

Sovereign immunity, nonprofit corporation

Number: INFORMAL

Date: May 04, 2004

Ms. Helene Cohen Rosen
General Counsel, Health Care District
of Palm Beach County
Post Office Box 810037
Boca Raton, Florida 33481-0037

Dear Ms. Rosen:

On behalf of the Health Care District of Palm Beach County, you ask whether sovereign immunity provisions of section 768.28, Florida Statutes, extend to a not-for-profit corporation established by the district to operate the Glades General Hospital when the health care district is the sole member of the corporation.

The Health Care District of Palm Beach County (District) was created by special act as an independent special district to provide comprehensive planning, funding and coordination of health care services to Palm Beach County residents.[1] Section 6 of the Palm Beach County Health Care Act sets forth the powers of the governing board of the district which include, among others, the power to "operate, and maintain such health care facilities as shall be necessary for the use of the people of the County, including the continued presence of at least one hospital in the Glades area, subject to and limited by the future financial resources and constraints of the District"[2]

According to your letter, the District, in order to comply with the requirement that the presence of a hospital in the Glades area be maintained, has entered into a contract for the purchase of substantially all of the assets of a hospital held by a for-profit corporation.[3] You state that the District established the Glades Hospital Holdings, Inc. (GHHI), a Florida not-for-profit corporation, the sole member of which is the district. Article III, section A. of the Articles of Incorporation for GHHI provides the corporation was established and shall be operated exclusively for charitable, scientific and educational purposes, including:

"To establish, construct, own, lease, operate, support, maintain, and/or manage one or more acute care hospitals in Belle Glade, Florida, including, but not limited to, the hospital presently operating and otherwise known as "Glades General Hospital" . . . and in each case, subject to and in furtherance of the intent of the Legislature of the State of Florida in enacting Chapter 2003-326, Laws of Florida . . . and in furtherance of the authority and responsibilities of the District Board of the Health Care District of Palm Beach County . . . as set forth in the Act[.]"

Section 768.28, Florida Statutes, in accordance with section 13, Article X of the Florida Constitution, waives sovereign immunity for the state and its agencies and subdivisions to the extent specified therein. Monetary limitations are prescribed in the statute allowing payment of a judgement against the state or its agencies and subdivisions.[4] State agencies or subdivisions

within the scope of section 768.28 include "executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities[.]"[5] Pursuant to section 768.28(9)(a), Florida Statutes, "[n]o officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

As noted by the First District Court of Appeal in *Shands Teaching Hospital and Clinics, Inc. v. Lee*,[6] "there are no sharp criteria" for determining when a corporation is primarily acting as an instrumentality of the state. However, the court considered a critical factor to be the existence of government control over the detailed physical performance and day-to-day operation of the corporation. The *Shands* court evaluated the legislation that organized the hospital, finding that the state was authorized to lease the facility to a private nonprofit corporation, which was directed to conduct a study and develop a plan to become more self-sufficient and fiscally independent. The court concluded that the Legislature's intent was to treat Shands, the corporation managing and operating the hospital, as an autonomous and self-sufficient entity, not primarily acting as an instrumentality on behalf of the state.

On the other hand, in *Prison Rehabilitative Industries and Diversified Enterprises, Inc. v. Betterson*,[7] the First District Court of Appeal, after a fact intensive analysis of the authorizing legislation, held the Prison Rehabilitative Industries and Diversified Enterprises, Inc. (PRIDE) was an instrumentality of the state entitled to the benefits of sovereign immunity. The court found that the statutory scheme governing PRIDE contained numerous provisions for extensive governmental control over PRIDE's day-to-day operations sufficient for it to constitute an instrumentality of the state. For example, the court found: 1) the Department of Corrections leased the industry program to the not-for-profit corporation organized solely for the purpose of operating the program; 2) while PRIDE was accorded substantial independence in the running of the work programs, its essential operations nevertheless remain subject to a number of legislatively mandated constraints, including providing the Governor and Legislature annual independently audited financial statements and in-depth status reports; 3) PRIDE was subjected to both financial and performance audits by the auditor general; 4) PRIDE's Articles of Incorporation were subject to the Governor's approval; and 5) funds were provided by the state. These statutory constraints cumulatively constituted sufficient governmental control over PRIDE's daily operations to require the conclusion, as a matter of law, that PRIDE acted primarily as an instrumentality of the state.[8]

The Florida Supreme Court has recognized that the immunity provided in section 768.28, Florida Statutes, extends to certain private parties who are involved in contractual relationships with the State, provided that such parties are agents of the State.[9] Whether such contracted parties "are agents of the state turns on the degree of control retained or exercised by [a state agency]."[10]

In the instant inquiry, the not-for-profit corporation was created by the District with the District as

its sole member. As noted above, GHHI's articles of incorporation specify that its purpose is to carry out the functions of the District as set forth in Chapter 2003-326, Laws of Florida. The corporation is required to operate and manage the hospital within the budget and hospital policies approved by the District and to submit to the District for review and approval an annual budget and service delivery plan for the hospital within the time guidelines established by the District.[11] The District has extensive financial oversight over the GHHI.[12] The District's governing board appoints and may discharge GHHI's board of directors as well as the hospital's chief executive officer and such other executive officers to the extent it determines.[13] It may amend GHHI's articles of incorporation and bylaws, establish policies governing GHHI's operational functions, adopt marketing and business strategies for GHHI, and monitor and audit GHHI to ensure compliance with hospital policies and hospital accreditation requirements.[14] The District is also responsible for approving short-term and long-term goals, planning and objectives; changes to hospital services and hospital administration, facilities, and programs; plans for expansion, merger or consolidation; strategic plans and policies; and asset transfers.[15] You also state that the hospital will receive supporting funds from the District.

In light of the above, it appears the Health Care District of Palm Beach County exercises significant control over the Glades Hospital Holdings, Inc., and thus the not-for-profit corporation would appear to be subject to the sovereign immunity provisions of section 768.28, Florida Statutes.

I trust that the above informal advisory comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

[1] See Ch. 03-326, Laws of Florida, codifying, amending and reenacting the special acts relating to the Health Care District of Palm Beach County. *And* see s. 1 of the Palm Beach County Health Care Act, [s. 3(2), Ch. 03-326, *supra*], setting forth the legislative intent.

[2] Section 6(1) of the Palm Beach County Health Care Act.

[3] You have advised this office that the hospital was sold by the District in 1999 to the for-profit corporation.

[4] Section 768.28(5), Fla. Stat., limits a judgment by any one person to \$100,000 and limits any claim or judgment that, when totaled with all other claims paid by the state arising out of the same incident or occurrence, to \$200,000.

[5] Section 768.28(2), Fla. Stat. See *Eldred v. North Broward Hospital District*, 498 So. 2d 911, 912 (Fla. 1986) (special taxing district hospital being charged with the responsibility to provide

for the public health and good of the citizens within the district, was an "independent establishment of the state" for purposes of s. 768.28).

[6] 478 So. 2d 77, 79 (Fla. 1st DCA 1985).

[7] 648 So. 2d 778 (Fla. 1st DCA 1994).

[8] See Op. Att'y Gen. Fla. 99-05 (1999) in which this office determined that a nongovernmental community transportation coordinator could claim sovereign immunity under section 768.28, Florida Statutes, based upon the oversight of the Commission for the Transportation Disadvantaged and the local coordinating board over the actions of the coordinator in carrying out the legislative mandate to provide transportation services. Compare Op. Att'y Gen. Fla. 02-71 (2002) where this office concluded that the Indian River Memorial Hospital, Inc., which was not formed by the district or any other governmental agency, received no money from the corporation other than payments for the care provided to indigent county residents, and provided no other governmental function, was not acting primarily as an instrumentality of the hospital district for purposes of s. 768.28, Fla. Stat.

[9] See, e.g., *Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997).

[10] *Id.* at 703. And see *Agner v. APAC-Florida Inc.*, 821 So. 2d 336 (Fla. 1st DCA 2002), holding that s. 768.28(9)(a), Florida Statutes, provided immunity to the corporation provided the contract established that the state agency would exercise significant control over the corporation; *Sierra v. Associated Marine Institutes, Inc.*, 850 So. 2d 582 (Fla. 2d DCA 2003), stating that although the corporations hired by Department of Juvenile Justice to run the boot camps were not state agencies, they may have sovereign immunity under s. 768.28 as agents of the state.

[11] Article I, s. (2)b.i. and ii., Bylaws of Glades Hospital Holdings, Inc. (Bylaws).

[12] As noted *supra*, GHHI's budget is subject to review and approval by the District. The District must approve capital expenditures or indebtedness in excess of \$100,000.00 and any litigation expenses. See Art. I, s. (2)b.iii. and iv, Bylaws.

[13] See Art. III, s. (2)b. and Art. VI, ss. (2) and (3), Bylaws.

[14] See Art. II, s. (2)c., h., d., and f., Bylaws.

[15] See Art. II, s. (1)f., h., and i., and (2)a. and b., Bylaws.