

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL November 5, 2003	No. I03-006 (R03-024) Re: Eligibility of Employees of Voluntary Associations to Participate in the Arizona State Retirement System
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To: Paul Matson
Director, Arizona State Retirement System

Questions Presented

Pursuant to Arizona Revised Statutes ("A.R.S.") § 38-727, employees of the State and political subdivisions of the State are eligible to participate as active members of the Arizona State Retirement System ("A.S.R.S."). In addition, A.R.S. § 38-743 permits ASRS members to enhance their retirement benefits by purchasing credit for prior employment with a State or political subdivision of a State.

You have asked whether voluntary associations comprised, in whole or in part, of political subdivisions or officers of political subdivisions are political subdivisions for the purposes of A.R.S. §§38-727 and -743.

Summary Answer

Associations that are neither created by state law nor designated as political subdivisions in the state's statutes or constitution are not political subdivisions under ASRS. Therefore, their employees cannot participate as active members of ASRS and prior employment with such an association is not eligible for public service purchase credit.

Background

Voluntary associations of governmental entities have existed in Arizona at least since 1937 when the Arizona League of Cities and Towns was formed. In *City of Glendale v. White*, 67 Ariz. 231, 194 P.2d 435 (1948), the Arizona Supreme Court recognized that municipalities may participate in such organizations. As you note in your opinion request, there are various organizations comprised of officers of a political subdivision and of political subdivisions and other entities.

Councils of governments, which are a type of voluntary association, have a unique history. In 1970, in response to federal enactments encouraging regional planning, Governor Jack Williams divided Arizona into six planning districts. Exec. Order No. 70-2 (July 8, 1970). Governor Williams and subsequent governors designated the associations in each of the six districts as the State's regional planning agencies for issues such as regional transportation and the environment. *MAG, History of MAG*, available at <http://www.mag.maricopa.gov/display.cms>. These planning agencies are commonly known as "councils of governments," or simply as "COGs."

Although some Arizona statutes have recognized the existence of COGs and regional planning agencies, *see, e.g.*, A.R.S. §§ 40-1152 and 48-5302, no constitutional or statutory provision expressly authorizes their creation. Rather, the members typically form non-profit corporations

under the general corporation laws of the state. Examples include the Maricopa Association of Governments ("MAG") (a non-profit corporation comprised of Maricopa County, twenty-seven municipalities, two Indian tribes and the Citizen's Regional Transportation Planning Authority) and the Southeastern Arizona Governments Organization ("SEAGO") (a non-profit corporation comprised of four counties, fourteen municipalities and five board members who represent the private sector.) See *MAG* at <http://mag.maricopa.gov/display.cms>; *SEAGO* at <http://www.seago.org>. MAG's website describes COGs as "public organizations," but the Pima Association of Governments ("PAG") asserts on its website that "PAG is not a government agency," and SEAGO's website states that it "is technically not a unit of government" and is "a private non-profit corporation." *MAG*, available at: <http://www.mag.maricopa.gov/about.cms>; *PAG*, *About Pima Ass'n of Gov'ts*, at <http://www.pagnet.org/AboutPAG/>; *SEAGO Background*, at: <http://www.SEAGO.org/backgrnd.htm>.

Analysis

When analyzing whether an entity is a political subdivision, Arizona courts have examined the entity's governmental attributes or looked to the enabling legislation to see if the Legislature expressly declared the entity to be a political subdivision. In *McLanahan v. Cochise College*, 25 Ariz. App. 13, 540 P.2d 744, (1975) the court of appeals applied the following test to determine whether a community college district was a political subdivision:

The attributes which are generally regarded as distinctive of a political subdivision are that it exists for the purpose of discharging some function of local government, that it has a prescribed area and that it possesses authority for subordinate self-government by officers selected by it.

Id. at 16, 540 P.2d at 747. After analyzing the relevant statutes, the court concluded that a community college district was a political subdivision.

In *Salt River Pima-Maricopa Indian Community. v. State*, 200 Ariz. 108, 113, 23 P. 3d 103, 108 (App. 2001), the court did not apply the *McLanahan* test to analyze whether charter schools were political subdivisions. Instead, the court determined that charter schools were not political subdivisions because nothing in the enabling statutes so described them. In contrast, the statutes specifically designated public school districts as political subdivisions. *Id.*, see also *Flood Control Dist. of Maricopa County v. Conlin*, 148 Ariz. 66, 70, 712 P.2d 979, 983 (App. 1985) (noting that statutes provided that flood control district was a political subdivision of the state).

The analysis of whether an entity is a political subdivision typically focuses on the relevant statutory scheme. See, e.g., *McLanahan*, 25 Ariz. App. at 16, 540 P.2d at 757, *Flood Control Dist. of Maricopa County*, 148 Ariz. at 70, 712 P.2d at 983; Ariz. Att'y Gen. Op. I89-063 (concluding that a regional public transportation authority is a political subdivision). No statute, however, creates the voluntary associations of public officers or public entities that are at issue here. The fact that these entities are not created by statute, and that no statute establishes their powers and duties indicates that they are not political subdivisions of the state.

These associations fall short of all three prongs of the *McLanahan* test. First, they do not "[exist] for the purpose of discharging some functions of local government." Their members may have the responsibility to discharge functions of local government, but the voluntary association itself does not. Second, they have no area of responsibility defined by the statutes or the constitution. They also do not possess "authority for subordinate self-government." They have officers, corporate boards, and articles of incorporation, but they are fundamentally controlled by their members. As PAG's website explains: "PAG is not a governmental agency and thus the

responsibility for implementing PAG plans or programs ultimately rests with its member jurisdictions."PAG-Member Jurisdictions, <http://www.pagnet.org/aboutPAG/MembersOverview.htm>.

A Second Circuit case concerning COGs is instructive. *See Education/Instruction, Inc. v. Moore*, 503 F.2d 1187, 1189 (2d Cir. 1974). The court concluded that the one-person, one-vote principle did not apply to COGs because COGs are "essentially advisory and non-governmental in both purpose and function." *Id.* In reaching its conclusion, the court analyzed the state laws establishing COGs and setting forth their responsibilities.

This is consistent with the analysis of this Office in 1975 concerning the nature of COGs. Attorney General Opinion No. R75-244 described COGs as "either voluntary unincorporated associations of local units of government or incorporated . . . non-profit associations." The Opinion observed that no constitutional or legislative authority permits a COG "to exercise the powers of a governmental agency." A COG "cannot tax, pass laws, govern inhabitants within its region, or exercise the powers of a sovereign, but can only carry out the function of providing planning input on the use of monies pertaining to federal financed programs." For these reasons, COGs were not governmental agencies for the purposes of A.R.S. § 11-951. *Id.*

Similarly, in 1990, this Office advised that the Arizona Interscholastic Association was not a political subdivision eligible to participate in ASRS. Ariz. Att'y Gen. Op. No. I90-071. In reaching this conclusion, the Opinion noted that this Office had previously concluded that the AIA, "is a private organization which is not a department or political subdivision of the State." *Id.* (citing Ariz. Att'y Gen. Ops. I89-010, I84-084). Although the AIA is a private organization, most of its members are school districts, which are political subdivisions of the State. Thus, neither the case law nor previous Attorney General Opinions support the conclusion that an organization comprised

primarily, or even exclusively, of political subdivisions is itself a political subdivision unless designated as such by statute.¹ *See also Weston County Hosp. Joint Powers Bd. v. Westates Constr. Co.*, 841 P.2d 841, 846 (Wyo. 1992) (rejecting argument that entity that is the aggregate of political subdivisions must itself be recognized as a political subdivision).

Conclusion

Voluntary associations of governments such as COGs are not "political subdivisions" for the purposes of the Arizona State Retirement System. They are not recognized by statute as political subdivisions. They are not created by statute; their duties and responsibilities are not prescribed by statute; and they lack the attributes of political subdivisions under state law. Therefore, absent a change in law, employment with a COG or other such voluntary association does not qualify a person for active ASRS membership and does not qualify as prior government service for the purpose of purchasing service credit in ASRS.

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¹Moreover, political subdivisions of the State are not the only participants in regional planning in Arizona. Regional planning in this State includes Indian tribes, which are sovereign entities and not political subdivisions of the State, but are nonetheless participants in regional planning issues and COG members.