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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARANA POLICE OFFICERS ASSOCIATION, INC., Plaintiff/Appellant, v. TOWN OF MARANA, an Arizona municipal corporation, Defendant/Appellee, and MARANA PERSONNEL ACTION REVIEW BOARD, Intervenor/Appellee.	2 CA-CV 2009-0063 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20088912

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 The Marana Police Officers' Association, Inc. ("the association"), appeals from the superior court's denial of special action relief. The action arises from a request for records relating to an employee of the Marana Police Department. "We review *de novo* whether the denial of access to public records is wrongful." *W. Valley View, Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, ¶ 7, 165 P.3d 203, 205 (App. 2007). In so doing, we defer to any factual findings made by the superior court. *Id.* We affirm the trial court's ruling.

¶2 The employee at the heart of this case was discharged from the Marana Police Department in June 2008. She then appealed to the Marana Personnel Action Review Board ("the board"), which reinstated her to her former position, with full back pay, on December 10, 2008. Although the board commenced its meeting and issued its decision in open session, it also had met in executive session during October, November, and December 2008.

¶3 On December 18, 2008, the association filed a public records request with the Town of Marana seeking the disclosure of "[t]estimony of all witnesses in the . . . [board] [h]earing." The town denied the request on the ground that information about the meeting, which was held in executive session, was confidential. The association then filed a complaint for special action against the town pursuant to A.R.S. § 39-121.02(A). The complaint alleged that the board had "held the personnel hearing in an unlawful and illegal executive session[,] which . . . violate[d] the Arizona Open Meeting Law" and that the transcript of the hearing was a public record subject to disclosure. The association also filed an application for an order to show cause why the records were not produced as requested.

¶4 The board, which was the custodian of the hearing records, then filed a motion for leave to intervene in this case, which the superior court granted. After reviewing the parties' pleadings and hearing oral argument on the matter, the court denied the association relief on March 12, 2009. We have jurisdiction over the association's appeal pursuant to A.R.S. § 12-2101(A) and (B).

¶5 The association now claims the hearing that was designated an "executive session" was actually a public meeting because, rather than simply "discussi[ng] and consider[ing]" an employment issue as is permitted in an "executive session" under A.R.S. § 38-431.03(A)(1), the board heard arguments from the parties and accepted evidence that included witness testimony. Consequently, the association contends the board violated Arizona's open meeting laws and wrongly denied it access to the records of the hearing. The

town and the board respond that the association has waived this argument by failing to raise it in the superior court. We agree.

¶6 "[T]he general law in Arizona [is] that a party must timely present [its] legal theories to the trial court so as to give the trial court an opportunity to rule properly." *Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970). A party therefore waives on appeal any argument not presented properly in the lower court. *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88, 796 P.2d 881, 890 (1990); *Crowe v. Hickman's Egg Ranch, Inc.*, 202 Ariz. 113, ¶ 16, 41 P.3d 651, 654 (App. 2002). This rule is procedural rather than jurisdictional. *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, ¶ 18, 169 P.3d 120, 125 (App. 2007). In order to promote fair and efficient proceedings, however, this court will rarely exercise its discretion to entertain novel arguments on appeal. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 17, 160 P.3d 223, 228 (App. 2007).

¶7 Pursuant to statute, a public body may hold nonpublic meetings for limited purposes, one of which is the "[d]iscussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body." § 38-431.03(A)(1). In its memorandum to the trial court, the association argued the board's hearing did not qualify as an executive session because: (1) the discharged police officer was a *former* employee, not a "public officer, appointee or employee of Marana"; (2) the board was exercising a reviewing authority rather than an appointing authority; (3) the hearing was more analogous to a

"'confidential' evidentiary hearing" such as that authorized by the State Personnel Board, and records of such hearings are public; and (4) characterizing the hearing as an executive session would prevent transcripts from being transmitted for appeals and special actions, contrary to public policy. The association did not urge, as it does on appeal, that § 38-431.03 prohibits a public body from "hear[ing] witness testimony, accept[ing] evidence, or hear[ing] opening and closing statements" during executive sessions, or that the statute does not "allow[] for participation *of any kind* by the employee or the employer during discussion or consideration by the public body."

¶8 The association disputes this conclusion, pointing to the following passage in its reply memorandum to the superior court:

> To argue that an employee (or former employee) could make an argument or present evidence to a public body in executive session renders several portions of the statute superfluous, void, and contradictory. . . . Further, to interpret A.R.S. § 38-431.03(A)(1) as allowing the employee, public officer, or appointee to argue or present evidence during an executive sessions renders subsection (B)(2) superfluous, void, and insignificant . . . .

We believe such oblique remarks did not present adequately the argument that "acquisition of information in an employment appeal *cannot occur during executive session*." Moreover, new arguments raised for the first time in a reply memorandum in the superior court, and therefore not subject to an opposing litigant's response, are deemed waived and will not be considered on appeal. *See Westin Tucson Hotel Co. v. Ariz. Dep't of Revenue*, 188 Ariz. 360, 364, 936 P.2d 183, 187 (App. 1997).

¶9 At oral argument the association contended its argument was not waived below, referring to the following sentence in its first memorandum to the superior court: "Here, the . . . Board wrongly believed . . . it could hold a full evidentiary appeal hearing in executive session under the exception to the O[pen] M[eeting] L[aw] found in A.R.S. § 38-431.03(A)(1)." That memorandum went on to list the "reasons" the association believed the open meeting exception did not apply, which we have enumerated above. None of those arguments asserted any analytical distinction between the use of an executive session to accept evidence, as apparently occurred here, and the use of an executive session to merely consider an employee's dismissal, which is expressly authorized in § 38-431.03(A)(1). As the association conceded at oral argument, the superior court did not rule on the issue of whether the board could accept evidence in an executive session, and the association elected to pursue an appeal rather than seek a ruling on the issue below. We therefore decline to address this issue in the first instance.

¶10 Furthermore, in the exercise of our discretion and in the interest of promoting the timely presentation of legal arguments in the superior court, we decline the association's invitation to rule on the issue presented here as a matter affecting the public interest. *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991). As the town correctly observes, to the extent the association wished to challenge the board's decision to hold evidentiary hearings in an executive session, in arguable violation of Arizona's open meeting laws, it could have done so immediately after the town posted notice that such

hearings would be held in executive session. *See* A.R.S. § 38-431.07(A) (allowing person affected by alleged open meeting laws violation to bring action to require compliance, prevent violation, or determine applicability of laws). Because the association failed to use available remedies to ensure open meetings and disclosure of public records before the board and further failed to present the current issue to the superior court in a timely fashion, we are not persuaded that the public interest requires this court to address the merits of an argument the association twice failed to assert at earlier stages in the proceedings.[1]

¶11 The association further argues § 38-431.03 did not prevent disclosure of the records here because the person who had appealed to the personnel board "was not an employee at the time of the executive sessions." As noted, § 38-431.03(A)(1) allows a public body to conduct an executive session, rather than an open meeting, to "discuss[] or consider[] . . . [the] employment . . . [or] dismissal" of a public employee. The association contends the dismissal of the police officer here was final months before the meeting of the board; therefore, "[t]he purpose of the so-called executive session was not to discuss and consider the dismissal . . . but to hear her appeal of whether there was just cause for the dismissal that had already been imposed."

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[1]Although all the parties signaled at oral argument that they would welcome clarification as to whether evidence may be accepted during an executive session, we choose not to address this potentially complex issue given its lack of comprehensive development below.

¶12 By its terms, however, § 38-431.03(A)(1) permits a public body to discuss or consider the dismissal of a public employee in executive session regardless of whether the dismissal is prospective or has already occurred. *See Arpaio v. Steinle*, 201 Ariz. 353, ¶ 5, 35 P.3d 114, 116 (App. 2001) ("If the statute's language is clear and unambiguous, we give effect to that language and apply it without using other means of statutory construction, unless applying the literal language would lead to an absurd result.") (footnotes omitted). Moreover, as an employee of the town, the discharged police officer had a right to appeal the decision to various town officials, including the board that ultimately reinstated her. Thus, even if the dismissal took effect immediately, it was not final until after the board had conducted its meetings. And those meetings could be held lawfully in executive session to discuss and consider the dismissal, as provided in § 38-431.03(A)(1).

¶13 Accordingly, we affirm the trial court's ruling denying the association's request for relief. We also deny the association's request for attorney fees.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge