



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>December 7, 2017</p>	<p>No. I17-007 (R17-013)</p> <p>Re: The Legislature's Authority to Define the Powers and Duties of the Arizona Board of Regents</p>
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To: Mark Finchem
State Representative, District 11
Arizona House of Representatives

Vince Leach
State Representative, District 11
Arizona House of Representatives

Questions Presented

1. What are the limits, if any, on the Legislature's authority to further define in statute the powers and duties of the Arizona Board of Regents?
2. What is the extent of the liability—personal, several, or otherwise—that the Arizona Board of Regents or its members would be subject to for actions of the Board that violate enforceable state or federal laws?

Summary Answer

1. The ability of the Legislature to define in statute the powers and duties of the Board of Regents is unrestricted unless an express or implied constitutional limitation exists. The Arizona Constitution contains two provisions specifically related to the Arizona Board of Regents. It identifies where the general conduct and supervision of the public school system must be vested, Ariz. Const. art. XI, § 2, and sets forth requirements for appointments to governing boards of state educational institutions (including the Board of Regents), *id.* § 5.

Courts have held that the Legislature cannot transfer administration of university and board personnel to bodies not provided for under Article XI, Section 2 of the Arizona Constitution. Except for violations of this section, Arizona courts have repeatedly recognized the authority of the Legislature to expand, restrict, and resolve policy disputes concerning the authority of the Board of Regents.

2. The Attorney General declines to answer this question. This question could implicate ongoing litigation between the Arizona Attorney General and the Board of Regents. *See* Complaint for Declaratory, Injunctive, and Special Action Relief, Case No. CV2017-012115, Maricopa County Superior Court (Sep. 8, 2017). Additionally, in other matters, the Attorney General’s Office could be asked to defend risk management cases involving the Board of Regents. *See* A.R.S. §41-621 *et seq.*

Background

The Arizona Constitution charges the Legislature with providing “for the establishment and maintenance of a general and uniform public school system,” including universities. Ariz. Const. art. XI, § 1(A)(6). The Legislature also is constitutionally authorized to establish governing boards vested with “[t]he general conduct and supervision of public schools.” *Id.* § 2. Through these provisions, the Arizona Constitution makes state institutions of higher learning, including universities, “objects for the special care and consideration of the Legislature.” *Bd. of Regents of Univ. of Ariz. v. Sullivan*, 45 Ariz. 245, 256 (1935).

The Legislature has exercised this prerogative since its territorial days. In 1885, the Thirteenth Arizona Territorial Legislature authorized the establishment of the “University of Arizona” in Tucson, Arizona. Laws of the Territory of Arizona Thirteenth Legislative Assembly 272 (1885) (Act No. 99 § 1). The same body vested the government of the University of Arizona “in a Board of Regents.” *Id.* at 273 (Act No. 99 § 3).

The Thirteenth Arizona Territorial Legislature also authorized the establishment of a Territorial Normal School in Tempe, Arizona. *Id.* at 247 (Act. No. 94 § 1). The government of this school was placed under the direction of a “Board of Education,” later named the “Board of Education of the Normal School of Arizona.” *Id.* at 248 (Act. No. 94 § 1); Acts, Resolutions and Memorials passed by the Eighteenth Legislative Assembly of the Territory of Arizona 75 (1895) (Act No. § 4) (naming the board of education).

A few years later, in 1899, the Territorial Legislature authorized a normal school in Flagstaff, Arizona, called the “Northern Arizona Normal School.” Session Laws of the Twentieth Legislative Assembly of the Territory of Arizona 30 (1899) (Act. No. 24 § 1). This school was also placed under the control of the Board of Education of the Normal School of Arizona. *Id.* (Act No. 24 § 5).

In 1901, the Territorial Legislature divided governance and control of the normal schools in Tempe and Flagstaff into two separate boards of education. The Revised Statutes of Arizona Territory 919, § 3671 (1901). After Arizona became a State, the State Legislature in 1925

allowed both the Tempe and Flagstaff schools to grant bachelor degrees. 1925 Ariz. Sess. Laws 54 (Ch. 23, § 4).

In 1945, the Legislature transferred the “jurisdiction, authority, and duties” of the board of regents of the University of Arizona, and the governing boards of education of the Tempe and Flagstaff colleges to “the board of regents of the university and state colleges of Arizona,” thereby uniting the governing boards of the three schools for the first time. 1945 Ariz. Sess. Laws 196 (Ch. 80, H.B. No. 136, § 4).

The colleges in Tempe and Flagstaff were later renamed, respectively, Arizona State University (in 1958) and Northern Arizona University (in 1966). The name of the governing board with “jurisdiction and control over” the three state universities was also changed to the Arizona Board of Regents. *See* Ariz. Rev. Stat. § 15-1625(A). The Legislature has long defined the powers and duties of the Arizona Board of Regents in statute. *See, e.g., id.* §§ 15-1625 to -1626.

Analysis

Although the Arizona Constitution makes the State’s universities “objects for the special care and consideration of the Legislature,” *Sullivan*, 45 Ariz. at 256, the Legislature does not need to trace its authority to a particular constitutional provision in order to enact legislation about State universities. It is well-established that “[t]he Constitution of Arizona is not, as is the Constitution of the United States, to be considered a grant of power or enabling act to the Legislature, but rather is a limitation upon the power of that body.” *Earhart v. Frohmler*, 65 Ariz. 221, 224 (1947). This is because:

[t]he Legislature is vested with the whole of the legislative power of the state, and may deal with any subject within the scope of civil government unless it is restrained by the provisions of the Constitution, and the presumption that the Legislature is acting within the Constitution holds good until it is made to appear in what particular it is violating constitutional limitations.

Id. (quotes omitted); *Sullivan*, 45 Ariz. at 255 (same). Of course, the legislative power may be restricted through an express constitutional provision. *E.g.*, Ariz. Const. art. II, § 6 (freedom of speech and press), and art. III (separation of powers). A limitation on legislative power also may “be implied by the text of the constitution or its structure taken as a whole.” *Citizens Clean Elections Comm’n v. Myers*, 196 Ariz. 516, 521, ¶ 14 (2000). In determining whether an implied prohibition exists, courts consider “the constitution itself and the effect that particular legislation has on the constitution.” *State ex rel. Montgomery v. Mathis*, 231 Ariz. 103, 113, ¶ 34 (Ct. App. 2012). In the absence of an express or implied constitutional limitation, “the legislature of this state may in the exercise of the sovereign powers of the state, enact any law its discretion may dictate.” *E.g., Roberts v. Spray*, 71 Ariz. 60, 69 (1950).

The Arizona Constitution contains two provisions directly related to the Arizona Board of Regents. First, Article XI, Section 2 of the Arizona Constitution identifies where “the

government and supervision of the public school system” must be vested. This section provides that “[t]he general conduct and supervision of the public school system shall be vested in a state board of education, a state superintendent of public instruction, county school superintendents, and such governing boards for the state institutions as may be provided by law.” Second, Article XI, Section 5 of the Constitution specifies how state educational boards are appointed. This section provides: “The regents of the university, and the governing boards of other state educational institutions, shall be appointed by the governor with the consent of the senate in the manner prescribed by law, except that the governor shall be, ex-officio, a member of the board of regents of the university.”

While neither provision expressly limits the Legislature’s authority to define the powers and duties of the Board of Regents, courts have held that the Legislature is prohibited from transferring “the general conduct and supervision” of the State’s universities to bodies outside the scope of Article XI, Section 2. In *Hernandez v. Frohmler*, 68 Ariz. 242, 251 (1949), the Arizona Supreme Court held that Article XI, Section 2 prohibited voters, through an initiative, from transferring the supervision of all employees at state universities, other than teachers, from the board of regents to a civil service board. The court had “no hesitation in holding” that this enactment was contrary to Article XI, Section 2, which places “[t]he general conduct and supervision” of educational institutions in special governing boards. *Hernandez*, 68 Ariz. at 251. The court reasoned: “To permit legislation to throw the employment and supervision of all personnel under the civil service law, except the teaching staff, would necessarily deprive the board of regents of a large portion of its constitutional supervisory power.” *Id.*

The court of appeals has similarly held that the Legislature does not have authority to include staff of the Board of Regents within the state’s merit system, declaring that Article XI, Section 2 “provides the board with plenary power over its employees.” *Arizona Bd. of Regents v. State Dept. of Admin.*, 151 Ariz. 450, 451 (Ct. App. 1986); *see also* Ariz. Att’y Gen. Op. I89-100 (The State Board of Directors for Community Colleges “has plenary power over its employees pursuant to Article XI, § 2 of the Arizona Constitution,” including “authority to provide employment benefits through reduced community college district tuition and fees to its employees and the employees’ spouses and dependents.”).

While educational governing boards have plenary power over personnel administration, the Arizona Supreme Court has long rejected the view that the Board of Regents is “an autonomous body, freed of all [legislative] shackles.” *Bd. of Regents of Univ. & State Colleges v. Frohmler*, 69 Ariz. 50, 60 (1949). From its territorial days, the Supreme Court of the Territory of Arizona announced that “[t]he university is a public institution, placed under the control of the board of regents, with full powers to manage the same, *subject only to the will of the legislature.*” *Devol v. Bd. of Regents of Univ. of Ariz.*, 6 Ariz. 259, 261 (1899) (emphasis added).

After Arizona became a State, the Arizona Supreme Court again affirmed that the Arizona Constitution only “directs the establishment of [a university], leaving the legislature free in determining as to particulars.” *Sullivan*, 45 Ariz. at 256. In *Sullivan*, for example, the Arizona Supreme Court affirmed the Legislature’s ability to expand the powers of the Board of

Regents. *Id.* at 255. It held that the Legislature could confer on the Board of Regents certain corporate powers and privileges, such as borrowing money and accepting federal grants. *Id.*

The Arizona Supreme Court also has affirmed the authority of the Legislature to reduce the powers of the Board of Regents. In *State v. Miser*, 50 Ariz. 244, 252 (1937), the court explained that there was no question that the Legislature had power to make minimum wage laws applicable to employees of the Board of Regents, and “could in fact, have placed any restriction it saw fit upon the expenditure of the funds appropriated to the university.” The court reasoned that “[i]t was just as much within the province of the legislature to lessen the power of the board of regents” through a minimum wage law as it was to add to the powers of the Board of Regents. *Id.* at 255. The Arizona Supreme Court also has rejected the argument that the Board of Regents’ constitutional powers preclude legislation permitting the state auditor to disapprove claims from payments arising from university contracts. *Frohmler*, 69 Ariz. at 59-60. The Attorney General has likewise opined that “[t]he constitutional powers of the [Board of Regents] are not so broad as to allow universities to enter contracts or expend public monies without regard to statutory limits imposed by the Legislature.” Ariz. Atty. Gen. Op. I99-015. As such, the Legislature could require the Board of Regents to comply with procurement code requirements. *Id.* (“[T]he Legislature acted within its authority by directing in A.R.S. § 41-2501(E) that the [Board of Regents] adopt procurement rules that are ‘substantially equivalent’ to the procurement code.”).

Finally, the Arizona Supreme Court has recognized the ultimate authority of the Legislature to settle policy disputes about the scope of the Board of Regents’ authority. In *Board of Regents of the Universities and State College of Arizona v. City of Tempe*, 88 Ariz. 299, 312, (1960), the court held that the City of Tempe could not apply its building codes and regulations to Arizona State University. Yet, in holding that the Board of Regents’ responsibilities must be exercised free of control or supervision by municipalities, the court also acknowledged that “the ultimate power to resolve this controversy rests in the Legislature which concededly may assign exclusive jurisdiction to the Board or to the City.” *Id.* at 305; *see also id.* at 311 (“The ultimate responsibility for higher education is reposed by our Constitution in the State. The legislature has empowered the Board of Regents to fulfill that responsibility *subject only to the supervision of the legislature and the governor.*”) (emphasis added). Similarly, in *Kromko v. Arizona Bd. of Regents*—which concerned “whether the 2003–04 tuition increase [ran] afoul of the ‘as nearly free as possible’ provision”—the Arizona Supreme Court emphasized that its decision did not “mean that the Board is free from constitutional constraints in setting tuition.” 216 Ariz. 190, 195, ¶¶ 23, 25 (2007). Instead, the court recognized that the Legislature “is free to enact a different policy or to set tuition itself” if it believed that tuition should be lower. *Id.* ¶ 23.

Thus, the Arizona Constitution (1) identifies where the general conduct and supervision of the public school system must be vested, Ariz. Const. art. XI, § 2, and (2) sets forth requirements for appointments to governing boards of state educational institutions, *id.* § 5. Except when legislation has violated the Constitution—by transferring authority for the general

conduct and supervision of state universities in violation of Ariz. Const. art. XI, § 2—Arizona courts have repeatedly recognized the authority of the Legislature to expand, restrict, and resolve policy disputes concerning the authority of the Board of Regents.

Conclusion

The authority of the Legislature to define the powers and duties of the Board of Regents is unconstrained unless expressly or impliedly restricted by the Arizona Constitution. Except when legislation has violated Article XI, Section 2, Arizona courts have repeatedly reaffirmed the Legislature's authority to determine the particulars of the Board of Regents' powers and duties.

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