MEMORANDUM

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This is a privileged attorney-client communication and should not be disclosed to persons other than Pima County officials and employees involved in the matter that is the subject of the communication. The privilege is held by Pima County and can be waived only by an official action of the Board of Supervisors.

To: Hon. Chairman and Members, Pima County Board of Supervisors

From: Andrew L. Flagg, Chief Civil Deputy County Attorney

Date: January 7, 2019

Subject: Authority of the Board of Supervisors and Community Law Enforcement Partnership Commission to recommend policy to the Sheriff

This memorandum responds to requests from Supervisors Bronson and Valadez at the December 18, 2018 meeting, regarding the authority of the Board of Supervisors and the Community Law Enforcement Partnership Commission (CLEPC) to make policy recommendations to the Sheriff.

It is our view that the Board's authority to make policy *recommendations* to the Sheriff is unlimited.[1] The Board has sole authority to set the budgets of all County officers, including the Sheriff. A.R.S. § 11-201(A)(6). Given that important role, the Board has a legitimate interest in the operation of each elected official's office, and therefore can make policy recommendations related to any aspect of the elected official's office.

As to the CLEPC, because that body is created by the Board, it can exercise whatever recommending authority the Board chooses to give it. Although there are limits to the Board's ability to delegate its authority, we see no reason why the Board could not, either in whole or part, delegate its policy-recommending authority to a body like the CLEPC that the Board created and

[1]This memorandum only addresses the authority to make policy recommendations, as requested at the December 18, 2018 meeting. The Board's authority to dictate the policy of elected officials is more limited, and has been addressed in a formal County Attorney opinion dated November 15, 2017 and a separate memorandum dated June 28, 2018, which the Board voted to release to the public. For the Board Members' convenience, copies of those memorandums are attached.

exercises control over.

c: Hon. Mark D. Napier, Pima County Sheriff
C.H. Huckelberry, Pima County Administrator

MEMORANDUM

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To: Hon. Chairman and Members, Pima County Board of Supervisors
Hon. Mark Napier, Pima County Sheriff
C.H. Huckelberry, Pima County Administrator

From: Regina L. Nassen, Deputy County Attorney

Date: June 28, 2018

Re: Review of ACLU Memo, *Power of County Board of Supervisors to Prescribe Policy for the County Jail*

In response to a request from Supervisor Valadez, I have reviewed the memorandum, which I have been told was prepared by a lawyer employed by the American Civil Liberties Union, entitled "*Power of County Board of Supervisors to Prescribe Policy for the County Jail*" (the "ACLU Memo," a copy of which is attached as Attachment A). The author of the ACLU Memo opines that the "Board of Supervisors has the authority to prescribe and influence jail policy." That, however, materially overstates the role that the Board has in the operation of the jail. Below, this memo summarizes the general principles regarding the relationship between the Board and other elected County officials, and then discusses the Sheriff's authority to operate the jail and reviews the specific legal authorities that the ACLU Memo cites in support of its opinion.

The General Rule

Attachment B is a copy of a formal Pima County Attorney Opinion that we issued last November, which analyzes the extent to which the Board of Supervisors can legally require other elected officials to follow Board-promulgated policies regarding selection, acquisition, and use of information technology resources. Although the factual subject matter of that memo is different from that of this memo, the general legal rule described in it is applicable here, and the major authorities (many of which are not cited in the ACLU Memo) are just as relevant.

As explained in more detail in that memo, a county's executive authority is split among its board of supervisors and the other elected officials. Though the board has the broadest scope

of authority, each of the other elected officials has some area within which they exercise discretionary authority independent of the board. And while a board of supervisors controls the county budget, including the allocation of funds to elected-official departments, and the salaries of the employees within those departments, it also has an obligation to adequately fund those departments. Those other elected officials are obligated to cooperate with the board regarding its fiscal decisions, and abide by the administrative policies and procedures developed by the board or under its direction—but only to the extent that this does not unreasonably interfere with their ability to decide how best to carry out the functions of their office.

The Sheriff's Authority over the Jail

Among other enumerated powers and duties, county sheriffs in Arizona have a mandatory duty to "[t]ake charge of and keep the county jail … and the prisoners in the county jail." A.R.S. § 11-441; *see also* A.R.S. § 31-101.[1] This delegation is very specific, and Arizona courts that have addressed the issue through the years have uniformly recognized that a county sheriff has significant discretion regarding how the jail is run, and the county's board of supervisors has no authority to interfere with it. The court opinions cited in the ACLU Memo are no exceptions; not one of those cases actually supports the ACLU Memo's central premise.

County Liability for Unconstitutional Jail Policies

The ACLU Memo emphasizes, out of context, statements in the cited cases that a county is in some circumstances "liable" or "responsible" for tortious acts committed by its sheriff in the course of the sheriff's law-enforcement and jail-administration duties. The Memo then extends—without any legal support—this concept of tort liability to an authorization to set policy, concluding that the board of supervisors, as the central governing body of "the county," can control how the sheriff carries out those duties. But that gets these cases exactly backwards. As explained by the first case cited in the ACLU Memo, *Fridena v. Maricopa County*, a county "is not [vicariously] liable … for the Sheriff's torts" because a county (presumably meaning the board of supervisors) has "no right of control over the Sheriff or his deputies" in the conduct of their official business. 18 Ariz. App. 527, 530 (1972). A county *is*, however, liable for harm resulting from unconstitutional jail policies promulgated by its sheriff, precisely because of the sheriff's independence. As explained in *Flanders v. Maricopa County*—also cited in the ACLU Memo—a sheriff's policies regarding jail operations are county policies for which the county is liable, not *vicariously*, but because the sheriff is "the person who exercises the County's governmental authority" with respect to the jail (203 Ariz. 368, 378, ¶ 63 (App. 2002)). "Liability is imposed, not on the grounds of *respondeat superior* [vicarious liability of the employer for the employee's acts], but because the [sheriff's] status cloaks him with the governmental body's authority." *Id.* at 378, ¶ 61. Maricopa County was thus liable for the unconstitutional conditions at Sheriff Arpaio's "tent city."

[1]Chapter 1 of A.R.S. Title 31 contains additional detailed provisions regarding the operation of local jails. Consistent with A.R.S. § 11-441 and with the authorities discussed in this memo, most of the specific duties assigned in Title 31, Chapter 1 belong to sheriffs, whereas the board's authority is mostly limited to fiscal responsibilities, along with authority to authorize certain specialized programs.

These tort principles were also recognized by the U.S. District Court for the District of Arizona in the other Arpaio case cited in the ACLU Memo.[2] The court in that case found that Maricopa County was liable for the Sheriff's discriminatory policies, because he was the final policymaker for the County with respect to law enforcement and operation of the County's jail: "As MCSO's chief officer, Arpaio directs law enforcement throughout Maricopa County. *He is responsible for MCSO's policies and operations, which include all facets of policing and prison administration*." *United States v. Cty. of Maricopa*, 151 F. Supp. 3d 998, 1004 (D. Ariz. 2015) (emphasis added). The Ninth Circuit, on appeal, in an opinion issued in May of this year, agreed:

> We have already rejected Maricopa County's first argument—that Arpaio was not a final policymaker for the County. In *Melendres v. Maricopa County*, 815 F.3d 645 (9th Cir. 2016) (*Melendres III*), we noted that "Arizona state law makes clear that Sheriff Arpaio's law-enforcement acts constitute Maricopa County policy since he 'has final policymaking authority.' " *Id.* at 650 (quoting *Flanders v. Maricopa County*, 203 Ariz. 368, 54 P.3d 837, 847 (Ct. App. 2002)). Because that determination was arguably *dicta*, we have conducted our own analysis of the issue, and we reach the same conclusion.

United States v. Cty. of Maricopa, 889 F.3d 648, 650 (9th Cir. 2018).

None of these cases[3] supports the proposition that a board of supervisors can control operation of the jail; they are instead based on the premise that it is the *sheriff* who controls jail operations.

The Board of Supervisors' Control over the Sheriff's Budget

The ACLU Memo also asserts that a board of supervisors can use its budgeting and appropriation authority to control jail operations. As discussed in the attached earlier opinion from this office, however, the Board cannot use its budgeting authority in a manner that unreasonably infringes on another elected official's legitimate exercise of the discretion

[2]I will address all the cases relied upon in the ACLU Memo in order to treat the ACLU's argument as charitably as possible. But it is worth emphasizing that the question addressed in the ACLU Memo and this one—the scope of the Board's authority over jail policies—is a question of *state* law. Federal decisions only touch the question because litigants sometimes sue under a federal statute, 42 U.S.C. § 1983, which in turn sometimes requires federal courts to decide who has "final policymaking authority" for purposes of liability under that statute. Thus, the federal decisions cited in the ACLU Memo, while worth looking at, are not binding authority on the actual legal question addressed in this and the ACLU Memo. *See Dube v. Likins*, 216 Ariz. 406, 417, ¶ 37 (App. 2007) (federal court decisions on state-law issues not binding on Arizona courts).

[3]The ACLU Memo also cites an unpublished district court ruling, *Murphy v. County of Yavapai*, CV-04-1861-PCTDGC, 2006 WL 2460916, at *2 (D. Ariz. Aug. 23, 2006). The court in this case, as in the Arpaio case, cited *Flanders* for the proposition that the sheriff is the final policymaker with respect to jail operations. Moreover, because, as noted above, this memo addresses a question of state law, I note that Arizona rules would prohibit the citation or discussion of this unpublished decision in a dispute in Arizona state court. *See* Ariz. R. Supreme Ct. 111(c)(1)(C), (d) (unpublished decision issued before January 1, 2015 cannot be cited for a point of Arizona law).

delegated to their office. The cases cited in the ACLU Memo do not support a different conclusion.

In the federal Arpaio case discussed above, Maricopa County argued that the United States lacked standing to sue the County for the Sheriff's discriminatory practices. The likelihood that a plaintiff, by prevailing against a defendant, will obtain effective redress for the complained-of wrong is an element of federal standing, and the Board of Supervisors argued that it did not have sufficient control over the Sheriff to enforce his compliance with the injunctive relief sought by the United States in that case. *Maricopa Cty.*, 151 F. Supp. 3d at 1016. The court rejected that argument, concluding that, although the Board of Supervisors clearly lacked "complete oversight and control" of the Sheriff's law-enforcement functions (*id*. at 1016), it could nevertheless "*encourage* [Arpaio's] compliance with court orders" (*id*. at 1015, emphasis added) regarding his discriminatory practices through the imposition of certain fiscal controls. This ability to "*contribute* to the requested relief" (*id*. at 2016, emphasis added) was enough to keep the County in the case. Although the opinion speculates that a board of supervisors' "power of the purse" can be used to influence a sheriff's jail policies, it also recognizes that this influence is limited. And the ability to take steps to partially oversee, or encourage, a county sheriff's compliance with the law is simply not the same thing as the ability to interfere with a sheriff's operation of the jail based on policy disagreements between the board and the sheriff. It is also worth noting that this case involved the interpretation of state law by a U.S. District Court judge and is not in any way controlling legal precedent. The Arizona Court of Appeals, in *Hounshell v. White*, 220 Ariz. 1, 6, ¶ 24 (App. 2008), held that the Apache County Board of Supervisors had no authority to discipline a sheriff's deputy even in the face of legitimate concerns that the sheriff and his command staff were abusing their powers.

The ACLU Memo cites to *Pinal County v. Nicholas* for the proposition that "the Board may withhold certain line items from row officers, based upon policy considerations." But that is *not* what the Court in *Nicholas* held. The court in that case did note that "the board of supervisors is charged with the duty of supervising all expenditures incurred by" a county officer (in *Nicholas*, it was the county attorney rather than the sheriff), "and rejecting payment of those which are illegal or unwarranted." 20 Ariz. 243, 249 (1919). But the actual holding in that case was that the Pinal County Board of Supervisors could *not* refuse to pay "necessary and reasonable" expenses lawfully incurred by the Pinal County Attorney in carrying out his prosecutorial duties. *Id*. at 246. The court noted that the Legislature obviously intended to "invest the county attorneys in the several counties of the state with certain discretionary powers" (*id*. at 245), which was particularly clear in light of the county attorney's law-enforcement function (*id*. at 246), a function shared with the county sheriff. The court held that a board of supervisors can refuse to pay an expense incurred by the county attorney *only* if it is "illegal or unwarranted" (*id*. at 249) or incurred "arbitrarily and capriciously" (*id*. at 248). The cited standards make it clear that a board of supervisors cannot refuse to pay a charge, reasonably incurred by a county attorney (and by extension, a county sheriff), based on "policy considerations."

Even the 1899 case cited by the ACLU Memo supports a conclusion opposite of that urged by the memo's author. The territorial code, though it authorized county sheriffs to hire jailers, expressly delegated to the boards of supervisors authority to set jailer salaries. Based on this allocation of responsibility—which remains the same, over a hundred years later (A.R.S. § 11-409 ("county officers …, by and with the consent of, and at salaries fixed by the board, may

appoint deputies"); *see also* *Hounshell*, 220 Ariz. at 4, ¶ 13)—the territorial Supreme Court rejected the Pinal County jailer's demand for a salary higher than the $50 per month set by the Pinal County Board of Supervisors. The jailer argued that it made no sense to give the sheriff authority to "select and employ" the jailer but, at the same time, "invest the board of supervisors with the power to practically deprive him of this privilege through an arbitrary adjustment of the compensation." *Truman v. Pinal County*, 6 Ariz. 191, 196 (1899). The court conceded that if the board, in setting the salary, acted "arbitrarily, without investigation, or through prejudice," that action would be subject to direct legal challenge—but that was not the case before it. *Id*. The court's recognition that the board, though it had considerable discretion in setting the jailer's salary, could not use that power to deprive the sheriff of his independently held authority to select the jailer, supports the conclusion that a board of supervisors cannot use fiscal controls to force a sheriff to change policies that are within the scope of the sheriff's discretion.

The issue in *Judd v. Bollman* was whether a superior court judge could order a county sheriff to house a prisoner in a particular location. The Court of Appeals answered that question in the negative, concluding that the sheriff had the sole discretion over that decision. 166 Ariz. 417, 418 (App. 1990). The court also noted that the board of supervisors, though it has the "power to appropriate funds for the creation and maintenance of the county jails," has no "authority to control where the sheriff houses prisoners." *Id*. Like the other cases cited in the ACLU Memo, this case does not support the ACLU's assertions that a board of supervisors can use its budgeting authority to control how the sheriff runs the jail.

The final case cited in the ACLU Memo is *Maricopa Cty. v. Dann*, in which the Arizona Supreme Court held that a superior court presiding judge acted in excess of their authority by hiring personnel in contravention of a hiring freeze put in place by the Maricopa County Board of Supervisors, without even requesting an exemption from the freeze. In upholding the board's control over fiscal matters, the Court emphasized that the hiring freeze was "not directed against the court alone" or "designed [or] intended to interfere with the statutory or constitutional functions of the court," and that cooperating with the Board of Supervisors would not "interfere with the concept of judicial independence." 157 Ariz. 396, 399 (1988). This language, like the language in the *Truman* case almost a century earlier, indicates that, while a board of supervisors has considerable discretion over fiscal matters, it cannot use this power to interfere with the discretion delegated to other independent public officials.

Conclusion

The ACLU Memo incorrectly analyzes the legal authorities cited in it, and ignores other relevant Arizona authorities addressing the scope of the Board's authority over elected officials. As a result, it materially overstates the Board's authority over the operation of the jail. The Sheriff—not the Board—has general authority to operate the jail, and while the Board controls the Sheriff's budget, and has authority to make a few other specific fiscal decisions concerning jail operations, it cannot do so in a way that unreasonably interferes with the Sheriff's discretionary decisions.

Attachment A

Power of County Board of Supervisors to Prescribe Policy for the County Jail

Issue: Whether the Board of Supervisors, in a county lacking a Jail Board District, has the legal authority to conduct oversight of and mandate policy changes related to the daily operations of a county jail. If yes, what is the scope of such power and from where does such power derive?

Short Answer: Yes. A.R.S. §§ 11-201(A)(4) & (A)(6), A.R.S. § 11-251(1), (7), (8), (39), and A.R.S. § 31-121, et seq. grants the Board of Supervisors the authority to prescribe and influence jail policy.

Analysis:

To start, Supervisors have the authority to "supervise the official conduct of all county officers and officers of all districts and other subdivisions of the county charged with assessing, collecting, safekeeping, managing or disbursing the public revenues, see that the officers faithfully perform their duties." A.R.S. § 11-251(1) (emphasis added). Arizona courts have confirmed that this power includes supervisory authority over the Sheriff. Fridena v. Maricopa Cty., 18 Ariz. App. 527, 530 (1972) ("the County exercises supervision of the official conduct of the Sheriff."). The fact that a Sheriff is an independently elected row officer does not remove his operations from Supervisors' oversight. United States v. Maricopa, Cty. of, 151 F. Supp. 3d 998, 1015 (D. Ariz. 2015). Indeed, of all the functions prescribed to the Sheriff, none is subject to greater oversight by the Supervisors than the county jail. Murphy v. Cty. of Yavapai, 2006 WL 2460916, at *2 (D. Ariz. Aug. 23, 2006) ("Under Arizona law as interpreted in Flanders, a county is responsible for its sheriff's jail policies."); Flanders v. Maricopa Cty., 203 Ariz. 368, 378 (Ct. App. 2002) (holding that while the Sheriff most often formulates jail policy, "[t]he County is responsible for the Sheriff's jail policies.")

Although the Board of Supervisors lacks disciplinary and firing authority over employees of the Sheriff's Department (see Hounshell v. White, 220 Ariz. 1 (Ct. App. 2008)), the Board can nevertheless prescribe policy over all county departments, including those departments headed by independently-elected county officials.

While the Sheriff clearly has authority to "take charge of and keep the county jail . . . and the prisoners in the county jail," A.R.S. 11-441(5), several provisions of Arizona statutes indicate that such powers are shared in many respects with the Board. For example, the Board is given the responsibility to "cause to be erected and furnished" a jail. A.R.S. § 11-251(8). Similarly, the Board has the authority to "take care of, manage and control the property" on which a jail is built. A.R.S. § 11-251(7). This suggests that, while the Sheriff has primary responsibility for the care of inmates, the responsibility for the care of the facility itself is shared between both the Sheriff and the Board. See, e.g., Judd v. Bollman, 166 Ariz. 417, 418 (Ct. App. 1990) (noting that the Sheriff has sole authority over "where a particular prisoner is housed" but the Board has the authority to "appropriate funds for the creation and maintenance of the county jails.")

Finally, the Board of Supervisors has budget authority for the Sheriff's Department and may use the budgeting process to influence jail policy. The board's budget authority over jail operations has existed since the territorial days. Truman v. Pinal Cty., 6 Ariz. 191, 195 (1899) (affirming the Board's authority to reduce the compensation of the Sheriff's jail staff and noting that such power "has never been, and is not now, questioned.") To be clear, the Board has a statutory obligation to fund the "actual and necessary expenses incurred by the sheriff in pursuit of criminals, for transacting all civil or criminal business and for service of all process and notices." A.R.S. § 11-444. Nevertheless, not all of the Sheriff's annual expenditures are likely to fall into those categories, providing the Board with some degree of discretion to set conditions on certain line items. Indeed, Arizona courts as early as 1919 have noted that the Board may withhold certain line items from row officers, based upon policy considerations. Pinal Cnty v. Nicholas, 20 Ariz. 243 (1919) (holding, in executing its duty to pay "necessary expenses" of the County Attorney, "the board of supervisors is charged with the duty of supervising all expenditures incurred by him, and rejecting payment of those which are illegal or unwarranted") (emphasis added). In 2014, former Maricopa County Administrator David Smith explained his interpretation of the Board's budgeting authority over Sheriff operations, noting that "within that reasonableness test of being able to meet their mandated functions, the Board would have the final say over the total amount [of the Sheriff's budget]." United States v. Maricopa County, et al., 2:12-cv-00981 (D. Ariz.), Doc. 349-7 (deposition of David Smith).

In Maricopa County, the Board's efforts to reign in Sheriff Arpaio's extravagances and systemic abuses reveal the extent of the Board's authority over the Sheriff's Department. Former County Administrator David Smith explained their method during the budgeting process: "we could try to be persuasive with respect to how [the Sheriff's] overall budget was going to come out. In other words, maybe they wanted a couple of positions over here in this program. Well, maybe we're going to, you know, do some trading with regard to you do this, and we'll do that, and everybody will come out better." Id. When asked if the Board can "take any action in response" to the Sheriff's failure to comply with county policies, Mr. Smith testified that "we can go in and cut the budget. Or we can put [the Sheriff] on, you know, a hyper-budget reporting where just about every expenditure has to be reported monthly." Indeed, Arizona statute confirms this authority. A.R.S. § 11-444(C) ("At the end of each month the sheriff shall render a full and true account of such expenses, and any balance remaining unexpended shall be paid by the sheriff into the county treasury.") The court found that the Board properly had authority, under state law, to "ensure compliance with county policy" and that persuasion through the use of the budgeting process was one such manner of doing so. United States v. Maricopa County, 151 F. Supp. 3d 998, 1015 (D. Ariz. 2015). See also Maricopa Cty. v. Dann, 157 Ariz. 396, 401 (1988) (holding that the Superior Court system, although an independent branch of government, must nevertheless follow budget-related policies set by the Board).

Attachment B

M E M O R A N D U M

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To: Pima County Elected Officials
C. H. Huckelberry, Pima County Administrator

From: Andrew L. Flagg, Chief Civil Deputy
Regina L. Nassen, Deputy County Attorney and Chief Ethics Counsel

Date: November 15, 2017

Subject: Effect of Board of Supervisors' IT-related Policies on County Elected Officials

This Opinion replaces and supersedes Formal County Attorney Opinion No. 2004-02, "*Authority of County Administrator to Enforce Pima County's Administrative Policy Regarding Acquisition of Computer Equipment and Software against Elected Officials.*"

Background

New Policy: D 27.2

At its September 5, 2017, meeting, the Board of Supervisors adopted a new IT-related policy, D 27.2, *Pima County Information Technology Program Lifecycle Management Plan*. The new policy imposes presumptive lifecycles for various types of IT-related hardware, and requires all departments, including those under the various elected officials, to work with the central-county IT Department ("Central IT") and the Procurement Department when selecting and acquiring hardware and software in order to make such acquisitions in the most cost-effective manner. The motion approving the policy contained direction to modify the policy to provide that elected officials should develop and submit their own lifecycle policies. However, the policy also contains a number of provisions that imply that Central IT will exercise greater qualitative control over the selection of hardware and software by County departments, including departments headed by elected officials. Violations of the policy "will result in the offending software or hardware solution being removed from access to the County network."

Amendment of Existing Policy: D 27.1

At the September 5, 2017 meeting, the County Administrator also indicated that he plans to propose amendments to Policy D 27.1, *Pima County Information Technology Program*, and he provided a draft revised policy to the Board.

Policy D 27.1, as currently written, delegates authority to the County Administrator to administer the County's IT program and provides that "[i]t is the policy of the Board of Supervisors that all Elected Officials, Appointing Authorities and Department Directors are responsible to ensure their

departments/divisions: participate in the Pima County IT Program, utilize and leverage the IT operational environment provided by the County Administrator, and adhere to the procedures and guidelines established and administered by the County Administrator."

The County Administrator has promulgated several Administrative Procedures pursuant to this delegated authority. Administrative Procedure 27-2, *Pima County IT Hardware & Software Purchases*, requires all software and hardware acquisitions to be "reviewed and approved as conforming to the submitting department's automation plan, County system standards, and/or approved budget by the Pima County Administrator's designee prior to acquisition." A proposed acquisition that is found to not comply with those requirements must be justified in a written request for a variance. The policy also authorizes the County Administrator to "block or terminate any component of the IT Program, … which has been detected to violate any County policy, especially any device/application/resource that poses a serious threat to security or integrity of the IT Program."

The draft proposed revisions to Policy D 27.1 would add even stronger statements requiring all departments, including those headed by elected officials, to adhere to centrally-promulgated security standards, utilize centralized IT contracts for hardware and software purchases, and comply with "County IT published software versions, server and storage standards, computer standards and telecommunications (networking and phone) equipment." Provisions have been added that prohibit accessing the County email and network systems using personal devices, and using County computers to access personal email and other electronic accounts; that authorize the County Administrator to "block or re-direct acquisitions that have been determined to be in violation of any County policy in order to maintain conformity to the standards and security for the County"; and that subject elected officials who violate the policy to "budget sanction by the Board of Supervisors." The County Administrator has indicted that he has directed staff to revise the draft to address some of the concerns that have been raised about these new provisions, so it will likely be somewhat different when it is actually proposed for adoption.

Questions Presented

We have been asked to revisit the issues addressed in County Attorney Opinion 2004-02 and explain whether and to what extent County elected officials are required to abide by these Board of Supervisors IT-related policies and County Administrator procedures.

Discussion

Delegation of Authority to County Administrator

Our 2004-02 opinion concluded that County Administrator promulgated procedures are not binding on elected officials, and that the Board of Supervisors, by requiring hardware and software purchases by elected-official departments to be approved by the County Administrator, had improperly delegated to him too much of the Board's discretionary authority. We have reviewed that conclusion, and the authority on which it was based, as well as subsequent legal authority, and are now updating and revising this aspect of our opinion.

The 1987 Attorney General Opinion relied upon in our 2004-02 analysis opined that "[p]owers granted to a governing body cannot be subdelegated, or transferred from the heads of agencies to

their subordinates, unless specifically authorized by legislation."[1] The court opinions cited by that opinion do not, however, support such a broad statement. In one case, the Arizona Court of Appeals held that a school district governing board could not delegate, to the district superintendent, the authority to decide whether to retain a probationary teacher.[2] The relevant statute, however, specifically referred to "the board's intention" to not offer a contract. And it specifically allowed the board to delegate to the superintendent the task of notifying the teacher of the retention/non-retention decision, which implied that no other delegation was permitted. The statutory language therefore clearly did not permit delegation of the decision at issue; the case does not establish a broader rule prohibiting any delegation of authority in the absence of specific statutory authorization.

In the other case relied upon by the Attorney General, the Arizona Court of Appeals held that a school board could not be bound by a collective bargaining agreement, nor could it delegate to the teachers' union the right to fix salaries.[3] The rule that an elected body cannot delegate its discretion to a private organization, however, does not mean that a public body cannot delegate some measure of discretionary authority to subordinate governmental bodies or officials. And A.R.S. § 11-201(A) specifically contemplates that a board of supervisors will delegate some measure of authority, by referring to "agents … acting under the board of supervisors' authority."

It is true that a governmental body that has *legislative* authority cannot delegate that authority to another branch of government or to a subordinate official or body.[4] But the authority delegated by the Board to the County Administrator in the IT policies, though it certainly involves the exercise of some discretion, and though the line is not always clear,[5] is more executive than legislative. It is therefore our opinion that the Board's delegation to the County Administrator of broad authority to administer and oversee the execution of its IT policies, including the authority to promulgate administrative procedures consistent with the goals expressed in those policies, is not improper.

Relationship between the Board of Supervisors and other County Elected Officials

Most of the cases we rely on for our analysis of the extent to which Board policies can bind other elected officials involve disputes between a county board of supervisors and the superior court, which is part of the judicial branch of State government. Those disputes involve a separation-of-powers component that a dispute between the county's executive officials does not. Nevertheless, the reasoning in these cases appears to be applicable to the latter situation.[6]

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1 1987 Ariz. Op. Atty. Gen. 189 (I87-119).

2 *Peck v. Bd. of Ed. of Yuma Union High Sch. Dist.*, 126 Ariz. 113, 115 (App. 1980).

3 *Bd. of Ed. of Scottsdale High Sch. Dist. No. 212 v. Scottsdale Ed. Ass'n*, 17 Ariz. App. 504, 510 (1972), *vacated on other grounds,* 109 Ariz. 342 (1973).

4 *Tillotson v. Frohmiller*, 34 Ariz. 394, 401 (1928); *Southern Pac. Co. v. Cochise Cnty.*, 92 Ariz. 395, 404 (1963).

5 "The line of demarcation between what is a legitimate granting of power for administrative regulation and an illegitimate delegation of legislative power is often quite dim." *State v. Marana Plantations, Inc.*, 75 Ariz. 111, 114 (1953).

6 The Court of Appeals held, in *Reinhold v. Bd. of Sup'rs of Navajo County*, that the justice court, as a "constitutionally created body," has the inherent right to "preserve its existence." 139 Ariz. at 231-232. The

A county's executive authority is split among its board of supervisors and the other elected officials: assessor, treasurer, superintendent of schools, recorder, county attorney, and sheriff. The board has the broadest scope of authority, but each of the other elected officials has some area within which they exercise discretionary authority independent of the board. The board and each individual elected official has the right to conduct their official business without unreasonable interference from the others, but they are likewise required to act reasonably, and to cooperate with one another. What is reasonable will vary according to the circumstances, and depending on how discretionary a particular function is.[7]

Thus, a board of supervisors controls the overall county budget, including the allocation of funds to elected-official departments,[8] but also has an obligation to adequately fund those departments.[9] And those other elected officials are obligated to cooperate with the board regarding its fiscal decisions,[10] and abide by the administrative policies and procedures developed by the board or under its direction[11]—but only to the extent that this does not unreasonably interfere with their ability to decide how best to carry out the functions of their office.[12]

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elected county offices are, like the justice court, established by the Arizona Constitution. Ariz. Const. art. VI, § 1 (establishing justice courts); Ariz. Const. art. XII, § 3 (establishing elected county offices). County elected officials therefore have this same right to defend their authority. *See also* *Maricopa County v. Biaett*, 21 Ariz. App. 286, 290 (1974) (recorder had the right to hire legal counsel, at county's expense, to sue the board of supervisors in order to defend his office; "To hold otherwise would leave the recorder at the complete mercy of those desirous of improperly usurping his functions.").

7 In this regard, it should be noted that the board of supervisors has statutory authority to "supervise" the assessor and treasurer to a greater degree than the other elected officials. A.R.S. § 11-251(1) (board of supervisors may "supervise the official conduct of all county officers … charged with assessing, collecting, safekeeping, managing or disbursing the public revenues").

8 A.R.S. § 11-201 (board of supervisors "has the power to . . . Determine the budgets of all elected and appointed county officers enumerated under § 11-401").

9 A.R.S. § 11-601 ("county charges" include "Salaries of county … officers, deputies and employees and necessary expenses incurred in the conduct of their offices."); *see also* *Bd. of Sup'rs of Maricopa County v. Stanford*, 70 Ariz. 277, 282 (1950) ("it is the duty of the supervisors to budget properly for the operation of the assessor's office"); *Biaett*, 21 Ariz. App. at 290 ("the legal expenses incurred by the recorder [to sue the board of supervisors] were such 'necessary expenses' as to make them a county charge.").

10 *Maricopa County v. Dann*, 157 Ariz. 396, 398-399 (1988) (court should have complied with process for requesting an exemption from countywide hiring freeze because the policy was generally applicable, reasonable, and did not "interfere with the statutory or constitutional functions of the court"); *Maricopa County v. Tinney*, 183 Ariz. 412, 414 (1995) ("In times of financial difficulty, it is not unrealistic to expect the judiciary to cooperate with the legislative branch of government in working within restricted budgets.").

11 *Lockwood v. Bd. of Sup'rs of Maricopa County*, 80 Ariz. 311, 315 (1956) (Board of Supervisors can control the court's purchase and use of vehicles—provided it doesn't hamper the court's ability to operate, and provided its actions aren't arbitrary).

12 *Mann v. Maricopa County*, 104 Ariz. 561, 566 (1969) ("The Board of Supervisors had the ministerial duty of approving the [personnel] requests, unless there is a clear showing that the judges acted unreasonably, arbitrarily, and capriciously in making the request."); *Broomfield v. Maricopa County*, 112 Ariz. 565, 568 (1975) ("The Board of Supervisors to challenge the action of the presiding judge would have to make a clear showing

The Pima County Board of Supervisors has a legitimate interest in minimizing IT-related expenses, maintaining the compatibility of systems that interact with one another, and protecting the data stored in those systems. It is therefore not unreasonable for the Board to require all elected officials to lease or purchase computer equipment in compliance with normal county procurement procedures, use standardized equipment when possible, comply with reasonable security standards, and work cooperatively with other departments that have related IT systems. The various Pima County elected officials must therefore comply with the IT policies' requirements except in those instances in which those requirements are inconsistent with the reasonable exercise of their discretion regarding how to carry out their delegated functions. And before departing from the policies, they must attempt diligently and in good faith to reach agreement or work out a compromise with central administration.[13] The County Administrator, Central IT, and the Board must also, however, act reasonably and grant exceptions to the policies' requirements when appropriate.[14] Ultimately, an elected official's decisions about their IT system must be honored unless the official is acting arbitrarily and capriciously.

Two provisions in the policies are worth specifically mentioning. Section 4 of the new lifecycle policy says that an "offending software or hardware solution" can be "removed from access to the County network." If such an action would disrupt the ability of an elected-official department to conduct its business, it would not be appropriate in the absence of some sort of emergency situation. The "budget sanction" provision in the proposed amended IT Program policy is also potentially problematic. As noted above, the Board of Supervisors controls the County's budget and it may, when setting a budget, take into account what it perceives as bad fiscal decisions on the part of elected-official departments. If the policy, by "budget sanction," means no more than that, it is not particularly concerning. But the Board of Supervisors *is* obligated to provide the resources reasonably necessary for the various elected officials to do their jobs; a "budget sanction" cannot be so severe as to disrupt the functioning of the official's department.[15]

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that the decision was unreasonable, arbitrary or capricious, and, in the absence of such clear showing, the decision of the presiding judge must be upheld.").

13 *Reinhold*, 139 Ariz. at 232. ("Mutual cooperation and an attempt to settle differences between the various branches of government is not only desirable, it is a legal prerequisite . . . .;" the court should exercise its power to compel the board to provide funding for personnel "only when there is no established method for obtaining needed personnel or when a reasonable, good faith, diligent effort to utilize such methods has been attempted and has failed.")

14 *Powers v. Isley*, 66 Ariz. 94, 106 (1947), ("the Board of Supervisors must exercise discretion, but they must act in a reasonable manner and not arbitrarily or capriciously in disapproving such salary. Neither must the judge in fixing the salary act arbitrarily or capriciously or unreasonably").

15 If the "sanction" involves taking money out of an elected official's current-year budget, there are also budget-law restrictions; the Board can "transfer monies between budget items" only if "[t]he transfer is in the public interest and based on a demonstrated need." A.R.S. § 42-17106(B)(2). If the sanction is intended to be punitive, it is difficult to imagine that that would qualify as a "demonstrated need." The County Administrator has indicated, however, that this is not the intent.

Conclusion

We revise our 2004-02 opinion regarding the Board's delegation of authority to the County Administrator to administer the County's IT program and find that such a delegation is not improper.

We do not, however, depart from the analysis in the rest of the 2004-02 opinion. The law requires the Board of Supervisors and the other elected officials with whom the Board shares the County's executive authority to work together in a reasonable manner so that each is able to act within the scope of their authority without unreasonable interference from, but also without unreasonably impinging upon, the others' discretion. The Board of Supervisors, as the repository of the broadest of the County's executive powers, including the power of the purse, has a legitimate interest in ensuring that County IT systems are acquired in a cost-effective manner, that they are appropriately secure, and that interacting systems are compatible to the extent necessary. Elected officials must respect Board policies designed to achieve those goals. At the same time, the selection and configuration of IT systems is often central to an elected official's conduct of their office, and the Board must respect their discretion in this regard, unless their actions are arbitrary or capricious.