

tissue committees of the hospital without reference to the other necessary data also contained and maintained in the medical records of the committee. Under such circumstances it would also appear that the surgical audit and tissue committees of the hospital would not fall among that group of persons to whom the revelation of such records could not be made. As your correspondence relates, the effective operation of the hospital for the care and treatment of its patients is heavily dependent upon internal administration and review by committees.

If the prohibition set forth in §458.22(4)(b), *supra*, were to apply to these types of committees upon which the hospital must rely, then in effect the prohibition must be read in such a way that the hospital may not "reveal" such medical records to itself. Obviously, such a construction would be neither feasible nor consistent with the purposes for which this law was designed.

With regard to those persons or commissions who are in fact strangers to the hospital and to its internal administration, such as agents or representatives of the patient, the joint commission on the accreditation of hospitals, or insurance carriers which pay benefits for the pregnancy termination procedure, the law is clear and explicit on its face that the *hospital* may not reveal such records nor make such a disclosure "except upon the order of a court of competent jurisdiction in a civil or criminal proceeding." Section 458.22(4)(b), F. S.

Here, I believe, the statutory maxim of *expressio unius est exclusio alterius* must be given application, in that this section provides for disclosure only under one circumstance, *i.e.*, upon the order of a court of competent jurisdiction in a civil or criminal proceeding and upon no other circumstance whatsoever.

With regard to that class of persons to whom *the hospital* may not furnish records of the termination of a pregnancy, it should be noted that the patient, upon her written authorization, may authorize her attending *physician* to furnish such information as she may deem necessary to those persons. Section 458.16, F. S., provides:

Any doctor or other practitioner of any of the healing sciences making a physical or mental examination of, or administering treatment to any person, shall upon request of such person, his guardian, curator or personal representative in the event of his death, furnish copies of all reports made of such examination or treatment. Such reports shall not be furnished to any person other than the patient, his guardian, curator, or personal representative, except upon the written authorization of the patient

073-420—November 15, 1973

RETIREMENT

TRANSFER FROM PARTICIPATION IN STATE RETIREMENT SYSTEM TO ANNUITY PROGRAM

To: Charles E. Miner, General Counsel, Department of Education, Tallahassee

Prepared by: James D. Whisenand, Assistant Attorney General

QUESTIONS:

1. Do existing Florida statutes authorize the Board of Regents or university administration to apply funds in the amount of a consenting employee's present contribution to the state retirement fund to an annuity program with a corresponding reduction in the employee's salary?
2. If question 1 is answered in the affirmative, does the respective university or the Board of Regents have the authority to contract with its employees to provide the described annuity program?

3. Does a state agency, other than the university system, have the authority to perform the acts described in questions 1 and 2?

SUMMARY:

A tax-sheltered annuity program deferring a portion of an employee's statutorily prescribed compensation or salary is not authorized under existing Florida statutes. Neither the Department of Administration, the Board of Regents, nor a state university has statutory authority to apply an employee's present state retirement contribution to such an annuity program with a corresponding reduction in the employee's salary.

You indicated that the U. S. Internal Revenue Service has informed you that this office must first determine whether the existing Florida statutes authorize a state agency or state university to provide a retirement fund program within the purview of 26 U.S.C. §403. Subsequent to this opinion, the Internal Revenue Service is to rule on the qualification of your proposed program.

The contemplated plan would require generally that an employee enter into an irrevocable salary reduction agreement with the employer. The employer would then use the agreed salary reduction funds to purchase, for the employee, annuities which qualify for the tax shelter status or deferred compensation benefits of 26 U.S.C. §403 and I.R.S. Revenue Ruling 69-650, 1969-2 CB 106. *See* Annotation 3 A.L.R.Fed. 719 (1967). This plan would apparently be elected in lieu of the state retirement system. *Cf.* AGO's 063-160 and 064-27. The gist of the transaction is that, upon I.R.S. approval, the salary reduction amount would not be taxed as current income under federal law.

Chapter 121, F. S. 1971, the Florida Retirement System Act, provides for a preemptive consolidation of existing retirement systems and laws. Contributions to a state retirement system are compulsory for defined employees pursuant to Ch. 121 or a former state retirement system law. Section 121.051. The rights of those employees previously covered by Chs. 122, 238, and 321, F. S., were preserved by statutory provisions. [See] 24 Fla. Jur. *Pensions, etc.* §13; and AGO 072-85.

The Department of Administration has general administrative authority over the state retirement systems and is, of course, bound by the statutory provisions relating to compensation and employee participation. Sections 20.31(5) and (6), 121.021(4), (5), and (32), 122.23(3), and 238.03, F. S. Employee members contribute to the state retirement system each pay period at a percentage rate of "earned or gross compensation." Section 121.021(22), F. S., defines compensation in pertinent part as: "[t]he monthly salary paid a member . . . as reported by the employer on the wage and tax statement . . . or any similar form. When a member's compensation is derived from fees set by statute, compensation shall be the total cash remuneration received from such fees." Section 238.01(4), F. S., defines [earnable] compensation similarly as: "[t]he full compensation payable to a teacher working the full working time for his position. . . ."

See 60 Am. Jur.2d *Pensions and Retirement Funds* §63; and §216.011(1)(n), F. S.

One of my predecessors in office considered similar questions on two occasions, AGO's 063-160 and 064-27, and concluded that the tax-sheltered annuity plan could not be adopted, as described, without certain legislative changes. Attorney General Opinion 064-27 found no statutory authorization for the purchase of tax-sheltered annuities as part of the state retirement system:

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. 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

