

tively, even though the laws of the society expressly authorize alterations therein, and although the member agrees to be bound by future changes; and, where a retrospective operation was intended, the alterations do not govern the rights and liabilities of preexisting members and their beneficiaries if vested rights would thereby be defeated or the obligation of contracts be impaired."

The *Anders* case quotes from a New Jersey case concerning a voluntary retirement plan:

"The legal relation between the plaintiff and the defendants is that of contract. . . . when this agreement was once made, it could not be altered without the consent of both parties thereto, and upon sufficient consideration. The fact that the terms of the agreement were embodied in an act of the Legislature does not change its essential character as a contract, and it was beyond the power of the Legislature to impair the obligation of this contract by subsequent legislation." [Anders at 644, quoting from *Ball v. Board of Trustees of Teachers' Retirement Fund*, 58 A. 111 (N.J. 1904).]

Therefore, although the legislature can "alter, change, amend, and render intact the actuarial soundness of the system so as to strengthen its fibers in any way it sees fit," such changes "can apply only to conditions in the future and never to the past." *State v. City of Jacksonville Beach*, *supra*, at 354. In a voluntary pension plan then, changes can be made which will affect future participants; however, the legislature has no power to make any change which will affect the contractual rights of existing participants. This would be in violation of Federal and Florida constitutional provisions which provide that no state shall pass any law impairing the obligation of contracts, Art. I, §10, U.S. Const.; Art. I, §10, State Const. Since the legislature is limited in this respect, so is many municipal government, which under Ch. 73-129, *supra*, can have only such power to enact local legislation as the state legislature has. It may be noted that employees participating in a voluntary plan may *elect* to join an amended or different plan set up by the legislature or municipal government. Since future municipal employees or future participants in a pension plan have, at present, no rights of any kind in such plan, any present changes would have no effect upon them. It follows, therefore, that a voluntary pension plan system can be changed by municipal ordinance without a referendum under §166.021(4), F. S. [Ch. 73-129, Laws of Florida], as to future participants.

A mandatory pension plan can be changed. Such plan confers a right on municipal employees since it can be enforced by any person entitled to its benefits; therefore, no change in this type of pension plan can be made without a referendum of the electorate. However, as in a voluntary plan, a municipality may set up a different mandatory plan for future employees which present employees could elect to join. This could be accomplished without a referendum.

073-428—November 21, 1973

#### STANDARDS OF CONDUCT

#### PUBLIC AND PRIVATE EMPLOYMENT INVOLVING SAME TYPE OF BUSINESS

To: County Nursing Home Administrator

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

#### QUESTION:

May the administrator of a county nursing home serve as the

president, and owner of a one-third share of the stock, of a corporation which owns and operates a private nursing home in the county without violation of the Standards of Conduct Law, §§112.311-112.318, F. S.?

#### SUMMARY:

As §112.314(2), F. S., is a penal statute, it cannot be ruled categorically in the absence of the facts that the ownership of an interest in a private nursing home by a county nursing home administrator would violate the law; however, to avoid any possible criticism as well as any possible violation of the law, it is suggested that the individual divest himself of either his private interest or his public employment.

You state that the county nursing home caters to elderly indigent patients, while the private nursing home, as a profitmaking institution, takes only paying patients, and that there is no competition between the two institutions. You spend all normal business hours at the county nursing home and usually visit the private nursing home early in the morning, at lunch time, or late at night. The private nursing home has a full-time administrator whom you have been advising during its initial organization, in the light of your experience as an administrator of the county nursing home.

The legislative policy represented by the Standards of Conduct Law, as declared in §112.311, *supra*, is that no public officer or employee shall have "any interest, financial or otherwise, direct or indirect, or engage in any business, transaction, or professional activity or incur any obligation of any nature which is in *substantial* conflict with the proper discharge of his duties in the public interest." (Emphasis supplied.) At the same time, §112.316, *supra*, states that

It is not the intent of this [Law], nor shall it be construed, to prevent any [public officer or employee] from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such [public officer or employee] of his duties to the state or the county, city, or other political subdivision of the state involved.

Section 112.313(6), *supra*, which formerly prohibited a public officer or employee from accepting other employment "which might impair his independence of judgment in the performance of his public duties," was invalidated by the Supreme Court in *State v. Llopis*, 257 So.2d 17 (Fla. 1971), on the ground of vagueness.

The only other sections of the Standards of Conduct Law that might prohibit your retaining the private nursing home interest while serving in your public position are §§112.313(4) and 112.314(2), *supra*. Section 112.313(4) prohibits a public officer or employee from accepting any employment or engaging in any business or professional activity "which he might reasonably expect would require or induce him to disclose confidential information acquired by him by reason of his official position." As noted in AGO 073-13, this statute "appears to place some responsibility for resolving the question upon the officer or employee himself—presumably because he is in the most advantageous position to do so." The possibility of your acquiring *confidential* information through your position as administrator of a county nursing home that you would be tempted to disclose to the administrator of the private nursing home is not, however, immediately apparent.

Section 112.314(2), *supra*, prohibits a public officer or employee from having "personal investments in any enterprise which will create a *substantial* conflict between his private interest and the public interest." (Emphasis supplied.) As noted in AGO 073-215,

. . . the mere ownership of a controlling interest in a firm, standing alone, does not prohibit a businessman from serving as a member of the

board of county commissioners. The personal investment in an enterprise that is prohibited by the act is one that will create a "substantial conflict" between his private interests and the public interest.

And the mere fact that an individual is engaged in his private capacity in the same type of business with which he is concerned as a public officer or employee does not necessarily create a substantial conflict between his public and private duties within the purview of this section. As a matter of fact, many regulatory boards are required by law to have at least one member who is engaged in the business or occupation which the board regulates. For example, the eleven-member Florida State Board of Examiners of Nursing Home Administrators must include six nursing home administrators and a hospital administrator. See §468.166, F. S. And in AGO 073-362, in ruling that bankers, architects, engineers, and building materials suppliers may serve as members of a county planning commission, it was said:

. . . I do not interpret §112.314(2), *supra*, as prohibiting a property owner or person engaged in a particular business or profession from qualifying to run for public office or from accepting an appointment to an appointive public office because of the mere possibility that, in the future, some decision of the board or commission of which he is a member might incidentally affect his own personal interest.

(It was suggested that an interested member should, in such a situation, refrain from participating in the official decision of the public body of which he is a member.)

On the other hand, when the nature of the public office and the private business is such that conflicts between public duty and private interest are bound to arise in the day-to-day performance of the public duties, the conflict is "substantial." This type of substantial conflict was found to exist in AGO 073-29, in which it was ruled that a county tax assessor could not continue to operate his private real estate appraisal business after assuming the duties of the public office.

In attempting to decide whether there will be such day-to-day conflicts between the administrator's public duties and his private interests, it cannot be overlooked that the grand jury, as one of the "watchdogs" of general public affairs, see *In re* Report of Grand Jury, 11 So.2d 315, 319 (Fla. 1943), has concluded in its report that the administrator "has put himself or allowed himself to be put in a position which could interfere with the proper discharge of his public duties." But it found also, as a fact, that the administrator "has effectively and efficiently operated the [county] nursing home through maintaining a high degree of professional competence and personal good conduct," based on testimony that patients "have been properly cared for, that all financial records are in proper form and that county-owned equipment has been properly maintained and accounted for." Without specifying the nature of the conflict, it recommended that the administrator should dispose of his personal interests in the private nursing home or be dismissed as the administrator of the county nursing home. However, I understand that the board of county commissioners has endorsed a special committee report recommending that the administrator be retained in his post, despite his connection with the private nursing home.

As noted above, the grand jury's report did not state the basis for its conclusions that the administrator's interest in the private nursing home "could interfere with the proper discharge of his public duties." As the county's facilities are primarily for indigent persons and the private nursing home takes only paying patients, the two institutions do not appear to be competitive in this respect. And even if competition for patients should develop in the future, it cannot be said that this would generate a conflict between the administrator's public duties and his private interests, as the responsibility for the admission of patients to the county nursing home is vested in the home's admissions advisory committee and board of trustees,

and not in the administrator. This was made clear in a request for an opinion as to whether the Sunshine Law, §286.011, F. S., is applicable to the meetings of the admissions advisory committee of a county nursing home, which question was answered in the affirmative in a letter dated October 3, 1973.

And the mere fact that the administrator has in the past and will also in the future spend some of his off-duty hours at the private nursing home—and, possibly, might answer questions, by phone, concerning the operation of the private nursing home during his working hours at the county nursing home—does not, in my opinion, generate the kind of conflict that is within the purview of a penal statute such as the Standards of Conduct Law. Any outside personal interest or investment—regardless of its nature—could, conceivably, so distract and occupy the time of a public officer or employee as to subject a state or county officer to the possibility of suspension for neglect of duty, *see* Art. IV, §7, State Const., and a public employee to dismissal for the same reason. But this is a far cry from saying that such an officer or employee could be found guilty of a misdemeanor because of a “substantial conflict” between his public duties and his private interests under the Standards of Conduct Law, §112.314(2), *supra*.

This leaves only one possible area of conflict—the possibility of competition between the two institutions for employees. The question of whether this possibility has generated a substantial conflict between the administrator’s public duties and his private interests is one of fact that has, apparently, been answered by the grand jury in one way and by the board of county commissioners in another, although, as noted above, the facts upon which these conclusions were based are not before me. It goes without saying that, under the Standards of Conduct Law, the attorney general is not a finder of the facts. His responsibility is to render an opinion when a public officer or employee makes a written request, accompanied by a “full written statement of the facts and questions he has,” for an opinion as to the application of the law to himself. Section 112.315, F. S. And, in the circumstances here present, and in the absence of any facts relating thereto, I could not in good conscience give a categorical yes or no answer to the question of whether the possibility of competition between the two institutions for employees would violate the law. As noted in *State v. Llopis*, *supra*, at 18, the statute is penal in nature; and it is well settled that such statutes must be strictly construed according to the letter thereof. It was said further that “[m]oreover, such penal statutes are to be strictly construed *in favor of the person against whom the penalty is sought to be imposed*.”

In light of this rule of construction, I am inclined to the view that the mere possibility of such competition does not generate a conflict sufficiently direct and substantial to constitute a violation of §112.314(2), *supra*. However, if the facts are such that competition for employees between the two institutions has arisen or will inevitably arise in the future as a day-to-day occurrence, it seems clear that the conflict between your public and private interests is substantial within the purview of the statutory prohibition. In either case—whether such competition is a mere possibility or will inevitably occur—it is suggested that you should divest yourself of one or the other of such interests, in order to avoid any possible criticism as well as any possible violation of the Standards of Conduct Law.

Assuming, then, that you will divest yourself of either your private or public interest, it is not necessary to refer to §112.313(2), *id.*, which requires public officers or employees to file a sworn statement disclosing an interest as officer, director, manager, agent, or owner of a controlling interest (10 percent or more) in a business entity which is subject to state or local regulation or which has substantial business commitments from a governmental agency. However, as there appears to be some misunderstanding as to this statutory requirement, it is proper to note that the filing of such a statement is not to be taken as the disclosure of a conflicting interest. The statutory requirement in this respect is for the purpose of revealing an interest that has some potential for conflict between private interests and public

duties. Of course, if the interest so disclosed does, in fact, represent a substantial conflict with the public duties of the officer or employee, he should divest himself of one or the other of such interests.

073-429—November 26, 1973

### TAXATION

#### RENTAL OF REAL PROPERTY ALONG WITH SALE OF SERVICES; TAX LIABILITY ON GIFT WRAPPING; DUES IN MERCHANTS' ASSOCIATION AS PART OF RENT

To: *Lew Brantley, Senator, 8th District, Jacksonville*

Prepared by: *J. Kendrick Tucker, Assistant Attorney General*

#### QUESTIONS:

1. Is the total payment taxable as "rent" when a department store subleases a certain department therein to a tenant for a sum certain when a part of the payment, which the parties do not intend to be rent, is for services to the sublessee?
2. Is it arbitrary and discriminatory not to exempt a gift box or gift wrapping which encloses purchases (and for which no charge is made to the customer) from the sales tax when rules of the state Department of Revenue exempt an ordinary merchandise bag used by a retail merchant to enclose a customer's purchase?
3. Is it arbitrary and discriminatory to tax dues paid to a retail merchants' association in a shopping mall which are made mandatory in the landlord's lease, but not paid directly to the landlord but to the retail association and used strictly to advertise and promote business for all the merchants in the said shopping mall as rent?

#### SUMMARY:

If a store which subleases a portion of its leased space to a tenant for a certain sum and provides services to the tenant with a portion of the rent being allocated for such services, then the sum is not taxed as rent if the parties intend not to treat it as rent, the agreement between the parties does not treat the sum as rent, the services rendered are separable and not incidental to the furnishing of the space, the rental and service charges are separately stated and billed, and the services furnished are not otherwise taxable. It would be discriminatory and unlawful not to exempt from the sales tax the receiving by customers of gift boxes or gift wrapping for which no charge is made because there is not a "sale" to the customer of the gift box or paper or wrapping services since there is no separate charge or consideration for such and in any event such gift boxes or gift wrapping are not taxed pursuant to the rules of the Department of Revenue. It is not arbitrary or discriminatory to impose the sales tax on dues paid by a tenant to a merchants' association pursuant to the terms of the lease because such payments are presumably part of the consideration for rental of the space to the tenant.

Your first question is answered as discussed below. Your second question is answered in the affirmative and your third question is answered in the negative.

The answer to your first question depends upon factual and legal determinations as to the terms of the agreement between the parties, the nature of the "services" rendered, and, of course, the intent of the parties. Since I am not