably the equivalent of that for which it is given."[6]

In addition, section 421.08(9), Florida Statutes, provides:

"Notwithstanding s. 112.061, the governing board of an authority may approve and implement policies for per diem, travel, and other expenses of its officials, officers, board members, employees, and authorized persons in a manner consistent with federal guidelines."

In light of the above grants of authority to municipal housing authorities, it appears that such authorities may, under state law, pay the Florida Bar dues for its legal staff employed by the authority, provided that the governing body of the housing authority makes findings that such an expenditure serves an authority’s purpose and appropriately budgets funds to make such payments. No comment is expressed herein, however, as to whether the terms of the contract preclude the GHA from paying such dues.

As discussed above, while the GHA possesses only such powers as are granted by law or necessarily implied therefrom, section 421.05(2), Florida Statutes, appears to grant the GHA the authority to establish the compensation, including benefits, of its officers and employees. In considering severance packages, this office in the past has been concerned with the provisions of section 215.425, Florida Statutes, which prohibits extra compensation being made to any officer, agent, employee, or contractor after the service has been rendered or the contract made. The purpose of such a provision is to prevent payments in the nature of gratuities for past services, and the restriction pertains to extra compensation given after service has been performed, not to compensation earned during service.[7] In the instant inquiry, however, it appears that the contract itself provides for the severance pay and thus is part of the compensation package authorized by contact.

This office has recognized that it has generally been accepted that a governmental entity is precluded from entering into contracts that extend beyond the current body's term of office if the subject matter of the contract is governmental.[8] A contract involving business or proprietary matters, however, may bind successor boards for a term of years, if the contract is reasonable in the length of time it will run.[9]

As this office noted in Attorney General Opinion 99-51, this restriction is no longer applicable to municipalities in Florida since the adoption of the Municipal Home Rule Powers Act.[10] Since 1983, this office has taken the position that school boards possess a variant of "home-rule power," and that a district school board may exercise any power for school purposes in the operation, control, and supervision of the free public schools in its district except as expressly prohibited by the Florida Constitution or general law.[11] Thus in Attorney General Opinion 01-52, this office stated that in light of its home rule powers, a school board may enter into a contract with a term in excess of the board members' terms of office, absent any constitutional or statutory prohibition against such action.

Unlike a municipality or a school district, however, a special district does not possess home rule powers. While the statutes grant a housing authority the authority to determine the compensation of its officers and employees, I cannot state that such a grant would encompass the authority to enter contracts, the subject of which is governmental, to extend beyond the current board's term. The determination as to whether a contract is proprietary or governmental is one that the agency initially must make; however, I would note that in Attorney General Opinion 99-51, this office stated a hospital district, created as an independent special taxing district, was not authorized to enter into an employment contract for a president and chief executive officer for the medical center when that contract will extend beyond the terms of office of the members of the current board.[12]

As noted *supra*, this office must presume the validity of the contracts that have been entered into and any question regarding the validity of such contracts must be addressed by a court of law, not this office. I trust that the above informal comments may be of some assistance to the Gainesville Housing Authority in resolving these issues.

Sincerely,

Joslyn Wilson

Assistant Attorney General

JW/t

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[1] *See* s. 421.04(1), Fla. Stat., stating in part that "[i]n each city, as herein defined, there is hereby created a public body corporate and politic to be known as the 'Housing Authority' of the city; provided, however, that such authority shall not transact any business or exercise its powers hereunder until or unless the governing body of the city by proper resolution shall declare that there is need for an authority to function in such city.

[2] *See, e.g.,* Ops. Att'y Gen. Fla. 87-23 (1987) and 84-08 (1984) (assistant state attorneys), 77-115 (1977) (public defenders), 72-04 (1972) and 69-138 (1969) (judges), and 58-15 (1958) (Florida bar dues are private expenses, personal to the individual belonging to these organizations, and may not be considered an expense of a county judge).

[3] *See, e.g.*, Specific Appropriation section 8(6)(c), Ch. 07-72, Laws of Florida, relating to Employee Compensation and Benefits for the Fiscal Year 2007-2008:

"Funds in this act may be expended for bar dues and for legal education courses for attorneys employed by the state as legal staff. Each state agency shall report the amounts expended for these purposes to the legislature by April 1, 2008."

[4] *See* s. 166.021(3), Fla. Stat., stating that in recognition of the home rule powers granted by Art. VIII, s. 2(b), Fla. Const., the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, with certain exceptions not pertinent to the instant inquiry. *Cf. Speer v. Olson*, 367 So. 2d 207 (Fla. 1978) (s. 125.01[1], Fla. Stat., grants to the governing body of a county the full power to carry on county government unless the Legislature has preempted a particular subject relating to county government by either general or special law).

[5] *See, e.g.*, Ops. Att'y Gen. Fla. 06-24 (2006), 99-73 (1999), and 99-51 (1999) (as statutorily created entities, special districts have only such powers and authority as have been expressly granted by law or may be necessarily implied therefrom in order to carry out an expressly granted power).

[6] *See* Black's Law Dictionary *Compensation* p. 301 (8th rev. ed. 2004) (remuneration and other benefits received in return for services rendered).

[7] *See, e.g.,* Op. Att'y Gen. Fla. 91-51 (1991) (in absence of a statute, collective bargaining agreement, or personnel policy or regulation authorizing such payments, severance payments in lieu of notice constituted extra compensation prohibited by s. 215.425, Fla. Stat.).

[8] *See, e.g.,* Op. Att'y Gen. Fla. 01-52 (2001). *And see Daly v. Stokell,* 63 So. 2d 644 (Fla. 1953); *City of Riviera Beach v. Witt*, 286 So. 2d 574 (Fla. 4th DCA 1973), *cert. denied*, 295 So. 2d 305 (Fla. 1974).

[9] *See Town of Indian River Shores v. Coll*, 378 So. 2d 53 (Fla. 4th DCA 1979); *Tweed v. City of Cape Canaveral*, 373 So. 2d 408 (Fla. 4th DCA 1979), *cert. denied* 385 So. 2d 755 (Fla. 1980) (s. 166.021[4], Fla. Stat., authorizes a city council to enter into contracts, governmental or proprietary in substance, which extend beyond the term of office of the council).

[10] *See Town of Indian River Shores v. Coll, supra*; *Tweed v. City of Cape Canaveral, supra*; Ops. Att'y Gen. Fla. 90-54 (1990) (distinction between proprietary and governmental functions is no longer followed in Florida, given s. 166.021(4), Fla. Stat., securing broad municipal home rule powers to cities) and 84-100 (1984).

[11] *See* Ops. Att'y Gen. Fla. 83-72 (1983), 84-58 (1984), 84-95 (1984), and 86-45 (1986).

[12] *And see* Op. Att'y Gen. Fla. 99-66 (1999), stating that contracts relating to the day-to-day operations of a special district, such as real estate contracts, managed care contracts and vendor contracts, were proprietary contracts that may extend beyond the terms of office of current board members. *Cf. Town of Indian River Shores v. Coll*, 378 So. 2d 53, 54 (Fla. 4th DCA 1979), in which the court concluded that the subject matter of a contract to fill public service employment position with the city funded by the Comprehensive Employment Training Act was proprietary rather than governmental, relying on *Daly v. Stokell*, 63 So. 2d 644. 645 (Fla. 1953) which set forth the following guidelines in distinguishing between a governmental and proprietary function:

"[T]he test of a proprietory power to be determined by whether or not the agents of the city act and contract for the benefit and welfare of its people; any contract, in other words, that redounds to the public or individual advantage and welfare of the city or its people is proprietory, while a governmental function, as the term implies, has to do with the administration of some phase of government, that is to say, dispensing or exercising some element of sovereignty."