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STATE CAPITOL
Phoenix, Arizona 85007

Robert H. Corbin

September 6 , 1979

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ARIZONA ATTORNEY GENERAL

Ms. Teri Dettmer
Deputy Yavapai County Attorney
Courthouse
Prescott, Arizona 86301

Re: I79- 232 (79-173)

Dear Ms. Dettmer:

We have reviewed your opinion dated May 30, 1979, to Dr. Kenneth E. Walker, Superintendent of Prescott Unified School District No. 1. The following is a revision of that opinion.

Dr. Walker asked the following questions:

1. Can our school district terminate the agreement for OASI with the Social Security Division of the Arizona Retirement System?
2. Is participation in the Arizona Retirement System mandatory or optional?
3. Could an agreement be made so that those employees who want to continue with OASI and State Retirement may do so while others terminate?

Prescott Unified School District No. 1 entered into a contract in 1951 with the State for coverage under the federal old age and survivor's insurance system. This contract provides:

8. That the State Agency or the Applicant, in conformity with the rules and regulations of the State Agency and the Federal Security Administrator, shall have the right to terminate this application and agreement upon giving at least two years' advance notice in writing to the other party, effective in the notice, provided, however, that the Application and Agreement must have been in effect not less than five years prior to receipt of such notice, and provided further, that if the Federal Security Administrator should terminate the agreement between the Federal Security Administrator and the State for the administration by the State of Section 218 of the Social Security Act, as amended, the State shall have the right to terminate this application and agreement in accordance with the same rights and powers as the Federal Security Administrator exercises in terminating the agreement between him and the State.

9. That, subject to the aforesaid provisions and applicable law, this application and agreement may be terminated or amended by the mutual consent of the parties in writing. (Emphasis added.)

While the contract provides that either the school district or the State may terminate the agreement for Social Security coverage, this does not end our inquiry. The applicable state statutes governing participation in both Social Security and the State Employees Retirement System ("System") and State Retirement Plan ("Plan" are A.R.S. §§ 38-741 et seq. and A.R.S. §§ 38-781.01 et seq.

In Ariz.Att'yGen.Op. No. 78-18 we discussed the relationship between participation in Social Security and the System or the Plan. The opinion concluded that participation in Social Security is a prerequisite to participation in the System or the Plan. This conclusion was based on A.R.S. § 38-745.A, governing the System, which provides:

All employees and officers of the state and instrumentalities of the state and all officers and employees of political subdivisions establishing a retirement system administered by the board pursuant to the provisions of this article who as a result of state service or service for the political subdivision are included in agreements providing for their coverage under the federal old age and survivors

insurance system, shall be subject to the provisions of this article and shall be members of the retirement system, except that membership shall not be mandatory on the part of any employee eligible and electing to participate in the optional retirement programs established by the Arizona board of regents pursuant to the authority conferred by § 15-725.02.

and A.R.S. § 38-781.03.B.1, governing the Plan, which provides:

All employees and officers of the state and instrumentalities of the state and all officers and employees of political subdivisions establishing a retirement plan administered by the board pursuant to the provisions of this article who as a result of state service or service for the political subdivision are included in agreements providing for their coverage under the federal old age and survivors insurance system, shall be subject to the provisions of this article and shall be participants of the plan, except that membership shall not be mandatory on the part of any employee eligible and electing to participate in the optional retirement programs established by the Arizona board of regents pursuant to the authority conferred by § 15-725.02.

The opinion expressly reserved the issue of whether a political subdivision may lawfully terminate its participation in either Social Security or the state retirements programs. Dr. Walker has raised these specific issues in the first two questions of his opinion request.

Both A.R.S. § 38-745.A and 38-781.03.B incorporate mandatory language that employees and officers of political subdivisions included through agreement in Social Security "shall be members of the retirement system". The mandatory nature of participation in state retirement is also evidenced by the specific statutory exemptions from mandatory coverage, i.e., members of retirement programs established by the Board of Regents (A.R.S. §§ 38-745.A, 38-781.03.B.1) and temporary employees (A.R.S. §§ 38-745.C and 38-781.03.B.3.). The question is, once having chosen to participate in Social Security, can a political subdivision withdraw from both Social Security and the state programs.^{1/}

[See last page for footnotes]

It may be argued that because the district's contract with the State for Social Security coverage expressly permits termination, a district could withdraw from Social Security and thereby terminate its participation in the State "System" or "Plan". However, there are additional statutory provisions that are applicable to school district employees. A.R.S. § 36-745.B provides:

B. All employees and officers of political subdivisions and instrumentalities of political subdivisions whose compensation is provided wholly or in part from state funds and who are declared to be state employees and officers by the legislature for retirement purposes shall, upon such legislative enactment, be subject to the provisions of this article and shall be members of the retirement system. . . . (Emphasis added.)^{2/}

Certificated teachers in most Arizona school districts are compensated partially by state funds and have been declared state employees for retirement purposes.^{3/} Therefore, wholly independent of the mandatory language in A.R.S. §§ 38-745.A and 38-781.03.B.1, certificated teachers are required to participate in state retirement programs.^{4/} As previously discussed in this opinion and Ariz.Att'yGen.Op. No. 78-17, participation in the state programs would require participation in Social Security.

We are left with a situation wherein part of the district's employees (certificated teachers) must be participants in state retirement programs and Social Security but non-certificated personnel are not under a similar state statutory mandate. The issue then becomes whether the district might terminate its participation in Social Security with respect only to its non-certificate personnel.

Applicable federal statutes allow termination with respect to any coverage group designated by the state. Coverage groups are defined in 42 U.S.C. § 418(b)(5), which provides:

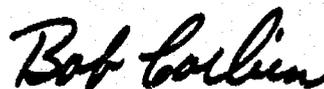
(5) The term "coverage group" means (A) employees of the State other than those engaged in performing service in connection with a proprietary function; (b) employees of a political subdivision of a State other than those engaged in performing service in connection with a proprietary function; (C) employees of a State engaged in performing service in connection with a single proprietary function; or (D) employees of a political subdivision of a State engaged in performing service in

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connection with a single proprietary function. If under the preceding sentence an employee would be included in more than one coverage group by reason of the fact that he performs service in connection with two or more proprietary functions or in connection with both a proprietary function and a nonproprietary function, he shall be included in only one such coverage group. The determination of the coverage group in which such employee shall be included shall be made in such manner as may be specified in the agreement. . . .

Certificated teachers were initially brought into the Social Security System on January 1, 1955, pursuant to Modification No. 33 to the Arizona State Social Security Agreement, which covered positions covered by the Arizona Teachers' Retirement System. However, the retirement system coverage group is not a permanent grouping. It is not a separate coverage group for report and termination purposes.^{5/} Therefore, both certificated and non-certificated persons employed by Prescott Unified School District No. 1 are part of the same coverage group, i.e., employees of a political subdivision performing governmental functions.^{6/} No provisions exist under federal statutes to terminate an agreement with only a portion of a "coverage group". Similarly, A.R.S. § 38-702 provides authority for the Governor to enter into an agreement with the federal social security administrator for the coverage of employees of a political subdivision. The statute does not authorize agreements for coverage of individuals. We are left with the conclusion that because some of the employees of Prescott Unified School District No. 1, i.e., teachers, must belong to Social Security and state retirement, that non-certificate employees must likewise remain in both Social Security and state retirement, since a coverage group cannot be partially terminated for purposes of Social Security.^{7/}

Sincerely,



BOB CORBIN
Attorney General

BC/mm

1. We note initially that federal statutes do not prohibit such a withdrawal but leave the issue in the control of the State. 42 U.S.C. § 418(g) (1) provides:

(g) (1) Upon giving at least two years' advance notice in writing to the Secretary, a State may terminate, effective at the end of a calendar year specified in the notice, its agreement with the Secretary either--

(A) in its entirety, but only if the agreement has been in effect from its effective date for not less than five years prior to the receipt of such notice; or

(B) with respect to any coverage group designated by the State, but only if the agreement has been in effect with respect to such coverage group for not less than five years prior to the receipt of such notice.

2. Likewise, A.R.S. § 38-781.03.B.2, governing the "Plan" provides:

2. All employees and officers of political subdivisions and instrumentalities of political subdivisions whose compensation is provided wholly or in part from state funds and who are declared to be state employees and officers by the legislature for retirement purposes shall, upon such legislative enactment, be subject to the provisions of this article and shall be participants in the plan. . . .
(Emphasis added.)

3. A.R.S. § 15-1462 provides:

All persons holding valid teachers' certificates issued by the state board of education, who on April 9, 1953, are regularly performing services as a teacher as that term is defined in § 15-1401, or are on official leave from such services and whose compensation, except for those on official leave, is derived in whole or in part from state school funds, are declared state employees subject to applicable laws pertaining to state employees, as well as laws pertaining to education. Persons entering employment herein described subsequent to April 9, 1953, shall have like status. The employer of persons herein described for the purposes of this article shall be the state board of education.

See also A.R.S. § 38-702, which authorizes the Governor to contract with the federal government for Social Security benefits. Subsection 4 provides that "[a]ll services which . . . are performed in the employ of the state by employees of the state shall be covered by the agreement."

4. We also note that A.R.S. § 38-781.03.A states that members of the "System" may elect coverage under the "Plan" and that such an election to participate shall be "irreversible". However, the legislative intent appears to be that a person electing the "Plan" cannot later reverse his decision and return to the "System". We do not believe that this provision is controlling on the issue of terminating participation in all state retirement programs.

5. See Handbook for State Social Security Administrators, § 211 (19).

6. The Social Security Administration regards teachers as employees of the school district which hires, fires and controls their job activities regardless of the source of funds for their salaries. Therefore, the provision in A.R.S. § 15-1462 declaring certificated teachers to be state employees does not place them in a separate coverage group. See 20 C.F.R. § 404.1004(c) (1)-(3).

7. We also note that should statutory changes be made in A.R.S. §§ 38-745.B and 38-781.03.B.2 to exclude certificated teachers from mandatory coverage in state retirement programs, the school district should be aware that 42 U.S.C. § 418(g)(3) provides:

If any agreement entered into under this section is terminated in its entirety, the Secretary and the State may not again enter into an agreement pursuant to this section. If any such agreement is terminated with respect to any coverage group, the Secretary and the State may not thereafter modify such agreement so as to again make the agreement applicable with respect to such coverage group.



D. Kirk Rich

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445-7450 EXT. 208

May 30, 1979

R79- 173

Dr. Kenneth E. Walker, Superintendent
Prescott Unified School District #1
P. O. Box 1231
Prescott, Arizona 86301

EDUCATION OPINION
ISSUE NO LATER THAN
7/31/79

Dear Dr. Walker:

You have asked this office for an opinion on the following questions:

1. Can your school district terminate the agreement for Old Age and Survivors Insurance (OASI) with the State Retirement System?
2. Is participation in the Arizona State Retirement System mandatory or optional?
3. Could an agreement be made so that those employees who want to continue with OASI and State Retirement may do so while others terminate?

Old Age and Survivors Insurance

The application of Prescott Elementary School District No. 1 for inclusion in OASI, a copy of which you supplied with your letter, states:

That the State Agency or the Applicant, in conformity with the rules and regulations of the State Agency and the Federal Security Administrator, shall have the right to terminate this application and agreement upon giving at least two years advance notice in writing to the other party, effective at the end of a calendar quarter specified in the notice, provided, however, that the Application and Agreement must have been in effect not less than five years prior to receipt of such notice, and provided further, that if the Federal Security Administrator should terminate the agreement between the Federal Security Administrator and the State for the administration by the State of Section 218 of the Social Security Act, as amended, the State shall have the right to terminate this application and agreement in accordance with the same rights and powers as the Federal Security Administrator exercises in terminating the agreement between him and the State.

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May 30, 1979
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The state statutes have no provisions covering the termination of either the contract between the school district and the state or between the state and the Federal Social Security Administration, except A.R.S. §38-704(6) which allows the state to terminate its agreement with a political subdivision in certain circumstances.

In order for the state to terminate the agreement with your school district, it must also be possible for it to exclude coverage of the school district employees from its agreement with the Federal Social Security Administration.

Termination of an agreement between the state agency and the Federal Social Security Administration is covered in 42 U.S.C.A. §418(g), which states:

1. Upon giving at least two years advance notice in writing to the Secretary, a State may terminate, effective at the end of a calendar year specified in the notice, its agreement with the Secretary ***
with respect to any coverage group designated by the State, but only if the agreement has been in effect with respect to such coverage group for not less than five years prior to the receipt of such notice.
2. If the Secretary, after reasonable notice and opportunity for hearing to a State with whom he has entered into an agreement pursuant to this section, finds that the State has failed or is no longer legally able to comply substantially with any provision of such agreement or of this section, he shall notify such State that the agreement will be terminated in its entirety, or with respect to any one or more coverage groups designated by him, at such time, not later than two years from the date of such notice, as he deems appropriate, unless prior to such time he finds that there no longer is any such failure or that the cause for such legal inability has been removed.
3. ...If any such agreement is terminated with respect to any coverage group, the Secretary and the State may not thereafter modify such agreement so as to again make the agreement applicable with respect to such coverage group.

The federal-state agreement, therefore, may only be terminated if the HEW Secretary finds that the state is not or cannot comply with the agreement or the statute. If the federal-state agreement is terminated with respect to any coverage group, the agreement may not later be modified to include that coverage group.

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It does not appear, however, that it would be possible to terminate the agreement with respect to certain individual employees while continuing the agreement with respect to others. A.R.S. §38-702 only authorizes the Governor to enter into a federal-state agreement with respect to "services", not with respect to individual employees. Similarly, under 42 U.S.C.A. §418(g)(1)(B), the agreement may be terminated only as to the entire coverage group, not as to individuals. 42 U.S.C.A. §418(d)(6)(C) allows for divisions of employees in certain states based on whether the employees desire coverage but this section does not apply to Arizona.

State Employees' Retirement System

Membership of school district employees in the State Employees' Retirement System is covered in A.R.S. §15-1463 which states:

***Upon establishment of coverage of such employees within the Federal Old Age and Survivors Insurance System, the State Board of Education, as an employing instrumentality of the State, together with its employees as herein designated, shall be subject to the State Employees' Retirement System.

It, therefore, appears that as long as the school district is included in an agreement providing for the school district employees' coverage under OASI, then the school district employees must also be members of the State Employees' Retirement System. On the other hand, if the school district terminated coverage under OASI, the school district would be disqualified from participating in the State Retirement System. Op. Atty. Gen. No. 78-17.

The statutes make no provision for an election by individual employees as to coverage under the State Retirement System. Also, as coverage under the State Retirement System is hinged to coverage under OASI and it is not possible to terminate the OASI coverage as to only certain employees, it would not be possible to make an agreement to continue some employees under the State Retirement System while others terminate.

If you have any questions concerning this matter, please contact me. Pursuant to A.R.S. §15-122(B), a copy of this letter is being sent to the Attorney General's Office.

Very truly yours,

Teri Dettmer

Teri Dettmer
Deputy County Attorney

TD:kb

cc: Mr. Dave Rich, Assistant Attorney General
Dr. Gene Hunt, Yavapai County Superintendent of Schools



Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert K. Corbin

September 12, 1979

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ARIZONA ATTORNEY GENERAL

Ms. Teri Dettmer
Deputy County Attorney
Yavapai County Attorney's Office
Yavapai County Courthouse
Prescott, Arizona 86301

Re: I79-233 (R79-239)

Dear Ms. Dettmer:

Pursuant to A.R.S. § 15-122(B), we decline to review your August 20, 1979 opinion addressed to the Beaver Creek School District, No. 26, relating to the power of a school board to accept the proceeds of a contract as a gift. We believe A.R.S. § 15-436(B), shielding the board from personal liability when relying upon the Attorney General's written opinion, applies equally to board action taken in reliance on the County Attorney's opinion which we have declined to review pursuant to A.R.S. § 15-122(B).

Sincerely,

A handwritten signature in cursive script that reads "Bob Corbin".

BOB CORBIN
Attorney General

BC/mm