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October 19, 1979

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ARIZONA ATTORNEY GENERAL

Mr. Charles A. Ott, Jr.
Director, Division of Emergency Services
Department of Emergency and Military Affairs
5636 East McDowell Road
Phoenix, AZ 85008

Re: 179-264 (R75-791, R79-196)

Dear Mr. Ott:

Over the years your Division has made several requests for opinions clarifying the relationship between the rule-making power of the Division of Emergency Services and the Administrative Procedure Act (APA), A.R.S. § 41-1001 et seq. On November 8, 1978, you submitted the following questions which were re-drafted from your original letter of December 17, 1975:

1. Are Civil Defense Administrative Orders (hereinafter referred to as CDAOs) issued by the Governor in 1962 through 1964 still in effect although A.R.S. § 26-302.B has been repealed and replaced by A.R.S. § 26-307.A?

2. If the answer to question 1 is yes, in view of the Administrative Procedure Act, A.R.S. § 41-1001 et seq., how may the aforementioned CDAOs be revised, superseded or rescinded?

More recently, you have asked whether the Act is applicable to Division rule and regulation modifications that must be made as a result of Executive Order No. 79-4.¹

1. Executive Order No. 79-4 provides for the disbursement of federal disaster assistance. The current rules and regulations, A.C.R.R. R8-2-33 et seq., deal with state funds only. Thus, the rules and regulations need to be amended.

Generally, it is our position that the Division of Emergency Services must comply with the provisions of the APA. In order to answer your questions, however, it is necessary to discuss the legislative history of the Division.

Prior to 1971 the organization and administration of emergency services were detailed in Chapter 2 of Title 26, entitled "Civil Defense". The Governor had specifically enumerated powers provided in A.R.S. § 26-341, subsections 1 and 2, which gave him "general direction and control of the department of civil defense", made him "responsible for carrying out the provisions of this chapter" and authorized him to make orders, rules and regulations to carry out the provisions of this chapter.^{2/} The civil defense laws were reorganized in 1971 to reflect the Legislature's concern with the adequacy of state response to emergency situations.^{3/} Title 26, Chapter 2 was renamed "Disaster Preparedness, Search or Rescue" and the provisions therein were changed to more clearly delineate responsibilities for planning and administration of emergency services.^{4/}

2. The Governor could, at his discretion, designate counties and other agencies to make, amend and rescind orders pursuant to A.R.S. § 26-302.A. A department of civil defense was provided by A.R.S. § 26-321, the director of which was "subject to the direction and control of the governor" and charged generally with coordinating civil defense activities. A.R.S. § 26-322. A civil defense advisory council was established by A.R.S. § 26-331.A, the purpose of which was to "advise the governor and director of civil defense on all matters pertaining to civil defense."

3. The historical note following A.R.S. § 26-301 relates the legislative purpose for reorganization, as set forth in Laws 1971, Ch. 51, § 1.

4. See historical note, *supra*, n. 1, wherein the Legislature specifies the areas of responsibilities to be covered by the act. Laws 1977, Ch. 26, § 3, substituted "Emergency Services" for "Disaster Preparedness, Search or Rescue" as the heading for the chapter.

Whereas the old act emphasized the Governor's powers relative to emergencies, the new act details the powers granted to other parties.^{5/} A most significant change in this respect is the grant of authority to counties, cities and towns to make, amend and rescind orders, rules and regulations so long as they do not conflict with those promulgated by the Governor.^{6/} A.R.S. § 26-307.A.

Your first question relates to the validity of CDAOs promulgated by the Governor under the old act in view of the fact that it has been repealed. A.R.S. § 26-302 formerly provided in part:

§ 26-302. Power of counties and other agencies designated by governor to make rules, regulations and orders; procedure

A. The counties and other agencies designated by the governor may make, amend and rescind orders, rules and regulations necessary for civil defense purposes and to supplement carrying out the provisions of this chapter, but not inconsistent with orders, rules or regulations promulgated by the governor or a state agency exercising a power delegated to it by him.

5. Under the new act, authority over emergency functions is divided among several parties. A division of emergency services is created by A.R.S. § 26-305 with clearly defined powers and duties granted to its director pursuant to A.R.S. § 26-306. In addition, A.R.S. § 26-302 provides that the Governor may delegate any of the powers, except emergency powers, vested in him to the Director of emergency services. A state emergency council is established under A.R.S. § 26-304, the powers and duties of which include making recommendations for orders, rules and regulations to the Governor and recommending assignment of a responsibility for emergency planning to a state agency.

6. Under A.R.S. § 26-302.A of the old act, the Governor had the discretion to allow counties to promulgate rules, etc.

B. Any order, rule or regulation promulgated by the governor, or by any board of supervisors or other agency authorized by this chapter to make orders, rules and regulations, shall have the full force and effect of law when issued by the governor or any state agency, if a copy thereof is filed in the office of the secretary of state, or if promulgated by a county or other political subdivision of the state or agency thereof, if filed in the office of the clerk of the political subdivision or agency promulgating it. Existing laws, ordinances, rules and regulations inconsistent with this chapter, or any order, rule or regulation issued under authority of this chapter, shall be suspended during the time and to the extent that they conflict.

Currently, A.R.S. § 26-307 provides in part:

§ 26-307. Power of counties, cities, towns and state agencies designated by the governor to make orders, rules and regulations; procedure

A. State agencies when designated by the governor, and counties, cities and towns may make, amend and rescind orders, rules and regulations necessary for emergency functions but shall not be inconsistent with orders, rules and regulations promulgated by the governor.

B. Any order, rule or regulation issued by the governing body of a county or other political subdivision of the state is effective when a copy is filed in the office of the clerk of the political subdivision. Existing laws, ordinances, orders, rules and regulations in conflict with this chapter or orders, rules or regulations issued under authority of this chapter, are suspended during the time and to the extent that they conflict.

Specific reference made in A.R.S. § 26-307.B to the fact that existing orders will be suspended only insofar as they conflict with orders issued under authority of the act assumes that

orders were in existence prior to the passage of the new act. Furthermore, when a Legislature repeals and simultaneously re-enacts a statute, it is generally held that provisions of the old statute which are included in the new one are continued in force from the date of the original enactment.^{7/} Both statutory schemes provide for promulgation of CDAOs by the Governor. We conclude, therefore, that the CDAOs promulgated under the old act are still in effect subject to the above-mentioned limitation regarding conflicts.

Having concluded that CDAOs issued prior to the new act are still in effect, we now consider your second and third questions, which relate to the procedures by which such CDAOs and rules may be revised, superseded or rescinded. A preliminary question is whether the rule-making process pursuant to the Emergency Services Act is governed by the APA, A.R.S. § 41-1001 et seq. As a general rule, all state agencies must follow the specified procedures when promulgating, amending or repealing an agency rule.^{8/}

7. See Anno: Effect of Simultaneous Repeal and Re-enactment of All, or Part, of Legislative Act. 77 A.L.R.2d 336, especially §§ 3, 11.

8. A.R.S. § 41-1001.1 provides in part: "1. 'Agency' means every agency, board, commission, department or officer, authorized by law to exercise rule-making powers or to adjudicate contested cases. . . ." Pursuant to A.R.S. § 36-306.A.3, the Director of Emergency Services has the duty, subject to the approval of the Adjutant General, to "[m]ake rules and regulations necessary for the operation of the division." Also, A.R.S. § 35-192.G directs the Director to "develop rules and regulations for administering the [emergency] fund, subject to approval by the governor." The Division is, then, "authorized by law to exercise rule-making powers." It is interesting to note that the Adjutant General, in his capacity as head of the Department of Emergency and Military Affairs (of which Emergency Services is one division, with Military Affairs being the other), has similar rule-making powers under A.R.S. § 26-102.4; however, in his capacity as director of the Division of Military Affairs, he has no rule-making authorization.

The definition of "rule" for purposes of the APA is set forth in A.R.S. § 41-1001.7:

7. "Rule" means each agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public, or declaratory rulings issued pursuant to § 41-1007 or intra-agency memoranda.

Under this definition, all statements of general applicability which describe the organization, procedure or practice requirements of the Division of Emergency Services are rules. Only statements concerning the Division's internal management and not affecting private rights or procedures available to the public are exempt.^{9/}

With respect to CDAO's made, amended or rescinded by counties or other political subdivisions of the state, A.R.S. § 26-307.B specifies that such a rule "is effective when a copy is filed in the office of the clerk of the political subdivision." This procedure pertains only to these entities and is an alternative to the APA. Such a special statute takes precedence over a general statute and thus governs the rule-making procedures for political subdivisions.^{10/} CDAO's which are

9. See, e.g., Washington School District No. 6 v. Superior Court, 112 Ariz. 335, 541 P.2d 1137 (1975) (establishment of textbook evaluation committee is internal procedure); Mendoza v. Industrial Commission, 22 Ariz.App, 433, 528 P.2d 184 (1974) (delegation of duty to set wage compensation concerns internal management). But see Ariz. Dept. of Aero. v. Fred Harvey Transp., 114 Ariz. 401, 561 P.2d 322 (1977; Ariz.Att'yGen.Op. No. 77-65.

10. Ariz. State Tax Comm'n v. Phelps Dodge Corp., 116 Ariz. 175, 568 P.2d 1073 (1977), and the cases cited therein.

promulgated, amended or rescinded by state agencies are subject to the requirements of A.R.S. §§ 41-1001 et seq.^{11/}

Similarly, with respect to the amendment of rules and regulations governing disbursement of federal emergency funds under Executive Order No. 79-4, pursuant to A.R.S. § 35-192.G, such amendments must be made in compliance with the APA. A.R.S. § 35-192.G provides:

G. The state director of emergency services shall develop rules and regulations for administering the funds, subject to approval by the governor.

The fact that the rules and regulations are subject to the Governor's approval does not excuse them from compliance with the APA. This is merely one additional step in the rule-making process; if the Legislature had intended to exempt these rules from the APA, it would have done so specifically by establishing an alternative procedure.^{12/} The rules governing disbursement of emergency funds to "provide for the allocation of public funds to alleviate the damage, loss, hardship or suffering resulting from . . . disasters" definitely impact upon private rights and procedures available to the public, as well as describing procedure requirements of the agency,^{13/} so that

11. It is interesting to note that the prior statutory scheme provided an alternate procedure for all CDAO's in A.R.S. § 36-302 (quoted above). The current statute only refers to political subdivisions. This reinforces the fact that the Legislature intended that state agency CDAO's must comply with the APA. We also note all promulgated CDAO's must not be inconsistent with those promulgated by the Governor.

12. See A.R.S. § 26-307.B, discussed above. Cf. A.R.S. § 26-115, which specifies that regulations made by the general staff of the Division of Military Affairs "shall be in force and effect when approved by the governor."

13. Executive Order No. 79-4 also provides, in pertinent part:

1. The Director, Arizona Division of Emergency Services is responsible for the administration of any funds made available by the State of Arizona or by any agency of the Federal government for meeting conditions constituting a state of emergency or a Presidential declaration of a major disaster. In this capacity said Director:

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they are covered by the definition of "rule" in A.R.S.
§ 41-1001.7.14/

We therefore conclude that the pertinent rules and regulations must be amended in accordance with the APA.

Sincerely,



BOB CORBIN
Attorney General

BC/mm

Footnote 13 Continued

a. Shall disburse the funds and sign encumbrances, claims and other pertinent documents and will maintain such records as are normally acceptable for audit purposes.

b. May, pursuant to State of Arizona procurement procedures, develop, negotiate and consummate contracts or leases with individuals, institutions or commercial agencies to prevent or minimize the loss of lives or property, to ease the suffering of disaster victims or to effect repairs, restoration and other assistance to eligible applicants.

c. May employ necessary additional personnel by exempt appointment or individual contract, within the availability of disaster-related funds, to effect full recovery measures, or to provide training and public information to enhance protection, survival and recovery from future disasters.

d. May, pursuant to State of Arizona procurement procedures, contract for the conduct of feasibility studies to analyze the adequacy of present personnel, procedures and equipment to cope with disasters and for a determination of changes or additional resources that will be required.

14. See also Ariz. Dept. of Aero. v. Fred Harvey Transp.,
114 Ariz. 401, 561 P.2d 322 (1977).



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Re: I79-265 (R79-261)

Dear Mr. Mayfield:

We have reviewed your opinion of September 18, 1979, to the Phoenix Union High School System concerning the District's responsibility with regard to the issuance of graduation diplomas and the following is a revision of that opinion.

The following questions were asked by Dr. Patrick B. Henderson, Superintendent of the Phoenix Union High School System:

1. May a school district withhold the diploma of a high school student who has met all the requirements for graduation but who, for personal reasons, chooses to delay accepting the diploma until the following year?

2. May the district withhold the diploma of a high school student who has completed all required courses and the minimum number of units for graduation, but has not yet met the requirements for a special program such as a vocational course? What about a student enrolled in a special education program for exceptional children?

As pointed out in your opinion, the State Board of Education has authority to determine the minimum number of credits necessary for graduation from high school. A.R.S. § 15-102.19. The board of education of a high school district may prescribe a course of study for its students which requires