

Municipality, creation of nonprofit corporation

Number: INFORMAL

Date: October 24, 1996

Mr. Scott E. Simpson
South Daytona City Attorney
Suite A, Granada Oaks Professional Building
595 West Granada Boulevard
Ormond Beach, Florida 32174

RE: MUNICIPALITIES--OFFICERS AND EMPLOYEES--CORPORATIONS--authority of municipality to create, by ordinance, a non-profit corporation to provide employee staffing and management services to the city. s. 166.041(4), Fla. Stat.

Dear Mr. Simpson:

You have asked for my opinion on substantially the following questions:

1. Is the City of South Daytona authorized to create a not-for-profit corporation to provide employee staffing and management services to the city?
2. Would the employees of a not-for-profit corporation created by the City of South Daytona be required to participate in the Florida Retirement System?
3. Would a not-for-profit corporation established by the City of South Daytona be protected by sovereign immunity?

In sum:

1. The City of South Daytona is authorized to create a not-for-profit corporation to provide employee staffing management services to the city.
2. Questions requiring an interpretation of the Florida Retirement System Act, Chapter 121, Florida Statutes, should most appropriately be addressed to the Division of Retirement of the Department of Management Services which is charged with administering these provisions.
3. A not-for-profit corporation created by the City of South Daytona would be protected by sovereign immunity as set forth in section 768.28, Florida Statutes.

According to your letter the City of South Daytona is considering establishing a not-for-profit corporation to provide employee staffing and management services to the city. The city would ask current employees to terminate their employment relationship with the city, be hired by the corporation and be leased to the city to provide services. All current employees of the city, except certified police officers, would be considered for employment by the corporation.[1]

Question One

It is well established that municipal governing bodies have the authority to create independent bodies to act as instrumentalities to carry out the purposes of the municipality.[2] In addition, municipalities are authorized by section 166.021(3), Florida Statutes, "to enact legislation concerning any subject matter upon which the state legislature may act . . ."[3] The Legislature has excepted from this broad authorization those subjects specifically described in section 166.021(3)(a)-(d), Florida Statutes:

- "a) annexation, merger, and exercise of extraterritorial power;
- b) subjects prohibited in the constitution;
- c) subjects preempted to state or county government;
- d) subjects preempted by constitutional county charter."

The Legislature has specifically authorized the creation of not-for-profit corporations to provide employee staffing and management services to the governmental entities[4] that create them and, under the grant of authority of section 166.021(3), the City of South Daytona may do the same if the city finds that such an action satisfies a municipal purpose.

Question Two

Questions requiring an interpretation of the Florida Retirement System Act, Chapter 121, Florida Statutes, should most appropriately be addressed to the Division of Retirement of the Department of Management Services which is charged with administering these provisions and the rules promulgated thereunder. Questions to the Division may be addressed as follows:

Florida Department of Management Services
Division of Retirement
2639 North Monroe Street
Tallahassee, Florida 32399-1560
Telephone: (904) 488-5540

Question Three

Section 768.28, Florida Statutes (1995), waives the sovereign immunity of the state and its agencies and subdivisions to the extent set forth in that section. Monetary limitations are specified in the statute allowing payment of a judgment against the state or its agencies or subdivisions by any one person not to exceed \$100,000 or any claim or judgment which, when totaled with all other claims paid by the state arising out of the same incident or occurrence, does not exceed \$200,000.[5] State agencies or subdivisions within the scope of section 768.28, Florida Statutes, are defined to include "corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities . . ."[6] A nonprofit corporation created by a municipality to handle employee management and staffing services for the city would appear to come within this definition.

Therefore, a not-for-profit corporation created by the City of South Daytona would appear to be protected by sovereign immunity as set forth in section 768.28, Florida Statutes.

These informal advisory comments are provided in an effort to assist you and should not be considered a formal Attorney General's Opinion.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tgk

[1] The city has made the determination that certified police officers must be employed by the city to retain the power to arrest.

[2] See generally 1 Fla. Jur.2d *Administrative Law* s. 8 (1977); and see *Nelson v. Lindsey*, 10 So. 2d 131 (Fla. 1942).

[3] See also *City of Tampa v. Braxton*, 616 So. 2d 554, 555-556 (Fla. 2d DCA 1993) "a municipality may exercise any governmental power for a municipal purpose except when expressly prohibited by law, and a municipality may legislate on any subject matter upon which the legislature may act, except those subjects described under paragraphs (a) through (d) of section 166.021(3), Florida Statutes (1989)"; and *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992).

[4] See, e.g., Ch. 84-539, Laws of Florida, discussed in Op. Att'y Gen. Fla. 93-83 (1993).

[5] Section 768.28(5), Fla. Stat. (1995).

[6] Section 768.28(2), Fla. Stat. (1995).