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Opinion 63-100-L

R-382

October 15, 1963

REQUESTED BY: G.O.HATHAWAY, Superintendent
Arizona Highway Patrol

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTION: Where, under the authority of the Merit System Rules, a member of the Arizona Highway Patrol was suspended without pay and subsequently returned to his position, can salary be paid to him from the current budget for the time the officer was suspended, even though the officer was not at work due to the suspension?

ANSWER: See body of opinion.

The rules of the Merit System Council are established pursuant to A.R.S. §28-235. This section sets out the duties of the Merit System Council as follows:

"(d) Provide a plan for fair and impartial selection, appointment, retention and separation or removal from service by resignation, retirement or dismissal of all classified employees."

The rules of the Council are published under the title of: "Laws and Rules Governing Officers and Employees of the Arizona Highway Patrol and Merit System Council Administrative Procedure." (cited herein as "Rules") These "Rules" give the Superintendent, or any person authorized by him, the power to take "punitive action" which means:

" . . . dismissal from service, demotion to a lower class, rank or grade, suspension from duty without pay, deduction from vacation credit in lieu of suspension from duty without pay, withholding of merit salary adjustment, reduction to a lower salary step within the range, or other disciplinary action."
"Rules §8.3.01" (Emphasis supplied)

The "Rules" state the cause for "punitive action", prescribe the procedure for filing such action and set out the rights of the officer against whom such action is taken. "Rules" §§8.3.03 and 8.3.09. In essence, the officer has a right to written notice, time to answer the charges and a hearing to determine the validity of such charges. Under "Rules" §8.3.09, the Council "shall" hold a hearing if an answer is filed by the officer, except when the punitive action was "suspension without pay." The mere act of suspension from duty without pay is a punitive action. "Rules" §8.3.01. In the case of suspended officer, the punitive "action" is the act of the Superintendent in suspending the officer from an active position with the patrol. Suspension from service differs from removal only in degree. If the suspended officer demands a hearing and the suspension is revoked, he may receive his salary for the time the "punitive action" was "improperly in effect."

" Section 8.3.12 Salary when punitive action
revoked

Whenever a punitive action is revoked and the appellant is ordered returned to his former position, the Superintendent shall direct the payment of salary to the appellant for such period of time as the punitive action was improperly in effect. An appellant alleging improper punitive action under these rules by seeking re-instatement after punitive action has been taken shall conform to the standards and regulations of conduct and action as prescribed by these rules and Patrol policies for applicants and employees in similar classifications until final disposition of his case made. Violations of such standards, regulations and policies of conduct and action may be separate cause for punitive action and shall result in forfeiture of all salary claims." (Emphasis supplied)

Under "Rule" §8.3.12, the payment of salary for the period of the suspension can only be directed, if the revocation of the suspension was of a punitive action which was improperly in effect. Where a criminal charge has been filed against an officer, the subsequent suspension is not improperly in effect. The mere fact that

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he is found not guilty of the criminal charge does not make the suspension improper. The suspension was proper because of the requirement that an officer of the law be above reproach to effectuate his duties. The fact that the charge was dismissed shows only that the criminal charge was improper.

If the Council, at a hearing finds the suspension was improperly in effect and orders the appellant returned to his former position, and the Superintendent directs the payment of salary for the period while the action was in effect, the salary may yet be unpayable from the current budget.

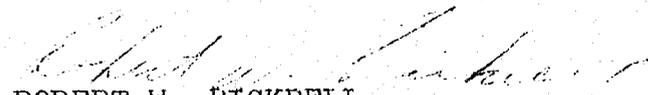
A.R.S. §35-181.01 as amended, states that a claim against the state must be presented "within one year after the claim accrues, and not afterward," and also "only from the appropriation made therefor."

A.R.S. §35-190(c) states:

"c. After expiration of such period of one month from the beginning of each fiscal year, all balances of appropriations for the prior fiscal year shall lapse and no further payments shall be made on any claim on account of expenditures of such prior fiscal year."

There are exceptions to this "lapsing appropriation" statute but the appropriations for personal services for the Highway Patrol do not come within the exception. Ch. 102, Sub.Div. 79, Arizona Highway Department, Highway Patrol, pp. 238-239, L.'63.

In conclusion, it is our opinion that the payment for back salary to a reinstated employee of the Highway Patrol could only be made if the suspension was found to be improper; if the procedural rules of the merit council were complied with by both the Superintendent and the employees and finally, if the payment was for a period of time within the present appropriation period.


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The Attorney General

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