



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>January 29, 2007</p>	<p>No. 107-001 (R06-037)</p> <p>Re: Application of Open Meeting Laws to Board of Trustees created under A.R.S. § 11-952.01.</p>
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Question Presented

Does the Open Meeting Law (Arizona Revised Statutes (“A.R.S.”) §§ 38-431 to -431.09) apply to the Board of Trustees (the “Board”) appointed by the multimember governing bodies of various political subdivisions to administer the Northern Arizona Public Employees Benefit Trust (“NAPEBT”) formed under A.R.S. § 11-952.01(C)?

Summary Answer

Yes. The Board of Trustees appointed by the political subdivisions under A.R.S. § 11-952.01 constitutes a public body under A.R.S. § 38-431(6). In administering an employee benefits program on behalf of the political subdivisions that created it, the Board constitutes an instrumentality of those political subdivisions. Moreover, one or more of the participating political subdivisions appoints each trustee on the Board. Therefore, the Board falls within the

definition of “public body” in A.R.S. § 38-431(6) and must comply with the Arizona Open Meeting Law.

Background

Section 11-952.01 of the Arizona Revised Statutes authorizes two or more public agencies to pool funds to insure or indemnify the agencies against risks of claims for loss of life, disability, accidents, or other claims. A.R.S. § 11-952.01(C). The public agencies may undertake such pooling (1) on a cooperative or contract basis, (2) by the formation of a nonprofit corporation, (3) by contracts or intergovernmental agreements with the Arizona Health Care Cost Containment System administration, or (4) by the execution of a trust agreement directly by the agencies or by contracting with a third party. A.R.S. § 11-952.01(C). Section 11-952.01(H) requires that any pool shall be operated by a Board of Trustees, at least three of whom are elected officials or employees of public entities within the state. This Board of Trustees, among other things, must establish the terms and conditions of coverage within the pool, ensure that all claims are paid promptly, and take all necessary precautions to safeguard the assets of the group. A.R.S. § 11-952.01(H).

Five political subdivisions¹ of the State of Arizona, all of whom are governed by multimember governing bodies, entered into an Intergovernmental Agreement and Declaration of Trust (the “Trust Agreement”) under A.R.S. § 11-952.01(C) to create the NAPEBT for the purpose of providing and maintaining health and welfare benefits for employees of the participating subdivisions. Trust Agreement, Art. 3.1. The political subdivisions subscribing to the Trust Agreement are the City of Flagstaff, Coconino County, Coconino County Community College District, Flagstaff Unified School District, and the Northern Arizona Intergovernmental

¹ A.R.S. § 38-431(5) defines “political subdivision” as “all political subdivisions of this state, including without limitation all counties, cities and towns, school districts and special districts.”

Public Transportation Authority (“NAIPTA”). NAIPTA is a political subdivision formed under A.R.S. § 28-9103 for the purpose of operating a public transportation system and consists of the following political subdivisions: City of Cottonwood; City of Flagstaff; City of Sedona; Coconino County; Yavapai County; and the Arizona Board of Regents, for and on behalf of Northern Arizona University. Although the Trust Agreement authorizes the addition of new participants in the trust, it specifically requires that participants be public employers. Trust Agreement, Art. 1.9. The Trust Agreement requires each participating political subdivision to contribute funds to the trust in an amount anticipated to pay for the benefits provided, and specifies that employees of the participants may also be required to contribute. Trust Agreement, Arts. 7.1, 7.3.

As required by statute, the Trust Agreement created the Board of Trustees to carry out the duties of overseeing the administration of the trust. Trust Agreement, Art. 5.1. Each Trustee is appointed by a participating political subdivision and has one vote in all matters that come before the Board. Trust Agreement, Art. 5.1. To appoint a Trustee, the political subdivision must either be a participating member at the time the latest amendment was executed or have been a participant in the Trust Agreement for at least one full year and must have at least two hundred active (non-retiree) employees covered under the terms and conditions set forth by the Board. Trust Agreement, Art. 5.2. A Trustee may resign or be removed at any time by the participating political subdivision that appointed him or her, and the political subdivision can then designate a successor Trustee. Trust Agreement, Art. 5.1. The Board meets regularly on a semi-annual basis with the requirement that twenty-four hours prior notice and an agenda be given to each Trustee. Trust Agreement, Art. 5.15.4. The Board also must maintain minutes of each meeting as required by statute. A.R.S. § 11-952.01(H); Trust Agreement, Art. 5.6.5. Nothing in the statute

or the Trust Agreement requires that notice be given to the public or that meetings be open for public attendance. The question presented is whether the Board is a public body such that its meetings must be open to the public under the Arizona Open Meeting Law, A.R.S. § 38-431.01.

Analysis

Under Arizona's Open Meeting Law, "all meetings of any *public body* shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. § 38-431.01 (emphasis added). A "public body" includes "all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and *other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision.*" A.R.S. § 38-431(6) (emphasis added). For guidance in interpreting the Open Meeting Law, the Legislature included a declaration of public policy in A.R.S. § 38-431.09 stating:

It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall construe any provision of this article in favor of open and public meetings.

The question then is whether the Board constitutes a multimember governing body of an instrumentality of one or more political subdivisions.

The term "instrumentality" is not defined in the statute, other than to indicate that the term includes corporations or other instrumentalities whose boards of directors are appointed or elected by the political subdivisions. A.R.S. § 38-431(6). In Arizona, the only Court that considered the term employed the dictionary definition of "instrumentality," namely, "something that serves as in intermediary or agent through which one or more functions of a controlling

force are carried out: a part, organ or subsidiary branch esp. of a governing body.” *Prescott Newspapers, Inc. v. Yavapai Cmty. Hosp. Ass’n*, 163 Ariz. 33, 39, 785 P.2d 1221, 1227 (App. 1989). The Court included a later statement from the dictionary that “INSTRUMENTALITY may suggest the fact of serving as an instrument but in today’s English it is likely to suggest a means or agency which is a minor part of a larger entity or under the control of a subsuming organization.” *Id.* Moreover, in evaluating whether an entity constitutes an instrumentality of a political subdivision, the Court looked to whether the function performed by the entity is committed to the political subdivision, i.e., is it something the political subdivision could do itself. *Id.* (noting that statute required the function of the entity to be carried out by a nonprofit corporation and not the Hospital District itself).

The Supreme Court of Oregon adopted a similar, yet more detailed, line of analysis in determining whether an entity constitutes a public body subject to the state’s public records law. *Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451, 463-64, 878 P.2d 417, 424-25 (1994). In that case, the Court adopted a six-factor analytical framework that focused on the control of the entity by the state or a political subdivision:

1. The entity’s origin (whether it was created by the government or independently of the government);
2. The nature of the function assigned to and performed by the entity (e.g., whether that function is one traditionally associated with government or is one commonly performed by private entities);
3. The scope of authority granted to and exercised by the entity (e.g., does the entity have authority to make binding governmental decisions or is it limited to making nonbinding recommendations?);

4. The nature and level of government financial involvement with the entity;
5. The nature and scope of government control over the entity's operation;
and
6. The status of the entity's officers and employees (e.g. whether the officers and employees are government officials or government employees).

Id. The Court noted that the list of factors was not exhaustive, and no single factor was either indispensable or dispositive. *Id.* at 464 n.9, 878 P.2d at 425 n.9.

Here, the Board falls within the definition of “public body” because it is an instrumentality of the participating political subdivisions and each trustee of the Board is appointed by the political subdivisions.² The Trust Agreement specifically provides that each member of the Board is appointed by one of the participating political subdivisions, although not every political subdivision may be entitled to appoint a Trustee. Trust Agreement, Art. 5.1. Additionally, each Trustee may be removed and replaced at any time by the political subdivision that appointed him or her. Trust Agreement, Art. 5.1.

Furthermore, NAPEBT—and the Board that administers it—were created by the various political subdivisions to carry out the duties and powers of the government entities that signed the Trust Agreement, namely, providing health and welfare benefits to their employees, or pooling assets and funds with other public agencies to do so. Applying the analytical framework set forth above, it is apparent that the Board operates under the control of the participating political subdivisions to carry out governmental functions. Although the *Marks* test is not

² “Board of Directors” in the statute should be interpreted to include a board of trustees such as the one in this case. In *Prescott Newspapers*, the Court did not distinguish between “board of directors” and “board of trustees” in considering whether the hospital association’s board of trustees was appointed by a political subdivision. 163 Ariz. at 40, 785 P.2d at 1228. This result also would seem to be mandated by the public policy provision in the Open Meeting Law favoring open and public meetings.


binding, it proves helpful in analyzing whether the Board and the NAPEBT constitute “instrumentalities” under the statute. First, the NAPEBT is created pursuant to state statute by an intergovernmental agreement between various political subdivisions. The participating political subdivisions pooled their funds under A.R.S. § 11-952.01(C) to form a trust that would administer and manage the employee benefit programs on their behalf. These functions are assigned by law to each of the political subdivisions and could be carried out by any of them independently of the trust. A.R.S. § 11-981(A) (authorizing cities, towns, and counties to provide insurance or to self-insure for employee health and welfare benefits); A.R.S. § 15-387 (authorizing school districts to provide insurance or to self-insure for employee health and welfare benefits); A.R.S. § 15-1444(B)(7) (authorizing community college districts to offer employee benefit plans); A.R.S. § 15-1626(F) (authorizing Arizona Board of Regents to offer employee benefit plans). The Board administers the trust and makes final binding decisions about disposition of the assets therein. Trust Agreement, Art. 5.6. Moreover, the participating political subdivisions provide primary funding for the trust, although employee contributions are authorized by the Trust Agreement. Trust Agreement, Arts. 7.1, 7.3. As noted above, the participating political subdivisions maintain the power to appoint and remove Trustees, thereby exercising a great degree of control over the operation of the trust itself. Trust Agreement, Art. 5.1. Finally, the Trust Agreement requires that at least four of the Trustees on the Board be employees of the participating political subdivisions, as required by statute. Trust Agreement, Art. 5.1.

In light of the degree of control exercised by the political subdivisions over NAPEBT and its Board, and the nature of the functions assigned to the Board, the Board is an instrumentality of the various political subdivisions that subscribed to the Trust Agreement. This analysis

complements previous opinions from this Office that boards of trustees administering employee benefit trusts created by school districts under A.R.S. § 15-382 were subject to the Open Meeting Law. *See* Op. Atty. Gen. Nos. I83-018 and I87-038. For these reasons, the Board constitutes a “public body” under A.R.S. § 38-431(6) and is subject to the Open Meeting Law.

Conclusion

Under the definition set forth in A.R.S. § 38-431(6), the Board constitutes a multimember governing body of an instrumentality of one or more political subdivisions and must comply with the requirements of the Arizona Open Meeting Law.


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