

County officer opting out of retirement system

Number: INFORMAL

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Mr. William H. Andrews
800 West Monroe Street
Jacksonville, Florida 32203

Dear Mr. Andrews:

Thank you for contacting the Florida Attorney General's Office regarding the disposition of retirement contributions made on behalf of a former Gilchrist County Property Appraiser, Mr. D. Ray Harrison. Attorney General Crist has asked me to respond to your letter. I understand your question to be whether Attorney General's Opinion 91-68 continues to represent the position of this office on the question of law presented. In that opinion it is concluded that, in the event that a county officer chooses not to participate in the Florida Retirement System, county funds which had been allocated to fund the employer's portion of the officer's retirement plan could not be used to fund an alternate retirement plan.

Section 121.052, Florida Statutes, establishes a separate class of members within the Florida Retirement System, designated the "Elected Officers' Class." [1] Membership in the class is specifically designated and includes "[a]ny constitutional county elected officer assuming office on or after July 1, 1981, including any . . . property appraiser" [2]

Section 121.052(3), Florida Statutes, providing for participation and withdrawal, states that

"Effective July 1, 1990, participation in the Elected Officers' Class shall be compulsory for elected officers listed in paragraphs (2)(a)-(d) and (f) assuming office on or after said date, unless the elected officer elects membership in another class or withdraws from the Florida Retirement System as provided in paragraphs (3)(a) -(d):

* * *

(d)1. Any elected officer may elect to withdraw from participating in the Florida Retirement System in any manner whatsoever. Upon assuming office, the member shall have a period of 6 months to notify the administrator of his or her decision to withdraw from the Florida Retirement System altogether. Such election shall be made in writing and a copy shall be filed with the employer.

2. Upon receipt of a request from an elected officer to withdraw from the Florida Retirement System pursuant to subparagraph 1., the administrator shall refund all moneys contributed by the elected officer to the system during the period of participation in the system, unless the elected officer has a vested right under the Florida Retirement System, in which case he or she shall not receive a refund of contributions.

3. Any elected officer who has withdrawn from the Florida Retirement System pursuant to this paragraph shall be permitted to rejoin the Elected Officers' Class upon written request to the

administrator.

a. Credit for prior service based on the period for which refunds were received pursuant to subparagraph 2. shall be received by an elected officer who rejoins the system upon payment to the System Trust Fund of an amount equal to the contributions refunded to the elected officer pursuant to subparagraph 2., plus 4 percent interest compounded annually from the date of refund until July 1, 1975, and 6.5 percent interest, compounded annually thereafter until the date of payment.

b. Credit for prior service based on the period during which the elected officer had withdrawn from the system, and for which no contributions were made, shall be received by the elected officer upon payment to the System Trust Fund of an amount equal to the contributions required, under the contribution rate in effect during the period of withdrawal for which credit is being purchased, plus 6.5 percent interest, compounded annually until the date of payment. The payment of the total of such amount shall be made by the employer and the elected officer in the relative proportions provided by law for contributions during the period of withdrawal.

Failure to timely withdraw from the Elected Officers' Class shall constitute an election to maintain membership in the Elected Officers' Class."

The statute clearly recognizes that members eligible to participate in the Elected Officers' Class may withdraw from the Florida Retirement System and presents a plan for those situations.

Pursuant to section 5(c), Article II of the State Constitution, "[t]he . . . compensation . . . of . . . county officers shall be fixed by law," that is, by action of the Florida Legislature.[3] Chapter 145, Florida Statutes, represents the legislative scheme for the mandate in the constitution. This chapter was enacted "to provide for the annual compensation and method of payment for the several county officers named herein." [4] Section 145.031, Florida Statutes, provides the compensation to be paid to Florida's property appraisers. As was discussed in Attorney General's Opinion 91-68, the moneys which are contributed to the state retirement system by the county on behalf of an officer or employee constitute a portion of an official's total compensation. That opinion notes that counties have no independent authority to set the compensation of county officers. Further, section 145.17, Florida Statutes, provides criminal penalties for the acceptance of salary for official duties as a result of "other general or special law, general law of local application, resolution, or supplement or from any other source[.]"

Nothing in Chapter 121 of which I am aware or to which you have drawn my attention would lead me to a different conclusion than that presented in Attorney General's Opinion 91-68. That is, in the absence of specific statutory authority for the contribution to a private retirement fund on behalf of a county property appraiser, such a contribution would appear to be additional, unauthorized compensation. Because the compensation of a property appraiser must be fixed by general law and the range of such salary is prescribed by section 145.10, Florida Statutes, the payment of funds into a private retirement fund that has not been authorized by general law is prohibited.

I trust that these informal comments will assist you in advising your client.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/tfl

[1] See s. 121.052(1), Fla. Stat.

[2] Section 121.052(2)(d), Fla. Stat.

[3] See, e.g., *Advisory Opinion to the Governor*, 22 So. 2d 398, 400 (Fla. 1945); and cf., *Merriman v. Hutchinson*, 116 So. 271 (Fla. 1928).

[4] Section 145.011(1), Fla. Stat.