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C.H. HUCKELBERRY
County Administrator

March 20, 2018

Barry Corey, Attorney at Law
DeConcini, McDonald, Yetwin & Lacy, P.C

Re: **Your March 9, 2018 Letter Regarding Chair of the Pima County Law Enforcement Merit System Council**

Dear Mr. Corey:

I asked Pima County's Chief Civil Deputy County Attorney to review your March 9, 2018 analysis. I have waived the Attorney/Client Privilege on his March 19, 2018 response and have enclosed it for your information. Mr. Flagg disagrees with your conclusion.

I hope the Law Enforcement Merit System Council (LEMSC) acts to correct this apparent deficiency and comply with the legal requirement related to the Chair of the LEMSC.

Please advise as to how the LEMSC will address this matter.

Sincerely,

C.H. Huckelberry
County Administrator

CHH/anc

Enclosure

c: The Honorable Chairman and Members, Pima County Board of Supervisors
The Honorable Mark Napier, Pima County Sheriff
Andrew Flagg, Chief Civil Deputy County Attorney

MEMORANDUM

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Attorney-Client Privilege / Confidential

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To: C.H. Huckelberry, Pima County Administrator

From: Andy Flagg, Chief Civil Deputy County Attorney

Date: March 19, 2018

Subject: Applicability of A.R.S. § 38-1002(D) to the Pima County Law Enforcement Merit System Council

Your memorandum dated March 12, 2018 asked me to review Barry Corey's analysis, in which he concluded that the requirement in A.R.S. § 38-1002(D) that the chair of a law enforcement merit system council "shall not be permitted to succeed himself" does not apply to the Pima County Law Enforcement Merit System Council ("Council"). Mr. Corey opines that the requirement does not apply because, under A.R.S. § 38-1006(B), the Pima County Merit System Commission "administer[s]" the statutory provisions applicable to the Council. I respectfully disagree with Mr. Corey's conclusion, and in my view the better answer is that the "shall not be permitted to succeed himself" requirement applies to the Council.

Section 38-1002 governs the composition of a county law enforcement merit system council. Subsection (D) provides that the chair of such a council serves for one year and "shall not be permitted to succeed himself." Under § 38-1006(B), if a county has a "merit system for all of its employees" under A.R.S. §§ 11-351 through 11-357 ("the Commission statutes"), then that commission "shall . . . administer[]" the statutory provisions applicable to the law enforcement merit system council. Pima County has a Merit System Commission, and the Commission statutes have no similar "shall not be permitted to succeed himself" requirement—indeed, the Commission statutes make no mention of requirements applicable to the chair.

Notwithstanding the "shall be administered" language in § 38-1006(B), it appears the Council and Commission have been treated, for all intents and purposes, as two separate bodies composed of the same five people. They are governed by separate sets of rules, and Chapter 2.24 of the Pima

County Code, which establishes the Commission, says nothing about the Commission administering the duties of the Council. Nor do the Merit System Rules. In short, there is no practical reason why, when sitting as the Council, the body couldn't comply with the "shall not be permitted to succeed himself" requirement.

Practical considerations aside, basic principles of statutory construction require that the § 38-1002 requirements be read in harmony with the Commission statutes.[1] The original versions of the Council statutes (A.R.S. §§ 38-1001 through 38-1007) and Commission statutes (A.R.S. §§ 11-351 through 11-357) were all enacted in 1969.[2] If there is a conflict between two statutes, one must yield to the other, but courts avoid constructions that create conflicts or render statutory language meaningless.[3]

With respect to the chair's term, there is no conflict between the statutes. There is no provision in the Commission statutes referring to the Commission chair at all, much less providing a term for the chair. Section 38-1002(D) can be applied without causing any conflict with the Commission statutes.

Indeed, there are many terms in § 38-1002 that are not reproduced in the Commission statutes. For example, under § 38-1002(A), Council members "shall be persons having recognized knowledgeable interest in the merit principles of personnel administration, and are prohibited from delegating their authority." This language is not in the Commission statutes, but I seriously doubt the Council members would concede those provisions do not apply when they sit as the Council. That would, however, be the logical extension of adopting Mr. Corey's argument that the "the qualifications and requirements for members of the [Council] are not and have not[] historically been regarded as applicable to the members of the Commission."

As Mr. Corey notes, the Council statutes and Commission statutes provide for different term lengths for the members—five years for members of the Council[4] and four years for members of the Commission.[5] For this reason, § 11-353 was amended in 2016 to add subsection (C), which permits the Board of Supervisors to appoint Commission members to five-year terms "[i]f the members of the county employee merit system commission are the same members that the board of supervisors appoints to the county merit system council for law enforcement officers established pursuant to section 38-1002."[6]

The 2016 amendment, and in particular the quoted language, supports the conclusion that "shall be administered" language in § 38-1006(B) does not render inapplicable all of the qualifications and requirements in § 38-1002. If § 38-1006(B) *had* the effect of rendering those qualifications

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[1] *E.g., Johnson v. Mohave Cty.*, 206 Ariz. 330, 333, ¶¶ 11-12 (App. 2003).

[2] 1969 Ariz. Sess. Laws, chs. 102, 117.

[3] *Midtown Med. Group v. State Farm Mut. Auto. Ins. Co.*, 220 Ariz. 341, 347, ¶ 22 (App. 2008); *Dowling v. Stapley*, 218 Ariz. 80, 84, ¶ 8 (App. 2008).

[4] A.R.S. § 38-1002(C).

[5] A.R.S. § 11-353(A).

[6] 2016 Ariz. Sess. Laws, ch. 41, § 1 (HB 2247).

and requirements inapplicable, then the 2016 amendment would have been entirely unnecessary—the existence of the Commission alone would have rendered the five-year term for Council members inapplicable. Moreover, by making the five-year-term option in the 2016 amendment applicable only if the members of the Commission were the same as the members of the Council, the Legislature strongly suggested that—despite the "shall be administered" language in § 38-1006(B)—the Council and Commission are treated as separate bodies, even if they consist of the same five people.[7]

In my opinion, the "shall not be permitted to succeed himself" provision in § 38-1002(D) applies to the Chair of the Council, even though the Commission is made up of the same five people. I therefore respectfully disagree with Mr. Corey's conclusion in his March 9, 2018 letter.

[7]Testimony before the Senate Government Committee in 2016, while of admittedly little weight, suggested that the 2016 addition of § 11-353(C) came about precisely because counties were having difficulty applying the requirements of both the Council and Commission to the same five people. *See* Hearing of Senate Government Committee (March 2, 2016), *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=17148&meta_id=351173.