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OPINION NO. 63-40
R-385
November 19, 1963

REQUESTED BY: JUSTIN HERMAN, Director of Highways
Arizona Highway Commission

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTIONS:

1. May the Merit System Council pursuant to the terms of A.R.S. §38-431, et seq., hold executive sessions which may not be open to the public in conducting hearings relative to highway employees' grievances in connection with either their dismissals or demotions or other grievances ?
2. If question no. 1 may be answered in the affirmative, may the Merit System Council nevertheless keep its recommendations to the Highway Commission confidential between the point in time it makes a recommendation and the time of the next regular Commission meeting ?

ANSWERS:

1. Yes.
2. Yes.

A.R.S. §38-431.01 provides that all official meetings at which any legal action is taken by governing bodies shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.

A.R.S. §38-431.02 provides that official meetings of governing bodies may be held in executive session providing:

" (1) That such session shall not be used to defeat the purposes of the provisions of this article.

(2) That no ordinance, order, rule, resolution, regulation, contract, appointment or other official action shall be finally approved at such executive session.

(3) That such executive sessions may be called only by a majority vote of the members of such bodies or agencies."

Subsection (B), of A.R.S. §38-431.02 further provides that executive session may be held by "governing bodies considering information regarding employment or dismissal of an employee." (Emphasis supplied)

The Merit System of the Arizona Highway Department was established generally pursuant to the authority vested by the Legislature in the Arizona State Highway Commission under A.R.S. §§ 18-102 (A) and 18-106, subsections (10) and (15). A.R.S. § 18-102 (A) provides that "The highways of the state shall be administered by the highway department. Control of the department is vested in the highway commission." A.R.S. § 18-106 provides that among the powers and duties of the commission are to ". . . (10) Prescribe the qualifications of employees of the department, and inquire into their official conduct. . . (15) Exercise such powers and duties necessary to carry out fully the provisions of this section, and in general exercise powers and duties which relate to adopting and carrying out policies of the department and control of its financial affairs." Thus, the Highway Commission, through its administrative rule-making powers has established its own internal merit system in order to effectuate the mandate contained in the above-referenced statutes. Regulation No. 15 relating to appeals to the Merit System Council concerning grievances of department employees does not specify a time within which the Merit System Council must report its findings and recommendations to the Highway Commission. However, through custom and practice a system has developed whereby the Merit System Council drafts a written report and recommendation which is generally presented for consideration by the Highway Commission at its next regularly scheduled meeting following the Merit Council appeal. Regulation No. 1 provides that "the council will also serve as a grievance committee for employees with problems concerning promotions, performance ratings and other grievances which cannot be settled in the normal manner . . ." And, further, that "a complete transcript of the minutes of each council meeting, together with the council's recommendations, will be made available to the Director of Highways and/or the Highway Commission for review. The findings and

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recommendations of the Merit System Council are advisory to the Director of Highways and/or the Highway Commission, whose decision is final."

It is thus apparent that, pursuant to the language contained in A.R.S. §28-431.01, the Merit System Council is not in any true sense a "governing body" which performs or conducts or takes any so-called "legal action." Therefore, construing the statute in its clearest meaning, the Legislature could not have intended in the first instance to require hearings conducted by the Merit System Council, which was established as an administrative arm of the Highway Commission, to come within the purview of A.R.S. §§ 38-431.01, et seq. This opinion is further buttressed by A.R.S. §38-431.02 more specifically when it is applied to the employment or dismissal or disciplining of department employees. This statute provides that this article shall not be construed to prevent agencies from considering information regarding employment or dismissal of employees in executive session.

Therefore, since the Merit System Council of the Arizona Highway Department is not a "governing body" and is not governed by the terms of A.R.S. §§ 38-431, et seq., and since it was established exclusively to consider "information regarding the employment or dismissal" of employees, it may hold executive sessions which are not open to the general public. It also therefore follows that its recommendations to the Director of Highways or to the Commission may remain confidential until the Commission, which is the "governing body," meets to act upon such recommendations.


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