

ADDENDUM MATERIAL

DATE 6/21/22

ITEM NO. A005



MEMORANDUM

Date: June 21, 2022

To: Chairman and Members
Merit System Commission and
Law Enforcement Merit System Council

From: Jan Leshner *Jan Leshner*
County Administrator

Re: **Memorandum from the Pima County Attorney to the Board of Supervisors Regarding
Legal Counsel for the Merit Commission**

At today's meeting of the Board of Supervisors, the Board unanimously agreed to release to the public the attached Memorandum, which previously had been protected as privileged communication between the Board and their attorney.

It responds to the following questions:

1. Does the Merit Commission have authority to retain its own legal counsel?
2. Is the County permitted to use a formal procurement process to select outside legal counsel for the Merit Commission?

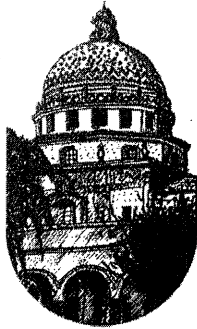
JKL/anc

Attachment

c: The Honorable Chair and Members, Pima County Board of Supervisors
Cathy Bohland, Director, Human Resources
Sam Brown, Chief Civil Deputy County Attorney
Ms. Donna Aversa, Leonard & Felker PLC

JUN 22 2022 09:21 PC CLK OF BD


ML



**ATTORNEY/CLIENT PRIVILEGED
M E M O R A N D U M**

Pima County Attorney's Office
Civil Division
32 North Stone Ave., Suite 2100
Phone 520.724.5700 Fax 520.620.6556

To: Pima County Board of Supervisors; Jan Leshar, County Administrator

From: Samuel E. Brown, Chief Civil Deputy County Attorney
Kathryn Ore, Deputy County Attorney 

Date: June 2, 2022

Subject: Legal Counsel for the Merit Commission

This memorandum addresses questions regarding the selection of legal counsel for the Merit Commission.

1. Does the Merit Commission have authority to retain its own legal counsel?

No. The Merit Commission does not have authority to retain its own counsel. And, if the Commission retains private counsel in a manner that is not compliant with Pima County Board of Supervisors Policy C 6.1 and related administrative procedures, any related charges "shall be the personal obligation" of the Commissioner(s).

The County Attorney is the legal advisor for Pima County unless hiring outside counsel is expressly authorized by statute. For example, the local Public Safety Personnel Retirement Board has express statutory authorization. *See* A.R.S. § 38-847(N) ("Each local board shall hire an independent legal counsel who is not an employee of or contracted with the employer or any employee organization and owes its duty of loyalty only to the local board in connection with its representation of the local board."). The Merit Commission does not have express legislative authority to hire outside legal counsel. *See* A.R.S. §§ 11-351 through 11-357.

When a potential conflict of interest arises, the Board and the County Attorney share responsibility for determining whether the County Attorney is unavailable and whether it is appropriate to hire outside legal counsel. Pima County Board of Supervisors Policy C 6.1; A.R.S. § 11-532(A); *Bd.*

of Supervisors of Maricopa Cty. v. Woodall, 120 Ariz. 379, 381–82 (1978) (finding that the Board does not have the power to hire “in-house” counsel independent of the County Attorney for the purpose of advising it and the various county officers, unless the County Attorney is unavailable); *see also Romley v. Daughton*, 225 Ariz. 521, 524, ¶ 13 (App. 2010) (concluding that “when the county attorney has conflicts of interests that render it unavailable to represent the county in certain matters, the Board may retain outside counsel to advise the Board on those matters”).

If the Board and County Attorney determine that the County Attorney cannot provide legal advice or representation, due to a conflict of interest, the Board has delegated its authority to the County Administrator to work with the County Attorney to “promptly arrange for competent legal advice or representation.” Board Policy C 6.1. In its delegation, the Board has expressly stated that “[o]nly the County Attorney and County Administrator have authority to retain counsel outside of the County Attorney.” Board Policy C 6.1. The Board has further prohibited the use of County funds to pay for private legal counsel retained in a manner that does not comply with Board policy and related administrative procedures. Any related charges are the “personal obligation” of the individual retaining private counsel. Board Policy C 6.1.

With regard to the Merit Commission, the County Attorney regularly appears before the Merit Commission on behalf of the County. The Board and County Attorney have previously determined that the County Attorney is unavailable to provide legal advice or representation to the Merit Commission due to a conflict of interest. Accordingly, the County Administrator and County Attorney are responsible for arranging for competent outside legal counsel for the Merit Commission. The County Attorney considered whether it could assist in the selection of the Commission’s legal counsel, but determined that, considering the identified conflict of interest and County Administrator’s decision to use an open procurement process to select qualified legal counsel, it did not need to be involved in selecting the Merit Commission’s legal counsel.

Board Policy C 6.1 strictly prohibits the Merit Commission from retaining its own legal counsel. In circumstances, like here, where the County Attorney decided not to participate in the selection of outside legal counsel, only the Board and, by delegation, the County Administrator have authority to retain counsel. And, if the Commission retains private counsel in a manner that is not compliant with Board Policy C 6.1 and related administrative procedures, any related charges “shall be the personal obligation” of the Commissioner(s).

2. Is the County permitted to use a formal procurement process to select outside legal counsel for the Merit Commission?

Yes, the County may use a formal procurement process facilitated by the Procurement Department to select outside legal counsel.

A proceeding in front of the Merit Commission is an administrative proceeding and the Merit Commission is a quasi-judicial administrative tribunal. Therefore, obtaining professional legal services to represent the Merit Commission would be exempt from the legal requirement to use a formal procurement process to select outside legal counsel. A.R.S. § 11-254.01; Pima County Procurement Code 11.04.020(C). Exemption does not mean, however, that the County is barred

from using the procurement process to select qualified legal counsel. It only means that the County is not *required* to use the procurement process. The County Administrator is permitted to utilize the procurement process facilitated by the Procurement Department to enhance transparency in the solicitation and selection of outside legal counsel.