Sovereign immunity, nonprofit corp. leasing hospital

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Mr. Gary C. Simons
General Counsel
Munroe Regional Health System, Inc.
121 Northwest Third Street
Ocala, Florida 34471

Dear Mr. Dean and Mr. Simons:

You ask whether the Munroe Regional Health System, Inc., which leases and operates a hospital owned by the Marion County Hospital District, a dependent special district, is entitled to sovereign immunity under the provisions of section 768.28, Florida Statutes.

In accordance with section 13, Article X, Florida Constitution, the provisions of section 768.28, Florida Statutes, waives sovereign immunity for the state and its agencies and subdivisions to the extent specified therein. Section 768.28(2), Florida Statutes, defines "state agencies or subdivisions" for purposes of the statute to include "executive departments, the Legislature, the judicial branch . . . and the independent establishments of the state, . . . counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities[.]"

This office recently has issued several opinions relating to the applicability of section 768.28, Florida Statutes, to not-for-profit corporations leasing facilities from a hospital district. In Attorney General Opinion 05-24, this office concluded that the Bert Fish Medical Center, Inc., a not-for-profit corporation created for the purpose of operating hospitals and other health care facilities situated within the geographic boundaries of the Southeast Volusia Hospital District, appeared to be subject to the sovereign immunity provisions of section 768.28, Florida Statutes.[1] The district had reorganized its operations under the provisions of section 155.40, Florida Statutes, and formed the not-for-profit corporation and was its sole member. The district's governing board comprised the membership of the corporation's board, although four additional members could be designated to serve. In addition, the lease agreement provided that the obligations of the corporation were "a transfer of a government function" from the district to the corporation and that the corporation, in carrying out its obligations under the agreement, was considered to be "acting on behalf of" the district as that term is used in section 155.40. The lease also required the corporation to provide the district with various financial reports.

Similarly, in Attorney General Opinion 06-36 this office determined that the Citrus County Health Foundation was acting primarily as an instrumentality of the Citrus County Hospital Board for purposes of section 768.28, Florida Statutes, and thus would appear to be subject to the sovereign immunity provisions of that section. The Hospital Board created the Citrus Memorial Health Foundation, Inc., as a not-for-profit corporation with the Board as its sole member, to carry out the purpose of the Board's enabling act. The lease agreement provided that the obligations of the corporation are considered to be a transfer of a government function from the Board to the Foundation and the Foundation, in carrying out its obligations under the agreement, is considered to be "acting on behalf of" the Board as that term is used in section 155.40, Florida Statutes. In addition, the Board has agreed to appropriate sufficient funds, in an amount to be determined by the Board, to the Foundation to provide medical services to the residents of the county. The Foundation was required to submit an annual budget and various reports to the Board, and the five members of the board of trustees of the Board served on the board of directors of the Foundation, which consisted of not less than ten or more than twelve members in addition to the medical staff director. In the event of the Foundation's dissolution, its assets, after payment of its liabilities, revert to the Board.

In contrast, this office in Attorney General Opinion 02-71, concluded that a not-for-profit hospital corporation not formed by the hospital district from which it was leasing facilities or by any other governmental agency, which received no district money other than payments for the care provided to indigent county residents, and provided no other governmental function, was not acting primarily as an instrumentality of the hospital district and thus was not entitled to sovereign immunity. While this office recognized that the corporation is subject to the Sunshine and Public Records Laws when it is engaged in the operation and management of the hospital, the criteria for making such a determination are different than those used to determine whether a private entity is primarily acting on behalf of a public agency. There was no indication that any portion of the lease between the district and the corporation expressly provided that the corporation was acting on behalf of the district in its management and operation of the hospital or that the day-to-day operation of the hospital by the corporation was subject to any governmental control by the district.

According to the information you provided, the not-for-profit corporation was formed at the direction of the board of trustees of the hospital district, which was created by special act as a dependent special district.[2] Section 1.2 of the lease agreement provides that "[i]t is the purpose of this Lease that Lessee act on behalf of Lessor in operating the Leased Premises to provide quality health care to all Marion County citizens at an affordable cost."[3] The board of trustees of the hospital district constitute seven of the fifteen directors of the corporation with the remaining eight members appointed by the board of directors of the corporation subject to approval by the Marion County Board of County Commissioners.

Under the lease agreement, the district may engage the services of outside consultants to determine whether the corporation is "fully satisfying the purpose of the Lease set forth in Section 1.2[.]"[4] The corporation is required to submit for approval to the board of trustees of the hospital district any material changes in the scope of services offered.[5] In addition, the corporation must submit its annual operating and capital budget to the district for approval before the start of the fiscal year.[6] Any management contract with an annual cost of $250,000 requires the prior consent of the hospital district as does any service contract that exceeds three years or

has an annual cost of $1 million dollars.[7] In the event of the corporation's dissolution, its assets, after payment of its liabilities, revert to the hospital board.[8]

The analysis and conclusions contained in the Attorney General Opinions 05-24 and 06-36 would appear to equally apply to your situation. Moreover, this office has been advised that a circuit court has already concluded that the corporation is acting as an instrumentality for the hospital district and is entitled to sovereign immunity.[9]

Thank you for contacting the Florida Attorney General's Office. I hope that the above informal advisory comments may be of assistance to you.

Sincerely,

Joslyn Wilson
Assistant Attorney General

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[1] This office relied on the decision of the First District Court of Appeal in *Prison Rehabilitative Industries and Diversified Enterprises, Inc. v. Betterson*, 648 So. 2d 778 (Fla. 1st DCA 1994), in which the court, after a fact-intensive analysis of the authorizing legislation, held that Prison Rehabilitative Industries and Diversified Enterprises, Inc. (PRIDE) was an instrumentality of the state entitled to the benefits of sovereign immunity. The court based its conclusion on the numerous statutory provisions for extensive governmental control over PRIDE's day-to-day operations sufficient for it to constitute an instrumentality of the state, *e.g.*, the Department of Corrections leased the industry program to the not-for-profit corporation organized solely for the purpose of operating the program; while PRIDE was accorded substantial independence in running the work programs, its essential operations nevertheless remained subject to a number of legislatively mandated constraints, including providing the Governor and Legislature annual independently audited financial statements and in-depth status reports; PRIDE was subjected to both financial and performance audits by the auditor general; PRIDE's Articles of Incorporation were subject to the Governor's approval; and funds were provided by the state. *And see* Op. Att'y Gen. Fla. 99-05 (1999) in which this office determined that a nongovernmental community transportation coordinator could claim sovereign immunity under section 768.28, Florida Statutes, based upon the oversight of the Commission for the Transportation Disadvantaged and the local coordinating board over the actions of the coordinator in carrying out the legislative mandate to provide transportation services.

[2] *See* Ch. 65-1905, Laws of Florida, as amended. *And see* The Official List of Special Districts prepared by the Department of Community Affairs, available online at: http://www.floridaspecialdistricts.org/, which lists the hospital district as a dependent special district. *Cf.* s. 189.412, Fla. Stat., which requires the department to maintain a master list of independent and dependent special districts.

[3] Section 1.2 of the Lease Agreement between Marion County Hospital District, as Lessor, and Munroe Regional Health System, Inc., as Lessee, effective October 1, 2003. *And see* "Whereas clauses" of lease stating that "Lessor and Lessee desire for Lessee to act on behalf of Lessor in

providing quality and affordable health care to the citizens of Marion County."

[4] Section 4.2 of the Lease Agreement.

[5] *See, e.g.,* s. 1.4G. of the Lease Agreement.

[6] Section 4.6 of the Lease Agreement.

[7] Sections 4.14 and 4.15 of the Lease Agreement.

[8] Article II, Articles of Incorporation.

[9] *Vickers v. Munroe Regional Health Services, Inc.*, Case No. 04-2139-CA-G (Fla. 5th Jud. Cir., Marion Co., May 16, 2006).