

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2006-000621-001 DT

05/08/2007

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DANIEL ROBERTSON
HAROLD DAVID SALEM II
STEWART SANDOVAL
MATTHEW SANFORD
CORI SIMON
WARREN SOLOMON
DEAN STEPHAN
DAWN STRUCK
DAVID TOULOUSE
RICK VAN GALDER
PATRICK WOLTER

v.

CITY OF MESA (001)
CHRIS BRADY (001)

MICHAEL W SILLYMAN

FINANCIAL SERVICES-CCC
REMAND DESK-LCA-CCC

RULING / REMAND

This Court has jurisdiction over this Special Action pursuant to the Arizona Constitution, Article VI, Section 18, of the Arizona Constitution, and Rule 4, Arizona Rules of Procedure for Special Actions.

This matter was taken under advisement following the oral argument of April 24, 2007.

Plaintiffs/Petitioners, current or former employees of the City of Mesa Police Department, have brought this Special Action to challenge the procedures employed by the City of Mesa in imposing discipline for violations of the City of Mesa's e-mail usage policy.

Jurisdiction

Acceptance of Special Action jurisdiction is highly discretionary. *Pompa v. Superior Court in and for the County of Maricopa*, 187 Ariz. 531, 931 P.2d 431 (App. 1997). Jurisdiction

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is generally accepted only in those cases in which “justice cannot be satisfactorily obtained by other means.” *King v. Superior Court*, 138 Ariz. 147, 149, 673 P.2d 787, 789 (1983) and may be assumed to correct plain and obvious errors. *Amos v. Bowen*, 143 Ariz. 324, 326, 693 P.2d 979, 981 (App. 1984). Rule 3 of the Arizona Rules of Procedure for Special Actions states:

The only questions that may be raised in Special Actions are

- (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
- (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
- (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Jurisdiction will be accepted and exercised in this case, as the Petitioners have no other remedy available. Moreover, the issues raised involve issues of public interest and concern.

Facts and Procedural History

The Mesa City Council enacted personnel rule with an effective date of December 7, 2005. Section 820 (A) provides that a “Department Manager or designated Acting Department Manager may suspend an employee....” Section 820 (D) provides for a pre-deprivation hearing if discipline is recommended against an employee that involves a suspension of more than 16 work hours. Rule 820 (D) provides that the pre-deprivation hearing will be held by the department management, designated acting department manager, an assistant manager or a division director. The Rule 820 (D) pre-deprivation hearing references the Management Policy No. 339 (“339”), enacted by the City Manager, which describes in more detail the pre-deprivation hearing procedures. Policy 339 provides in Section VI the steps to ensure due process. Section VI (D) (7) of 339 provides that the department manager/designee will refrain from making any announcement of the final decision at the time of the pre-deprivation hearing. It goes on to provide that after the hearing the department manager shall weigh all the evidence and determine whether or not the proposed discipline should be imposed, modified or rescinded.

In April 2006, the Plaintiffs were served with notice of intent to suspend ranging from 16 work hours to 250 work hours. The proposed punishments were based on the City Manager’s newly implemented disciplinary matrix designed to identify categories of pornographic and obscene images and assigned discipline to these categories. The matrix was prepared to assure that all employees who engaged in violations of the City’s e-mail usage policy were treated equally and consistently. Final decisions on the discipline imposed on all city employees were

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made in accordance with the matrix and regardless of department. In implementing the matrix punishment procedure, the City Manager suspended the authority of the police department to assign discipline for its officers.

The City Manager acted in excess of his legal authority and in violation of the Mesa City Charter. By requiring all departments to discipline employees in accordance with his matrix, he suspended the authority of the police department to assign discipline for its officers. This violates City of Mesa Charter, Article II, Section 204, which provides “Policy making...shall be vested in the council....”

Section 403 of the Mesa City Charter provides that the Personnel Director, the Merit System Board, and the City Manager shall prepare personnel rules to be proposed to the City Council. The City Council may then adopt the proposed personnel rules by ordinance. Section 303 states the City Manager has the authority and responsibility to recommend personnel policies to the City Council. It is the adoption of these personnel rules that establishes the policy of the City Council, as defined in Section 304 (C) of the Mesa City Charter. When the City Council adopted the personnel rules it was establishing the “policy” of the City. Section 304 of the City Charter specifically provides that the City Manager “shall not exercise any policy-making or legislative functions.” The City Manager is required to follow the City of Mesa personnel rules and is specifically prohibited by the City Charter from changing those rules, which are the City’s policy.

When the City Manager adopted and imposed a disciplinary matrix which required all department heads to follow, his actions were contrary to the disciplinary action procedures adopted by the City Counsel in Section 820 of the personnel rules. The decision to suspend and the amount of suspension was not made by the department manager, and the pre-deprivation hearing did not conform with the procedures set forth in Section 820 (D) and Policy No. 339 referred to in Section 820 (D). The Personnel Rules specifically spell out that the Department Managers are responsible for imposing the discipline of a suspension. The City Manager reviews grievances pertaining to the discipline. Personnel Rules Sections 820(E) and 710. When the City Manager inserts himself into the disciplinary process in deciding discipline to impose, it is contrary to the City Council’s obvious intent to have the City Manager act as an impartial reviewer of discipline imposed.

This Court concludes that by adopting and requiring all departments to follow the matrix punishment procedures, the City Manager engaged in a policy-making function. He engaged in policy-making functions by changing the personnel rules, which is specifically prohibited.

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IT IS THEREFORE ORDERED remanding this matter to the City of Mesa to comply with its own personnel rules in imposing discipline, if any, for the alleged violations of the City's e-mail usage policy.

IT IS FURTHER ORDERED that counsel for Plaintiffs shall lodge an order consistent with this opinion and its application for attorney's fees and costs by **May 25, 2007**.