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Robert H. Corbin

June 5, 1979

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ARIZONA ATTORNEY GENERAL

William P. Reilly, Acting Director
Department of Administration
State Capitol
Phoenix, Arizona 85007

Re: I79-147 (R78-308)

Dear Mr. Reilly:

By your letter of October 24, 1978, you have posed the following question:

Are employees of the Fund Manager of the Public Safety Personnel Retirement System subject to the Arizona State Employees Merit System?

The answer to your question is yes.

The Arizona Merit System, established by Laws 1968, Ch. 200, § 1 and re-enacted in Laws 1972, Ch. 141, § 4, and appearing as A.R.S. §§ 41-671 - 785, was enacted to eliminate the spoils system in state employment by providing merit system selection for state employees. Under the Merit System, the Arizona State Personnel Board has been delegated the responsibility for providing rules for, among other things, classifying state service positions, testing or evaluation of applicants, and establishment of eligibility tests for appointment of persons to state service positions and promotions from one position to another in state service. (See A.R.S. § 41-783).

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The Legislature, in A.R.S. § 41-762, has defined those positions which are state service positions subject to the merit system as follows:

In this article and article 6, unless the context otherwise requires:

1. 'Employee' means a person holding a position in state service.

2. 'State service' means all offices and positions of employment except offices and positions exempted by the provisions of this article.

Those positions which are exempted from the Merit System are set forth in A.R.S. § 41-771:

The provisions of this article and article 6 do not apply to:

1. Elected state officers.

2. State officers and members of boards and commissions appointed by the legislature or the governor, the employees of the governor's office, the employees of the Arizona legislative council, and the employees of the supreme court and the court of appeals.

3. State officers and employees appointed or employed by the legislature or either house thereof.

4. Officers or employees of state universities and colleges, personnel of the Arizona state school for the deaf and blind, or the public school system.

5. Patients or inmates employed in state institutions.

6. Officers and enlisted men of the national guard of Arizona.

7. The single administrative or executive head of each state department or agency.

8. Positions which the personnel administration division determines are essentially for rehabilitation purposes.

9. Temporary or part-time personnel as determined by the personnel administration division.
10. No more than two assistants who serve in the office of an elected state officer.
11. One administrative assistant who serves a board or commission elected to head a state agency, department or division, and one assistant for each elected member of such board or commission.
12. Any other position exempted by law.

The authority of the Fund Manager of the Public Safety Personnel Retirement System to organize and function is created by A.R.S. § 38-848. While no specific authority for the Fund Manager to hire employees is set forth in A.R.S. § 38-848 except by inference in A.R.S. § 38-848 (N), historically, it has been considered that an agency, board, or department has the inherent authority to hire employees to perform its functions, conditioned, of course, on the availability of appropriations or other funds to pay for such services.

The administrator for the Fund Manager suggests that because under A.R.S. § 38-848(I), administration of the fund system of accounts and records can be accomplished through the employment of a state department or other body, ostensibly even a private agency, and that employees of a private agency would not be state employees. Therefore, it is asserted that hiring employees to keep accounts directly rather than through a private agency does not make those employees state service employees. The administrator further suggests because the employees are paid for from the fund itself, which includes contributions from all members of the system, including state, city and county law enforcement personnel, that therefore the employees of the fund should not be considered state service employees within the meaning of the state merit system.

We disagree with this reasoning. The questions of what constitutes a public office has been reviewed by the courts on several occasions. In order that a position be determined to a public office there must be a specific position created by law which has certain definite duties imposed by law on the incumbent and such duties must involve the exercise of some portion of the sovereign power. Windsor v. Hunt, 243 P. 407, 29 Ariz. 504 (1926); Tomaris v. State, 224 P.2d 209, 71 Ariz. 146 (1951). The position of Fund Manager is one which has been created by law under A.R.S. § 38-848(A). Definite duties have been imposed upon the Fund Manager as set forth in A.R.S. §

38-848(d). The investment of the funds of Public Employees Retirement System is an exercise of the sovereign authority for the reason that retirement benefits are a part of the Public Safety Employees Compensation package. Yeazell v. Capins, 402 P.2d 541, 98 Ariz. 109 (1965). Therefore, it is hereby concluded that the Fund Manager is a state agency.

The next issue which must be resolved is whether public employees of the fund manager are subject to the State Merit System Laws. The scope of a merit system and its application or operation in any particular instance must be determined from the law which establishes it. Murray v. Civ. Serv. Comm'n, 22 Cal.App.2d 304, 70 P.2d 696 (1937). A.R.S. § 41-762 includes under the merit system all offices and positions in state government except specifically exempted offices and positions. Neither the provisions of A.R.S. § 41-771 set forth above, nor the statute which creates the Fund Manager, specifically exempts the Fund Manager employees from the merit system.

In view of the fact that we have concluded that the Fund Manager is a state agency, the employees of the Fund Manager are subject to the state merit system established under A.R.S. § 41-762, et seq.

In The Law of Civil Service, H. Eliot Kaplan, 1958, p. 76, it is recognized that:

". . . [t]he growing trend toward creating public authorities to perform the normal functions of government has posed the problem of their status in application of the civil service laws. It has been held that employees of a public authority, unless expressly excepted from the provisions of the civil service law, are subject to the jurisdiction of the personnel agency the same as are other employees in the regular agencies of government. This principle is applicable to both state and local public authorities."

The Fund Manager, a creature of the Legislature, has been delegated the responsibility to perform a normal function of government, namely, the investment of funds of government employees under the public safety employees retirement system. Even if the fund administrator is correct, that the fund manager is not a state department or agency, nevertheless the Fund Manager may be defined as comparable to or in the nature of a "public authority." As such its employees must be considered to be subject to merit system laws. The fact that the Legislature has included city and county Public Safety Employees Retirement funds within the Fund Manager's responsibility does not affect the merit system status of the

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Fund Manager employees. The Legislature had the option of providing separate fund management for the state and local systems, in which event the separate system employees would have been subject to their respective merit systems. The combining of the systems has no effect on the status of the employees. The Legislature also had the option of specifically exempting the Fund Manager's employees from the merit system, which it did not do.

With reference to the argument regarding the source of the funds, it has been held that the fact that employees of a "public authority" are paid solely out of revenues derived from the services performed by the authority does not impliedly exclude employees from the civil service rules. City of Miami v. Greater Miami Port Authority, 155 Fla. 831, 22 So.2d 152 (1945). Consequently, the fact that the Fund Manager employees are paid from the fund rather than specific Legislature appropriations does not affect the merit system status of the employees.

In view of the fact that there is no general or special statutory exemption to the contrary, it is hereby concluded that employees of the Fund Manager of the Public Safety Personnel Retirement System, except these individual employees specifically qualifying for an exemption under A.R.S. § 41-771, are subject to the State Employees Merit System (A.R.S. § 41-761, et seq.).

Sincerely,



BOB CORBIN
Attorney General

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