

Department of State to investigate a sworn complaint filed with it involving an alleged violation of §99.161, *supra*, by a corporation, and requiring it to revoke the corporation's charter if it is subsequently found by the court, in an appropriate judicial proceeding, that the corporation has in fact violated the law. However, the department's investigation is a preliminary, fact-finding one only; and it has no power actually to adjudicate the question of the violation. Any findings of fact indicating that a violation has occurred are referred by the department to the state attorney in the appropriate county "for filing of a petition and pleadings in the circuit court." Thus, even in this particular instance, the power to *enforce* the law is vested in the judiciary, acting through its judicial officers.

073-49—March 8, 1973

MUNICIPALITIES

AUTHORITY TO AMEND SPECIAL ACT CREATING POLICE AND FIRE DEPARTMENT PENSION FUND

To: Hyatt Brown, Representative, 31st District, Daytona Beach

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTION:

May the City of Daytona Beach amend the provisions of a special act creating its police and fire department pension fund by ordinance or by amendment to its charter act?

SUMMARY:

A special act establishing a pension fund for a municipality may not be amended by home rule ordinance; however, the provision of the city's charter act adopting the pension plan established by that special act could be amended by special act of the legislature and, perhaps, by an ordinance approved by a majority of the electors voting on the question adopted pursuant to §166.17, F. S. 1971.

Under Art. VIII, §2, State Const., a municipality of this state may exercise any power for municipal purposes "except as otherwise provided by law. . . ." And §167.005(1), F. S. 1971, provides that municipalities

. . . shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when *prohibited* by general or special law. (Emphasis supplied.)

In AGO 070-150, my predecessor in office stated the general rule applicable here, as follows:

. . . a legislative direction by general or special act, including a special charter act, as to the manner in which a particular municipal function or purpose is to be performed, is ordinarily to be interpreted as a prohibition against its being performed in a different manner; and. . . such a legislative direction cannot be superseded by a "home rule" ordinance in conflict therewith. When, however, a general or special law provides an alternative method of accomplishing a municipal purpose and merely authorizes a city to proceed in accordance therewith, such *permissive* legislative authority would not be within the rule of statutory construction referred to above.

The special act in question, Ch. 65-1443, Laws of Florida, did not provide a "permissive" or "alternative" method for the city's police and fire department pension plan. It specifically created the pension fund for employees of the police and fire departments of the city and established a system of retirement, disability, and death benefits for these employees. This being so, under the rule referred to above, the City of Daytona Beach may not, by home rule ordinance, repeal or amend the legislative directive in this respect.

The question of whether a municipality may effect an amendment or repeal of a special act by an amendment to its municipal charter is not so easily resolved. Under Art. VIII, §2, State Const., municipalities may be established or abolished "and their charters amended pursuant to general or special law." And §166.17, F. S. 1971, authorizes the governing body of a municipality to initiate proposed amendments to its charter (except that part describing the boundaries of the city) by a three-fifths vote, subject to referendum approval by a majority of those voting in the election. It was said in *City of St. Petersburg v. English*, 45 So. 483 (Fla. 1907), that a city's "charter" consists of the creative act "and all laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise." And in AGO 071-177 I noted that, when an amendment to a municipal charter is incorporated therein, it will have the same force and effect as if originally incorporated therein, that is, the force and effect of law. When applied in the situation here present, this would mean that the amended charter act, being later in point of time than the 1965 special act, would supersede the earlier act under the rule that, if there is a positive repugnance between two acts, the later act must control. *Tamiami Trail Tours v. Lee*, 194 So. 305 (Fla. 1940).

Here, §80 of the city's charter act, Ch. 67-1274, Laws of Florida, expressly provides that the city's police and fire department employee pension fund shall be organized and operated under the provisions of Ch. 65-1443, *supra*. I understand that it is desired to amend the 1965 act so as to extend to old members of the pension fund plan the same right to "delayed retirement" as is presently held by new members of the plan under §6.3 of Ch. 65-1443, *supra*.

Such an amendment could certainly be made by a special legislative act amending the city's charter act; and I am inclined to the view that it could be done also by the joint action of the municipality's governing body and the electorate of the city in adopting an amendment to the city's charter act, as authorized by §166.17, *supra*.

073-50—March 9, 1973

CHIROPRACTIC

ACUPUNCTURE NOT WITHIN SCOPE OF PRACTICE

To: Dr. Paul Vogel, Administrative Coordinator, Florida State Board of
Chiropractic Examiners, Miami

Prepared by: S. Strom Maxwell, Assistant Attorney General

QUESTION:

Does the practice of acupuncture fall within the scope of practice
of chiropractic as outlined in Ch. 460, F.S.?

SUMMARY:

Pending legislative clarification or a judicial determination to the contrary, the practice of acupuncture is not within the scope of the practice of chiropractic as prescribed by Ch. 460, F. S., and a chiropractic physician is not authorized to practice acupuncture for anesthetic purposes in examining, analyzing, and diagnosing the