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ARIZONA ATTORNEY GENERAL

March 17, 1980

The Honorable Pat Wright
Arizona House of Representatives
House Wing, State Capitol
Phoenix, AZ 85007

Re: I80-038 (R80-052)

Dear Representative Wright:

In your letter of February 29, 1980, you asked a series of questions, all of which relate to the issue of whether the Arizona Board of Regents (Board) is in compliance with Article XI, § 5 of the Arizona Constitution, so as to be properly constituted and properly exercising jurisdiction over Arizona State University (ASU) and Northern Arizona University (NAU).

At the outset we note that your questions are taken almost word for word from a legislative Council memorandum which discusses this subject. On the whole the memo accurately addresses the issues raised and should be of help to you as you deliberate over these difficult questions. We therefore find it unnecessary to address all your questions individually.¹

We believe that when they drafted Article 11, Section 5 of the Arizona Constitution the framers intended to establish separate governing boards for each state educational institution. However both the Constitution and state statutes are unclear on the point.

^{1/} We think that the State Superintendent of Public Instruction may be considered a proper member of the Board (questions 6 and 7) inasmuch as the Legislature has interpreted Article XI, § 4 to require the State Superintendent's membership on the Board (Art. XI, § 4, requires the State Superintendent to be a member of any board controlling "public instruction in any state institution"). See also A.R.S. § 15-721. With respect to question 11 regarding the mandatory inclusion of the State Superintendent on the Board, we again reiterate that this determination is for the legislature to make in light of applicable constitutional provisions.

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Both the Constitution and the pertinent statutes contain ambiguities which raise important doubts as to the validity of the current system.^{2/} The proper forum for addressing this problem is the Legislature, which has both the authority and the duty to clarify existing law.^{3/} Because of the importance of these questions we would urge the Legislature to consider this subject as soon as possible and refer the matter to the people for their action.

Question 10 asks whether the Legislature may delegate its authority to fix fees "and other legislative functions" to the Board. In Ariz.Att'yGen.Op. No. 73-25-L we said that the authority to fix fees may be delegated. We are not sure what is meant by your reference to "other legislative functions". However, we are enclosing a copy of Ariz.Att'y Gen.Op. No. 73-25-L, which sets forth the general standards with respect to delegation.

Since we think the appropriate forum for resolving inconsistencies which exist in the Constitution and between the Constitution and the statutes begins in the Legislature, we strongly suggest that pertinent provisions of the Constitution and the Arizona Revised Statutes be reviewed in order to clarify or to eliminate what may be perceived to be inconsistencies or inequities in existing law.^{4/}

Sincerely,


BOB CORBIN
Attorney General

BC/mm

^{2/} For example, Article XI, § 5 provides for regents of "the university" and "governing boards of other state educational institutions." At the time the Constitution was adopted, there was one university and two educational institutions. It is unclear whether the framers intended that one Board of Regents would govern universities or whether each institution must have its own board; we believe the better interpretation is the latter.

Footnotes Continued

3/ Courts will defer to legislative judgments unless a statute's invalidity can be established beyond a reasonable doubt. Roberts v. Spray, 71 Ariz. 60, 223 P.2d 808 (1950). See also General Electric Co. v. Telco Supply, 84 Ariz. 132, 325 P.2d 394 (1958); Welsh v. Arizona St. Bd. of Accountancy, 14 Ariz.App. 432, 484 P.2d 201 (1971).

4/ Following is an excerpt from an Arizona Legislative Council memorandum which discusses statutes which appear to be unclear or inconsistent with respect to treatment of the state universities. Without adopting the reasoning or conclusions of the author, we think the memo will be useful as a starting point for dealing with the problems which exist in the area.

The U of A continues to be the sole beneficiary entitled to funds for certain college and university purposes (see A.R.S. section 3-121 et seq., 15-742 et seq., 37-522 and 37-524). ASU and NAU must share funds disseminated pursuant to grants to normal schools and teachers colleges (see A.R.S. section 37-523).

* * *

The Legislature has not only selected the U of A to be the sole beneficiary entitled to funds for certain college and university purposes but has also bestowed other monetary benefits upon the U of A. Until July 1, 1975, A.R.S. section 41-123 (amended by Laws 1974, chapter 186, section 1) authorized the Secretary of State to distribute seventy-five copies of the statutes to the U of A and only one copy to ASU and one copy to NAU. The actual distribution, however, was eighty copies to the U of A, eight copies to ASU and 6 copies to NAU. The inequities and lack of fiscal responsibility which existed under section 41-123 were primary considerations in its amendment. An inequity which still exists pursuant to A.R.S. section 12-108 is the free (emphasis supplied) distribution by the Secretary of State to the U of A law librarian and law library of sixty copies of

Footnote 4 Continued

the Arizona reports (decisions of the Arizona Supreme Court.) ASU and NAU, if they desire copies, may purchase (emphasis supplied) them from the Secretary of State or the publisher.

* * *

As mentioned above, there are many statutory citations to the "university of Arizona", "the university" and the "board of regents of the university and state colleges of Arizona". To conform with the intent of the Legislature to clarify existing law or to eliminate inequities in the law, at least the following A.R.S. sections should be reviewed:

3-121	11-906	15-743	27-555
3-122	12-108	15-746	28-1524
3-123	15-701	15-76	32-921
3-125	15-702	15-771	35-149
3-126	15-702.01	15-1191	35-150
3-128	15-702.02	15-1195	36-1853
3-232	15-703	15-1401	37-482
3-276	15-704	24-904	37-522
3-344	15-724	27-150	37-523
3-402	15-727	27-151	38-481
3-619	15-728	27-152.01	38-751
9-921	15-729	27-153	40-360.01
9-957	15-742		

Title 15, Chapter 7 heading

Title 15, Chapter 7, article 1 heading

GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

June 11, 1973

DEPARTMENT OF LAW LETTER OPINION NO. 73-25-L (R-37)

REQUESTED BY: THE HONORABLE JAY C. STUCKEY
Arizona State Representative

QUESTION: May Arizona's Legislature lawfully delegate,
with appropriate standards, the authority to
determine amounts of "fees"?

ANSWER: Yes.

It is significant to note at the outset that contemplated in your request is the fact that, if the authority to determine amounts of fees were to be delegated to an administrative agency, the exercise of that authority would be required to be in accordance with Arizona's Administrative Procedures Act, A.R.S. §§ 41-1001, et seq.

It is assumed further, and such fact is emphasized, that the authority to be delegated would be in the nature of "fee-setting"--not "taxing". Arizona's Supreme Court reviewed the distinction at length in Stewart v. Verde River Irrigation and Power District, 49 Ariz. 531, 68 P.2d 329 (1937), and in its written opinion established the answers to the following two inquiries to be determinative:

1. Is the fee based upon the theory of paying the reasonable expenses to the state of furnishing the service, or is it fixed for the purpose of returning a surplus revenue to the state?

2. If the former be true, is the scale of payment in reasonable proportion to the services rendered?

In that regard, if the lawmaking authority to determine amounts of fees is delegated to an administrative agency, employment of language along the lines of the following is recommended:

The administrative agency shall establish a schedule of fees for [detailed here should be the matters for which fees will be charged], so that the total annual income derived from such fees will approximate reasonably the anticipated budget of the agency. The amount established in each of the various categories of fees in the schedule shall be in a reasonable proportion to the services rendered.

In State v. Arizona Mines Supply Co., 107 Ariz. 199, 484 P.2d 619 (1971), Arizona's Supreme Court affirmed its liberal position with respect to the extent to which the law-making power may be delegated to an administrative agency. Specifically, the Court stated as follows:

Under the doctrine of "separation of powers" the legislature alone possesses the lawmaking power and, while it cannot completely delegate this power to any other body, it may allow another body to fill in the details of legislation already enacted. . . .

"* * * We see, then, that while the Legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously do itself. Without this power legislation would become oppressive, and yet imbecile. . . ." Peters v. Frye, 71 Ariz. 30 at 35, 223 P.2d 176 at 179 (1950).

Delegation of "quasi-legislative" powers to administrative agencies, authorizing them to make rules and regulations, within proper standards fixed by the legislature, are normally sustained as valid, and, barring a total abdication of their legislative powers, there is no real constitutional prohibition against the delegation of a large measure of authority to an administrative agency for the administration of a statute enacted pursuant to a state's police power. . . . (Original emphasis.)
107 Ariz. at 205.

Approximately one year ago, the Supreme Court of Washington, in Barry and Barry, Inc., v. Department of Motor Vehicles, 81 Wash.2d 155, 500 P.2d 540 (1972), held proper a legislative delegation to an administrative agency of the authority to promulgate a schedule of maximum fees for employment agencies. The court held specifically:

. . . We hold that the delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power. . . . (Original emphasis.) 500 P.2d at 542, 543.

Arizona's Supreme Court announced substantially the same position in Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963). The Court held:

A statute does not unconstitutionally delegate legislative power if it contains reasonably definite standards which govern exercise of power and if procedural safeguards in nature of right of review are provided. 93 Ariz. at 275.

The following language appears in the Supreme Court of Washington's written opinion in Barry and Barry, Inc., supra, and is applicable especially to the subject herein:

We are convinced and have no hesitancy in saying that the strict requirement of exact legislative standards for the exercise of administrative authority has ceased to serve any valid purpose. In addition to lacking purpose, the doctrine in several respects impedes efficient government and conflicts with the public interest in administrative efficiency in a complex modern society.

. . . [R]equiring the legislature to lay down exact and precise standards for the exercise of administrative authority destroys needed flexibility. Normally, the legislature meets only biennially. It does not have the opportunity to adopt a fee schedule and then alter it periodically to meet the changing needs of employment agencies and the public as revealed by administrative experience. In addition, it seems probable that various economic factors would affect any meticulously prescribed legislative standards, and it is doubtful that such standards could be attuned to coincide with these factors on a biennial basis. (Emphasis added.) 500 P.2d at 543.

On the basis of the authorities cited hereinabove, it is our opinion that the lawmaking authority to determine amounts of fees may be delegated to an administrative agency, as long as:

1. Guidelines are enacted to assure that a "fee" and not a "tax" is to be imposed (the guidelines contemplated herein would constitute also "reasonable definite standards", one of the requirements for a lawful delegation); and
2. Procedural safeguards in the nature of a right of review are provided.

The Legislature may wish to consider, and it is so recommended, that provision for periodic (e.g., annual) review of fee schedules by an administrative agency be required.

Informally, and in connection with this matter, we have been asked whether or not our opinion would be different if the administrative agency involved were a "90-10" agency. In that regard, the following apprehension was expressed:

Since 10% of a "90-10" agency's revenue is paid into the general fund, (1) doesn't the "90-10" agency have to determine amounts of fees in excess of its anticipated expenses and, accordingly, (2) doesn't that result in a "tax" instead of a "fee"?

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For the following reason, our opinion would be no different even if the administrative agency involved were a "90-10" agency.

Certain costs are involved in the operation of an administrative agency which are not covered, or paid for, by the 90% statutory appropriation inherent in a "90-10" agency. Examples of costs not covered are the services rendered by the Attorney General and the Department of Finance. We are informed that it is understood generally that the 10% which is paid into the general fund is intended to cover costs like those mentioned above, the precise ascertainment of which is extremely difficult if not impossible.

Respectfully submitted,

Gary K. Nelson
by ES

GARY K. NELSON
The Attorney General

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