

such officers or employees. The fact that a state, county or local officer or employee may voluntarily execute and deliver an agreement or directive that a certain sum be taken from the salary payable to him, from time to time or otherwise, and used by the paying authority to purchase an annuity for him to be payable to him in the future, would not affect the amount of compensation or salary payable to him, although by the purchase of the annuity his [actual] receipt of such salary or compensation might be delayed. Such a purchase of an annuity for the officer or employee would not seem to affect the salary or compensation of the officer or employee for purposes of retirement under Chs. 122, 123, or 238, Florida Statutes, or other statute or law providing a retirement system, unless otherwise specifically provided by law. See AGO 063-160 of December 31, 1963, to the same effect as to school teachers.

Thus, there would appear to be no statutory authority for the Department of Administration, the Board of Regents, or the respective universities' administration to apply an employee's present state retirement system contribution to the referenced annuity program with a corresponding reduction in the employee's salary.

This principle of executive appropriation discretion was discussed at length in AGO 071-28, stating:

The object of these constitutional provisions [Art. VII, §1] . . . secure for the legislature the exclusive power of determining how, when, and for what purpose, the public moneys should be applied in conducting government. . . . The executive branch of government manages and spends only those moneys appropriated to it by law, and then only for the purposes or objects specified in the appropriation. . . .

Although §112.171, F. S., authorizes certain governmental bodies to make employee salary *deductions* upon request, there do not appear to be any statutory provisions that would equate such deductions with salary *reduction* or authorize the use of such funds for the tax-sheltered annuity plans you have submitted. See AGO 073-421.

All state moneys must be disbursed from the treasury by warrant as designated by legislative act. Sections 17.03, 17.09, 18.02, 215.35, 216.321, and 216.331, and Chs. 17, 18, 110, 215, and 216, F. S. No state warrant can be issued except as authorized by an appropriation law, and those moneys appropriated can be expended only for the purpose appropriated and in accordance with legislative authorization. Sections 216.192, 216.251, 216.281(1), 216.292, and 216.321, F. S.

I have been unable to find any statutory authority that would permit an affirmative response to your questions, and consider the referenced Attorney General Opinions applicable under existing Florida statutes. Your second and third questions are answered accordingly.

073-421—November 15, 1973

#### RETIREMENT

#### PARTICIPATION IN ANNUITY PROGRAM BY EMPLOYEES OF SPECIAL DISTRICT

To: Don Laurent, Executive Director, Sarasota Memorial Hospital, Sarasota

Prepared by: James D. Whisenand, Assistant Attorney General

QUESTIONS:

1. May the Sarasota County Public Hospital Board, under present law, enter into a deferred compensation agreement with its employees as described in Rev. Rul. 69-650?

2. If question 1 is answered in the affirmative, would the general investment restrictions of the hospital apply to investments in deferred compensation accounts set up pursuant to such a program?

SUMMARY:

A deferred compensation plan for the employees of a hospital district, deferring a portion of an employee's prescribed compensation, and the subsequent investment thereof in tax-sheltered annuities or other securities are not authorized under the district's enabling legislation or other existing Florida statutes. Section 112.171, F. S., authorizing certain wage or salary deductions does not authorize salary reductions or a tax-sheltered annuity or investment plan.

Under the contemplated employment contract, certain employees may irrevocably elect to defer receipt of a portion of their scheduled salaries. For each electing employee, the employer establishes a deferred compensation account and credits to such account the amount the employee elected to defer. The funds placed in such deferred compensation accounts would be used at the employee's election for the purchase of tax-sheltered annuities or other securities. The amounts deferred are to be satisfied from the employer's general funds. The Internal Revenue Service has ruled that the amount deferred under the contract is not includable in the employee's taxable income in the year earned. The deferred amount is includable in the employee's gross income when actually received or made available to the employee. Cf. Rev. Rul. 69-650, 1969-2 CB 106; 26 U.S.C. §403.

According to Ch. 26468, 1949, Laws of Florida, and amendments thereto, the governing board of the hospital district is authorized to hire hospital staff and fix their compensation. All moneys received by the hospital and deposited to the credit of the hospital fund may be paid out only for supplies, equipment, wages, salaries, and other items of expenses. Section 7, Ch. 26468, *supra*. I have been informed by the Department of Administration that the hospital district participates, pursuant to Ch. 121, F. S., in the consolidated Florida Retirement System. The percentage of compensation contributions to this system by defined employees is mandatory. Section 121.051. A statutory entity such as this hospital district has only such limited and special powers as are legally conferred on it by statute. It cannot exercise any power or perform any official act or function unless its enabling legislation expressly or by necessary implication so authorizes it. See *Edgerton v. International Company*, 89 So.2d 488 (Fla. 1956); AGO 073-164.

In AGO 064-27 the then attorney general responded to a similar question by concluding that:

State, county and local officers, boards, commissions, etc., have no authority, in the absence of an appropriation therefor made by the legislature, or in accordance with statutes and laws of the state, to purchase so-called tax-sheltered annuities for their officers and employees and make payment therefor, absent the authority or consent of such officers or employees. . . .

See also AGO's 063-160 and 071-28; *Amherst College v. Comm'r of Corp. & Tax.*, 238 N.E.2d 351 (Mass. 1968); and *Arizona State Tax Commission v. Reiser*, 493 P.2d 920 (Ariz. 1972), wherein the court discusses a recently enacted Arizona statute specifically authorizing a similar annuity plan.

Section 112.171, F. S., authorizes special districts to make certain employee

requested wage or salary deductions. There is, however, a fundamental distinction between a deduction contemplated by this section and an authorized salary or wage reduction or exemption required by the contemplated annuity plan. *See* AGO 073-420.

In *Florer v. Sheridan*, 36 N.E. 365, 369 (Ind. 1894), that court discussed a "deduction-reduction" distinction:

Deductions and exemptions are two separate and distinct things, having no connection. A deduction is the taking of the subtrahend from the minuend; it is a subtraction. Exemption is an immunity or privilege; it is freedom from a charge or burden to which others are subject.

*See also* Arizona State Tax Commission v. Reiser, *supra*; and *Kreher v. United States*, 314 F. Supp. 409 (M.D. Fla. 1970).

Although §112.171, F. S., does permit certain deductions, there does not appear to be any statutory authorization for the contemplated plan and I consider the referenced Attorney General Opinions applicable. Your second question is answered accordingly. *Cf.* §218.34, F. S., created by Ch. 73-349, Laws of Florida.

073-422—November 15, 1973

#### COUNTY COMPTROLLER

#### DUTIES AS ADMINISTRATIVE OFFICER FOR COUNTY COMMISSION

*To: Jack H. Greenhut, Escambia County Attorney, Pensacola*

*Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General*

#### QUESTION:

Is a county comptroller authorized, under a special law requiring him to serve as "ex officio clerk and administrative officer" of the board of county commissioners, without specifying any duties as administrative officer, to take over and administer, without direction from the board, the day-to-day affairs of the board, such as the preparation of the agendas for board meetings, drafting and signing of correspondence resulting from official actions of the board, and the like?

#### SUMMARY:

Under Ch. 73-455, Laws of Florida, dividing the duties of the circuit court clerk between a court clerk and a county comptroller, the county comptroller in carrying out his duties as ex officio clerk and administrative officer of the board of county commissioners should serve at the board's direction in accordance with the procedures traditionally followed by the circuit court clerk in this respect.

The special act in question, Ch. 73-455, Laws of Florida, purports to divide the duties of the circuit court clerk between two officers, as authorized by Art. V, §16, State Const. Under the statute, the clerk of the circuit court is to carry out the judicial duties of that constitutional office, and the county comptroller is to serve as "ex officio clerk and administrative officer of the board of county commissioners, recorder, auditor, and custodian of all county funds and of all official records of the board of county commissioners." Section 3 of the act imposes certain specific duties upon the county comptroller, none of which is of the type referred to in your question; nor is there any other provision which would indicate that the legislature intended to create an additional office—that of county administrator—and to vest in the county comptroller the duties of that office. The title of the act speaks of