

**To: The Honorable Joe Eddie Lopez
Arizona State Senate**

May 14, 2001

**Re: Exemptions from State Merit
System
I01-010 (R01-016)**

Questions Presented

1. Are state employees covered by the merit system unless specifically exempted under A.R.S. § 41-771?
2. Does an agency have any authority to "uncover" a position that is not specifically exempted?

Summary Answers

1. By definition, all employees in "state service" are covered by the merit system. The definition of state service in A.R.S. § 41-762(2) excludes only employees who hold positions within the exemptions in A.R.S. § 41-771.
2. Agencies do not have the authority to "uncover" positions. The Legislature has specified in subsections A and B of A.R.S. § 41-771 which positions are exempt from the merit system. The Department of Administration (DOA) is responsible for determining whether positions fall within A.R.S. § 41-771(B).

Analysis

The Legislature has established a comprehensive state personnel system, sometimes referred to as the merit system or civil service system. *See generally* A.R.S. § 41-761 to 41-786; Arizona Administrative Code (A.A.C.) R2-5-101 to 2-5-903. An "employee" for the purposes of these laws is "a person holding a position in state service." A.R.S. § 41-762(1). "State service" includes "all offices and positions of employment in state government except offices and positions exempted by the provisions of this article."⁽¹⁾ A.R.S. § 41-762(2). As the Arizona Court of Appeals noted, "the Merit System initially encompasses *all* state personnel, and only *then* proceeds to exempt certain classes of employees from its purview." *McLeod v. Chilton*, 132 Ariz. 9, 18, 643 P.2d 712, 721 (App. 1981). Positions covered by the State personnel system or merit system are referred to as "covered positions." A.A.C. R2-5-101(17) (defining "covered position").

The exemptions from the State merit system are set forth in A.R.S. § 41-771(A) and (B). Subsection A provides that "[t]his article and article 6 of this chapter do not apply to:

1. Elected state officers.
2. State officers and members of boards and commissions appointed by the legislature or the governor, the employees of the governor's office, the employees

of the Arizona legislative council, and the employees of the supreme court and the court of appeals.

3. State officers and employees appointed or employed by the legislature or either house thereof.

4. The curator, curatorial aids, and tour guides and any other person employed to work in the state capitol museum.

5. Officers or employees of state universities and personnel of the Arizona state school for the deaf and the blind.

6. Patients or inmates employed in state institutions.

7. Officers and enlisted personnel of the national guard of Arizona.

8. The single administrative or executive director and one deputy director of each state department or agency.

9. Not more than two assistants who serve in the office of an elected state officer, where that elected state officer is the sole elected head of the department.

10. One administrative assistant who serves a board or commission elected to head a state agency, department or division, and one assistant for each elected member of such board or commission.

11. Persons reporting directly to the governor.

12. Employees of the department of emergency and military affairs who occupy Arizona national guard positions identified as mobilization assets.

13. Any other position exempted by law."

A.R.S. § 41-771(A). The inclusion of the category "any other position exempted by law" indicates that other statutes may also exempt particular positions from the merit system. *Cf. McLeod*, 132 Ariz. at 16-17, 743 P.2d at 719-720 (Chief Veterinary Meat Inspector was exempt from merit system since statute provided that he serves "at the pleasure of the [livestock] board").

Subsection B of A.R.S. § 41-771 also exempts from the merit system positions "determined by the director [of DOA] to meet any of the following criteria:

1. Top level positions in a department or agency that determine and publicly advocate substantive program policy. This includes those persons engaged in the direction of line operations if they report directly to the director or deputy director of the agency and in large multi-program agencies those persons who report directly to the head of a primary component of the department or agency.

2. Those persons who are required to maintain a direct confidential working relationship with an exempt official.

3. Persons who provide legal counsel.
4. Positions that are part time.
5. Positions that are temporary, established for the purpose of conducting a special project, study or investigation.
6. Positions that are essentially for rehabilitation purposes.
7. Positions that are determined by the director [of DOA] to be directly or indirectly engaged in establishing policy or enforcement standards.
8. Directors of all institutions which maintain supervision or care on a twenty-four hour per day basis other than halfway houses or group homes."⁽²⁾

A.R.S. § 41-771(B).

The Arizona Constitution further limits the reach of the state merit system. The Court of Appeals has determined that employees of the Board of Regents are not subject to the State personnel system administered by DOA because of the Board's constitutional authority. *Board of Regents v. Dep't of Admin.*, 151 Ariz. 450, 451, 728 P.2d 669, 670 (App. 1986).⁽³⁾ Similarly, this Office has previously determined that employees of the State Board of Directors for Community Colleges are exempt from the state personnel system because of the constitutional role of that board. Ariz. Att'y Gen. Op. 188-114; *but see* Ariz. Att'y Gen. Op. 199-014 (employees of the State Department of Education are not exempt from DOA's authority over state personnel system).

Conclusion

An employee is covered by the State merit system absent a constitutional limitation or unless the employee holds a position that is exempt from the State personnel system under A.R.S. § 41-771(A) or (B). DOA is responsible for determining whether A.R.S. § 41-771(B) applies to particular positions.

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1. Article 5 of Title 41, Chapter 4.

2. These positions are exempt from article 5 and article 6, except that they are subject to A.R.S. § 41-772(D), (E), and (F), which prohibit people from coercing state employees to participate, or not participate, in certain political activities. A.R.S. § 41-771(B).

3. The Supreme Court determined that a previous civil service system could not extend to University employees because of the constitutional authority of the Board of Regents. Hernandez v. Frohmiller, 68 Ariz. 242, 251, 204 P.2d 854, 860 (1949). University employees are now expressly exempt by statute.

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