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June 29, 1979

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ARIZONA ATTORNEY GENERAL

Re: I79-174 (R79-021)

Dear Director Jamieson:

In your letter dated March 21, 1979, you asked our office four questions concerning the applicability of A.R.S. § 41-772(B) to state employees who are also deputy registrars. More specifically, you asked:

Is a State service non-exempt employee who was appointed Deputy Registrar prior to obtaining State service employment with the State, in violation of A.R.S. § 41-772.B. and subject to the discipline as provided in A.R.S. § 41-772.D., if said employee does not serve in the capacity of Deputy Registrar by registering voters subsequent to obtaining employment with the State although no written resignation as Deputy Registrar was submitted to the appropriate appointing officials?

Answer: Yes

Is a State service non-exempt employee, who was appointed Deputy Registrar subsequent to obtaining employment with the State, in violation of A.R.S. § 41-772.B. and subject to the discipline as provided in A.R.S. § 41-772.D., if said employee upon being notified of the aforementioned provisions takes immediate steps to remove herself/himself from the appointment of Deputy Registrar?

Answer: Yes

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If answered in the affirmative, do the actions of the last two persons above mentioned constitute service as a Deputy Registrar in violation of A.R.S. § 41-772.B., et seq., and Personnel Board R2-5-31.C. which may be cause for discipline or dismissal of said employee in the State service pursuant to A.R.S. § 41-770.A.13?

Answer: Yes

Or do these facts as presented give rise to any mitigating circumstances that may be considered by me insofar as disciplinary action that may be taken?

Answer: No

In an attempt to remove, or at least minimize, partisan politics from the everyday operation of state government, the legislature enacted A.R.S. § 41-772. Sometimes called the state's Hatch Act, 41-772 governs all State service non-exempt employees and provides in part:

B. No employee or member of the personnel board may be a member of any national, state or local committee of a political party, or an officer or chairman of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take any part in the management or affairs of any political party or in any political campaign, except that any employee may express his opinion, attend meetings for the purpose of becoming informed concerning the candidates for public office and the political issues, and cast his vote. (Emphasis added).

The first issue to be addressed, therefore, is whether an appointment as a deputy registrar constitutes an act proscribed by § 41-772(B).

The appointment of deputy registrars is governed by A.R.S. § 16-141, which reads in part:

A. The county recorder shall appoint deputy registrars in each precinct in the county, for each political party having at least two candidates on the ballot in that county, other than presidential electors, in the last general election, who shall:

1. Be appointed from a list of eligible voters in the precinct, such list to be sent to the county recorder by the county chairman of each political party.

2. Be equal in number for each political party to the number of precinct committeemen of the party entitled to elect the greatest number of committeemen in that precinct in the next primary election.

B. Before making an appointment of any deputy registrar, the county recorder shall request the county chairman of each political party to recommend persons for appointment, and if a county chairman within ten days of such request supplies a sufficient number of names of persons in his party in a given precinct who are otherwise qualified, the persons appointed shall be selected from those so recommended. If a county chairman supplies one or more names for a precinct, but less than the number allowed, the county recorder shall appoint those persons so recommended. (Emphasis added).

As was stated in our earlier opinion Atty.Gen.Op. 69-1:

The very procedure required for the appointment of a deputy registrar requires the occupant of that office to participate in the affairs of a political party. That appointments are made from nominees supplied by the county chairman of each eligible political party, and that each party is entitled to an equal number of deputy registrars in each precinct, makes that office a partisan one. While the primary function of a deputy registrar is the registration of eligible electors, the selection procedure has been designed to protect each party. . . . A deputy registrar, therefore, is representing his political party as a part of that office. Atty.Gen.Op. No. 69-1 at 2.

Further support for our conclusion that deputy registrars are affiliated with political parties comes from the Deputy Registrar Handbook provided each newly appointed registrar. In that guide, the status of the registrars is recognized: "Because Deputy Registrars are members of the party organization. . . ." (at p. 2), the handbook also lists other permitted activities besides simply registering voters. Among these include participation in registration drives sponsored by the political party and circulating the party's nomination petitions.

Since deputy registrars are appointed through their nomination by a political party, and because they serve as representatives of their party, they may not simultaneously be a State employee under the mandate of A.R.S. § 41-772(B) unless they are specifically exempted by § 41-771. A.R.S. § 41-771 reads in full:

§ 441-771. Exemptions

The provisions of this article 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. Not more than two assistants who serve in the office of an elected state officer, where that elected state officer is the sole elected head of the department.
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.

If the employee is not covered by § 41-771 and he is a deputy registrar at any time during his employment, then he is subject to the mandate of A.R.S. § 41-772(D) which states:

D. A person in the state service who violates any of the provisions of this section shall be subject to suspension of not less than thirty days or dismissal. (emphasis added).

It is a general rule that "shall" indicates a mandatory intent unless a convincing argument to the contrary is made. Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir., 1977), C. Sands, Sutherland's Statutory Construction, § 25-04 (4th ed. 1973). In this situation, there appears no convincing argument to the contrary, and indeed, a mandatory construction is the best manner of fulfilling the intent of the statute. To permit the exercise of discretion in determining the extent of an erring employee's penalty would thwart the purpose of the statute.

As stated in the statute, an employee must at least be suspended for thirty days. Any mitigating circumstances surrounding the individual employee's situation may only be used by the Board to determine whether the employee should be dismissed or the length of suspension beyond the minimum thirty days.

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The intent of the legislaure is unequivocal and it leaves no room for exceptions beyond those stated in § 41-771. The statutes do not distinguish active deputy registrars from inactive ones and do not provide a sliding scale according to the length of simultaneous service. Until the statutes are amended, there is no choice but to follow § 41-772(D) and either dismiss or suspend for at least thirty days any faulting employee.

Sincerely,



BOB CORBIN
Attorney General

BC/mm