

Opinion No. 2013-040

July 12, 2013

The Honorable Chris Richey
State Representative
Post Office box 2356
West Helena, Arkansas 72390-0356

Dear Representative Richey:

You have requested my opinion on a dispute between a former police officer and the Helena-West Helena Civil Service Commission. You have provided certain background facts, which I will summarize as follows:

A former police sergeant, who was fired for an “off duty incident,” made a timely appeal to the Civil Service Commission, which had [by statute] 15 days within which to hold a trial on whether the sergeant was properly disciplined. The Commission did not respond to the request for an appeal until two months after receiving it. The Commission then held “a public meeting to address the appeal.” The Commission unanimously voted to reinstate the sergeant and award him “back pay without holding a hearing/trial” because the Commissioners “felt they were in violation of their own policy by refusing to respond to the appeal letter within 15 days.”

The next day, however, the Commission “met privately with the Mayor, Chief of Police, the Chief’s Attorney, and the City Attorney,” to discuss rescinding “the reinstatement and holding a hearing/trial at a later date.” Within one week of this private meeting, the Commission “held a special call meeting to [rescind] all actions taken by the Commission and [it then] held a trial/hearing.” During this “trial/hearing,” the Commission “admitted to holding a private

meeting” and voted to dismiss the sergeant from the department but award him the two months’ back pay.

With this background in mind, you ask three questions:

1. Does the Civil Service Commission have the right to hold a private trial/hearing after a decision has already been made in a public meeting regarding the reinstatement of the appellant?
2. Was the Civil Service Commission in violation of the Arkansas Freedom of Information Act when holding the private meeting?
3. What are the remedies for the person seeking reinstatement?

RESPONSE

I am unable to answer your first two questions in this case because doing so would require me to engage in fact-finding and possibly engage in the private practice of law, both of which I am unable to do. Instead, I can speak more generally about the purpose, conduct, and culmination of meetings of a Civil Service Commission under A.C.A. § 14-51-308. Regarding your second question, I will simply explain the general procedural requirements and leave to the appropriate fact-finder the question whether the procedures were followed in this particular case. The answer to Question 3 is found in A.C.A. § 14-51-308(e), which requires the aggrieved former employee to appeal the Commission’s decision to the appropriate Circuit Court within 30 days of the Commission’s decision.

DISCUSSION

Question 1: Does the Civil Service Commission have the right to hold a private trial/hearing after a decision has already been made in a public meeting regarding the reinstatement of the appellant?

Because I am not a fact-finder when issuing opinions, and I am prohibited from the private practice of law, I am neither in a position to judge whether the Commission’s actions were proper nor how the Commission’s actions affect the termination or reinstatement of the former employee. I can however speak more generally about your question to the extent that it states a pure question of law

regarding the purpose, conduct, and culmination of meetings of a Civil Service Commission under A.C.A. § 14-51-308.

Section 14-51-308 establishes a clear procedure and timeline for the Commission's review of certain disciplinary decisions. Any civil-service employee who is to be fired, reduced in rank or compensation, or suspended for at least three days, must be notified in writing of that disciplinary action at the time it occurs. That writing must also explain the reasons for the action.¹ Employees who object to the discipline can then request that the Commission hold a "trial" "on the charges alleged as the grounds for" the disciplinary action.² During this trial, the Commission's ultimate purpose under the statute seems to be to determine whether there is sufficient evidence to support the "charges alleged as the grounds" for the disciplinary action.

The statute also indicates the means for accomplishing this ultimate purpose or objective. The Commission must conduct a "trial." Several factors throughout section 14-51-308 indicate that the legislature intends for this "trial" to be robust and akin to what we normally mean by the term "trial":

- -308(c)(2) speaks of the employee's right to present "witnesses";
- -308(d)(1) speaks of the Chair of the Commission issuing rulings on "pleadings" and the "admissibility of evidence";
- -308(e)(1)(B)(i), which speaks of preparing a "transcript of the proceedings before" the Commission, seems to contemplate arguments being elicited from opposing sides, witnesses being examined and cross-examined, and evidentiary rulings from the Commission; and
- -308(e)(1)(B)(ii) speaks of the Commission's obligation to ensure that the "transcript" of and "evidence" elicited during the proceeding being "made available" to the party who is filing the appeal with the Circuit Court.

Like a standard trial before a court, the "trial" conducted by the Commission culminates in a final order. Subsection -308(d)(2) requires that the final decision—

¹ A.C.A. § 14-51-308(a)(1) (Supp. 2011), as amended by Act 994 of 2013.

² A.C.A. § 14-51-308(b).

on whether there is sufficient evidence to support the “charges alleged as the grounds” for the disciplinary action—“shall be by a majority vote of the members of the commission.”

Further, and also like a standard trial before a court, the parties to the proceeding before the Commission have appellate rights. Specifically, -308(e)(1)(A) gives both the city and the employee “[a] right of appeal ... from any decision of the commission to the circuit court within the jurisdiction of which the commission is situated.” If either party follows the statute’s procedure for perfecting the appeal, then the Commission must “prepare a written order containing its decision.” That decision is then reviewable by the circuit court.³

For reasons stated earlier, I am unable to apply the foregoing rules to the set of facts you convey. Instead, I must leave to the appropriate fact-finder the questions of (a) the degree to which the Helen-West Helena Civil Service Commission has diverted from the foregoing rules and (b) the effects of that diversion on the Commission, the City, and the former employee.

Question 2: Was the Civil Service Commission in violation of the Arkansas Freedom of Information Act when holding the private meeting?

Not having been apprised of all the surrounding facts nor opposing argument, I cannot be definitive about whether the Commission violated the FOIA. Instead, I can simply explain what procedures *should* have been followed, and leave to the appropriate fact-finder the question *whether* they were in fact followed.

If a governing body wants to convene for a special meeting to hold an executive session to discuss a personnel matter, the governing body must give a least two hours’ notice to certain parties and must allow the public to attend.⁴ Further, when the governing body convenes for this special meeting, it must announce that it intends to go into executive session, and it must state the “specific” purpose for doing so.⁵ The FOIA provides an exhaustive list of the permissible reasons for

³ A.C.A. § 14-51-308(e)(1)(B)(ii).

⁴ A.C.A. § 25-19-106(a) (regarding attendance), -106(b) (regarding notice).

⁵ A.C.A. § 25-19-106(c)(1).

going into a personnel-matters executive-session.⁶ The FOIA also provides an exhaustive list of the persons who can attend an executive session. Attorneys are not permitted to attend executive sessions.⁷

The Commission is clearly a governing body, a meeting of which would qualify as a “meeting” under the FOIA. Therefore, it is plainly subject to the above procedures. I believe it is important to note, however, that even if it is determined that the particular private meeting in question was a FOIA violation, that determination would not appear to affect the former officer’s termination. The validity of the Commission’s ultimate action (which affirmed the officer’s termination), depends instead on the Commission’s final meeting, which you say was held as an open, public meeting and conducted as a “trial/hearing.”

Question 3: What are the remedies for the person seeking reinstatement?

The answer to this question is set out in A.C.A. § 14-51-308(e), which affords the city and the employee a “right of appeal ... from any decision of the commission to the circuit court within the jurisdiction of which the commission is situated.”⁸ This appeal begins by filing a “notice of appeal” with the Commission within 30 days of its decision.⁹ The circuit court must “review the commission’s decision on the record and may, in addition, hear testimony or allow the introduction of any further evidence upon the request of either the city or the employee.”¹⁰ The statute also gives a further “right of appeal” from the circuit court’s decision to the Arkansas Supreme Court.¹¹

⁶ *Id.*

⁷ See A.C.A. § 25-19-106(c)(2) (containing a comprehensive list of those persons allowed to attend an executive session; attorneys are not listed); *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968) (holding that city council could not consult its attorneys in an executive session).

⁸ A.C.A. § 14-51-308(e)(1)(A).

⁹ A.C.A. § 14-51-308(e)(1)(B).

¹⁰ A.C.A. § 14-51-308(e)(1)(C).

¹¹ A.C.A. § 14-51-308(e)(2).

The Honorable Chris Richey
State Representative
Opinion No. 2013-040
Page 6

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/RO:cyh