



# Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert K. Corbin

April 13, 1989

Ralph T. Milstead, Director  
Arizona Department of Public Safety  
P.O. Box 6638  
Phoenix, Arizona 85005

Re: 189-028 (R89-037)

Dear Col. Milstead:

You have asked for an opinion concerning the enforceability of section IIA of the Arizona Department of Public Safety Selection Guidelines, which was "adopted" by the Law Enforcement Merit System Council. This Guideline provides that any demonstrated pattern of homosexual behavior may result in the rejection of an employment application. We conclude that the Guideline is unenforceable for the reasons set forth in this opinion.

The duty to establish standards, qualifications and a selection plan for the Arizona Department of Public Safety is vested in the Law Enforcement Merit System Council by A.R.S. § 28-235(C)(3)(b) and (c).

In Ariz. Att'y Gen. Op. 183-032, we expressed the view that these duties can only be accomplished by rules. We indicated that the Council was required to promulgate rules in accordance with the then existing Administrative Procedure Act.

The Council has enacted general entrance provisions in A.A.C. R-13-5-25, and promulgated eligibility criteria in A.A.C. R13-5-26(1). The Guideline which is at issue, however, has not been adopted by the Council in conformity with the Administrative Procedure Act. See A.R.S. §§ 41-1001 to -1066. The terms of the Guideline meet the definition of a "Rule" as set forth in A.R.S. § 41-1001(12):

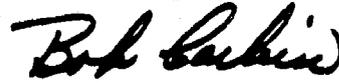
"Rule" means an agency statement of general applicability that implements, interprets or prescribes law or policy.

Ralph T. Milstead, Director  
I89-028  
Page No. 2

A rule is unenforceable unless it is adopted and certified in substantial compliance with the Administrative Procedure Act. A.R.S. § 41-1030. A rule which has not been promulgated in accordance with the Administrative Procedure requirements remains without force or effect. Malumphy v. MacDougall, 125 Ariz. 483, 610 P.2d 1044 (1980).

We therefore conclude that the Guideline which is the subject of your question has no force or effect, and should not be used to evaluate applicants for employment by the Department of Public Safety.

Sincerely,



BOB CORBIN  
Attorney General

BC:LAW:adf