

1 Scott M. McNair
(Plaintiff, Pro Per)

2 [REDACTED]
3 Phoenix, Arizona [REDACTED]
4 [REDACTED]

5 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
6 **IN AND FOR THE COUNTY OF MARICOPA**

7 SCOTT M. MCNAIR
8 Plaintiff

9 V.

10 MARICOPA COUNTY DEPARTMENT
11 OF TRANSPORTATION, ET AL,
12 Defendants

CASE No. LC2003-000539-001 DT

PLAINTIFF'S OPENING MEMORANDUM

(Assigned to the Hon. Michael D. Jones)

13 **I. PLEA FOR LENIENCY AND WAIVER OF FORMAL REQUIREMENTS**

14 In that the Plaintiff (McNair) is neither represented by counsel nor had any formal legal training, he
15 does hereby request leniency from the Court for the form and content of this pleading.

16 In accordance with J.R.A.D.¹ Rule 13, the Plaintiff does hereby request that the Court waive and/or
17 modify any formal procedural requirements in order to insure McNair due process and equitable justice,
18 and to insure that a fair and just determination can be made.

19 Moreover, as McNair is a pro se litigant and not an attorney, his pleadings must be considered
20 without technicality. (Pro se litigants' pleadings are not to be held to the same high standards of
21 perfection as lawyers.²)

22 **II. STATEMENT OF CASE**

23 This action is a Judicial Review of an Administrative decision of a case appealed from the State of
24 Arizona Personnel Board (Board), docket number 02-056. It originated as a "*Whistleblower*" complaint
25 filed under A.R.S. §38-532.

¹ J.R.A.D. refers to the *Arizona Rules of Civil Procedure for Judicial Review of Administrative Decisions*.

² Haines V. Kerner, 92 S.Ct. 594; Jenkins V. McKeithen, 395 US 411, 421 (1969); Picking V. Penna. Rwy. Co. 151 F.2d 240; Puckett V. Cox, 456 F.2d 233.)

1 **III. STATEMENT OF JURISDICTION**

2 This Court has jurisdiction in this matter pursuant to A.R.S. § 41-784.F and A.R.S. §12-901 et. seq.,
3 and A.R.S. § 38-532.I.

4 **IV. STANDARD OF REVIEW**

5 On appeal of an administrative board’s decision pursuant to the Administrative Review Act, the
6 superior court determines whether the administrative action was illegal, arbitrary, capricious, or was an
7 abuse of discretion³.

8 The Superior Court may modify, affirm or reverse the decision in whole or in part (See A.R.S. § 12-
9 910.E and A.R.S. §12-911.A.5)

10 The reviewing court may draw its own conclusions as to whether the administrative agency erred in
11 its interpretation and application of the law⁴.

12 Questions of statutory interpretation involve questions of law and the appellate court is not bound by
13 the administrative agency’s conclusion⁵.

14 **V. PREFACE**

15 There are currently three separate motions from McNair outstanding in this case that directly affect
16 the substance of this case and McNair’s ability to file a competent Opening Memorandum. These
17 include a Motion for Evidentiary Hearing and a Motion for Continuance. Being that the Court issued an
18 order dictating that McNair’s Opening Memorandum was to be filed by this date, and since as of this
19 date no decisions have been issued concerning those outstanding motions, McNair is therefore forced
20 under duress to file this memorandum or waive any future right to appeal.

21 **VI. STATEMENT OF FACTS**

22 On June 6, 2003, McNair filed a timely complaint in this Court for Judicial Review of an
23 Administrative Decision. In his original complaint, McNair asserted that the items contained in the
24 *“HEARING OFFICER’S REPORT AND RECOMMENDATION FOR DISMISSAL OF COMPLAINT”*

³ A.R.S. § 12-910(G), Siegel v. Arizona State Liquor Board, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).

⁴ Carondelet Health Services v. Arizona Health Care Cost Containment System Administration, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995)

⁵ Seigal, 167 Ariz. 401

1 (H.O. Harold J. Merkow), subject to review by the Court shall include, but not be limited to the
2 following:

- 3 1) HOR⁶, pg. 5, FINDING OF FACT, item 9, “Maricopa County failed to provide copies of its
4 Motion to Dismiss to named respondents”
- 5 2) HOR, pg. 5, FINDING OF FACT, item 9, *“He (Complainant) was unable to present any*
6 *evidence at the February 10 jurisdictional hearing, that the County has been undertaking an*
7 *‘ongoing campaign’ of denial of discovery, disclosure and access to public records and that*
8 *“McNair cannot present documents, evidence, or testimony if not given the opportunity to do so.*
9 *Furthermore, McNair cannot present documents that the County refuses him access to or secrets*
10 *from him in order to inhibit his right to due process and justice.”*
- 11 3) HOR, pg. 5, FINDING OF FACT, item 9, *“...that he is entitled to equitable tolling...”*
- 12 4) HOR, pg. 5, FINDING OF FACT, item 9, *“...that his supervisor threatened him and that*
13 *these threats of imminent reprisal were intended to prevent the Complainant from contacting any*
14 *Public Body or Director”*
- 15 5) HOR, pg. 6, FINDING OF FACT, item 11, *“No documentary evidence exists in the record of*
16 *this matter to show that prior to December 2002, Complainant made a written request before an*
17 *administrative body to review whether his separation from service with Maricopa County was a*
18 *result of a prohibited personnel action”*
- 19 6) HOR, pg. 6, FINDING OF FACT, item 11, *“No evidence exists in the record of this matter*
20 *to show that, prior to November 2002, Complainant knew that the Maricopa County Merit*
21 *System Commission would not entertain a request for hearing from Complainant.”*
- 22 7) HOR, pg. 7, CONCLUSIONS OF LAW, item 2, *“Complainant was not in ‘state service’ as*
23 *an employee of Maricopa County.”*
- 24 8) HOR, pg. 9, CONCLUSIONS OF LAW, item 3, *“Complainant has failed to show that he*
25 *meets the jurisdictional requirements of the Whistleblower statute since Complainant has failed*

⁶ HOR refers to the *Hearing Officer’s Report and Recommendation for Dismissal of Complaint.*

1 to produce any written complaint that he submitted to a public body prior to the expiration of his
2 contract...”

3 9) HOR, pg. 9, CONCLUSIONS OF LAW, item 4, “Complainant has failed to show that he
4 meets the jurisdictional requirements of the Whistleblower statute since Complainant has failed
5 to produce any written request for a hearing to any administrative body within 10 days from his
6 separation...”

7 10) HOR, pg. 9, CONCLUSIONS OF LAW, item 5, “Complainant is not entitled to a hearing
8 before the Arizona State Personnel Board...”

9 11) HOR, pg. 10, REASONS FOR RECOMMENDATION, “Complainant’s argument is
10 spurious since he never tried to submit a request for a hearing and he did not know that a
11 request for hearing would be rebuffed.”

12 12) HOR, pg. 10, REASONS FOR RECOMMENDATION, “The undersigned believes that,
13 since the Arizona Revised Statutes are available to all government employees at any time,
14 Complainant should have made himself aware of the law and its applicability to him.”

15 13) HOR, pg. 10, REASONS FOR RECOMMENDATION, “...the written disclosure on which a
16 complaint is based must have been submitted to a public body while the person was a
17 government employee.”

18 14) HOR, pg. 11, REASONS FOR RECOMMENDATION, “When Complainant published his
19 e-mail...he was no longer an employee...and his re-employment rights were no longer an issue.”

20 15) HOR, pg. 11, REASONS FOR RECOMMENDATION, “The only way Complainant’s re-
21 employment rights could be pertinent is if...while employed...he was told that he would not be re-
22 employed because of a disclosure made to a public body.”

23 16) HOR, pg. 11, REASONS FOR RECOMMENDATION, “Since Complainant has not
24 produced any documentation... it is wholly irrelevant whether Maricopa County did not provide
25 any discovery materials to Complainant.”

26 17) HOR, pg. 11, REASONS FOR RECOMMENDATION, “All in all, Complainant has no
27 basis for pursuing a Whistleblower complaint.”

1 18) HOR, pg. 11-12, REASONS FOR RECOMMENDATION, “...his actions during the months
2 of June and July do not support any conclusion that he was a whistleblower or that he suffered
3 any prohibited personnel action.”

4 19) HOR, pg. 12, REASONS FOR RECOMMENDATIONS, “Complainant’s complaint is
5 untimely and does not fall within the ambit of the Whistleblower statutes.”

6 20) McNair has also asserted that the Board acted in manner that was illegal, arbitrary,
7 capricious, or an abuse of discretion.

8 Included in McNair’s complaint were a Demand For Trial De Novo and a Demand For Trial By
9 Jury, as prescribed by A.R.S. §12-910.C and J.R.A.D. 11.

10 Following the filing of his complaint, as required by A.R.S. §12-904.B, McNair provided notice to
11 the Board that the complaint had been filed and that the Board was required to transfer its complete
12 agency record of this matter to the Superior Court. Included in his notice to the Board, was a demand
13 that the transcript of proceedings before the Board be included in the record.

14 According to J.R.A.D. 5.A, the Board was then required to transmit to the Court and all parties, a
15 document entitled “*Certification of Record on Review*”. This “*Certification of Record on Review*” is
16 intended by statute to be a certification by the Board that **a COMPLETE and accurate record** of the
17 originating action had been transferred to this Court. This same statute requires that: “*This certification*
18 *shall include an index of all materials contained in the record on review...*”

19 Rather than comply with J.R.A.D. 5.A and A.R.S. §12-904.B, on July 2, 2003 Ms. Judith Henkel
20 (Director, State of Arizona Personnel Board) and Mr. Craig C. Mousel (Counsel for the Board), filed a
21 vague letter with this court asserting that the **complete** record had been transferred. This “vague letter”
22 failed to include “*an index of all materials contained in the record*”.

23 Subsequently, on July 23 2003 McNair filed a MOTION TO COMPEL COMPLIANCE WITH
24 TRANSFER OF RECORD REQUIREMENTS with this Court, in order to force the Board to comply
25 with J.R.A.D. 5.A and A.R.S. §12-904.B.

26 On August 8 2003, McNair filed a MOTION TO COMPEL WITHDRAWAL OF COUNSEL AND
27 REQUEST FOR SANCTIONS against counsel for Defendants Maricopa County Department of

1 Transportation, et. al. Said counsel (Daniel Brenden) was and is listed as a witness in this case, and
2 therefore under Arizona State Bar Ethics Rule 1.7, Mr. Brenden is statutorily prohibited from
3 representing anyone in this matter. (Several months later, Judge Jones arbitrarily denied this motion and
4 has allowed Brenden to appear, in direct and clear violation of the law.)

5 On September 22, 2003 a prehearing conference of this matter was heard before the Honorable
6 Michael D. Jones. At that conference, the issue of the Board's failure to file a proper "*Certification of*
7 *Record on Review*" (including an *index of all materials contained in the record*) was discussed. It was
8 also discovered at this conference, that the Board had not forwarded a copy of the transcript of its
9 proceedings, thereby negating the validity of its previously filed "*Certification of Record on Review*"
10 and proving that the record was incomplete.

11 Rather than order the Board to comply with its statutory duty, Judge Jones ordered all parties to
12 review the record in the Clerk of the Court's possession and "report back" on the completeness of the
13 record. A second prehearing conference was schedule for November 24, 2003.

14 Following such, McNair visited the Clerk of the Court's office, and was denied access to the record
15 (His OWN case file.) (Emphasis added.)

16 On November 11 2003, a REQUEST FOR COURT REPORTER AT PREHEARING
17 CONFERENCE SET FOR NOVEMBER 24, 2003 was filed by McNair.

18 On November 17 2003, McNair filed a NOTICE OF APPEAL signifying his intent to seek appeal of
19 certain issues in this case to the Arizona Court of Appeals.

20 On November 24 2003, it was discovered that the Court had failed to procure a Court Reporter so
21 the prehearing conference was to be cancelled. Prior to canceling such, counsel for the Board submitted
22 a sealed envelope to the Court claiming that it "completed the record". The contents of this sealed
23 envelope have never been disclosed to McNair. This act by the Board again proved that its
24 "*Certification of Record on Review*" was faulty, and that the record was incomplete.

25 Also submitted to the Court on this date, was a MOTION FOR CHANGE OF JUDGE by McNair.

26 On December 17 2003, the Clerk of the Superior Court prepared an index of the record of this case,
27 in anticipation of McNair's appeal to the Arizona Court of Appeals. In that index, the Clerk listed three

1 separate sealed envelope(s). (The contents of which have **never** been disclosed to McNair.)

2 On February 18 2004, a fourth prehearing conference was held in this matter. Again McNair raised
3 the issue of the Board's failure to file a proper "*Certification of Record on Review*" (including an **index**
4 **of all materials contained in the record**). McNair's motion/demand that the **Board comply** with the
5 **statutory requirements of transferring a complete record and accompanying index was summarily**
6 **denied** by Judge Jones. (Emphasis added.)

7 At this same conference, McNair attempted to inform Judge Jones that he had been **denied all**
8 **access to the Court's record of this (his) case.** Rather than take steps to rectify this gross injustice and
9 interference with McNair's right to due process, Judge Jones chose to verbally assault McNair for his
10 assertion that the Court had received any "sealed" envelopes, and for McNair's failure to inform the
11 Court sooner about his being denied access to the record. Following Judge Jones' tirade, he then began
12 summarily denying motions submitted by McNair **months earlier.** Judge Jones then concluded the
13 conference by arbitrarily scheduling dates for memorandum to be filed in this action. Judge Jones also
14 stated that he would accept motions for an evidentiary hearing and a continuance in order to hold such.

15 On March 10 2004, McNair filed a NOTICE OF INACCESSIBILITY OF COURT RECORDS TO
16 PLAINTIFF (with supporting affidavit). As per the February 18 2004 instructions of Judge Jones,
17 McNair also filed a MOTION FOR EVIDENTIARY HEARING, a MOTION FOR CONTINUANCE,
18 and a MOTION TO AMMEND.

19 As of this date, no rulings on those motions have been made. Thereby forcing McNair to file his
20 Opening Memorandum without **ever** having seen the record of this case, without **ever** having received
21 an index of the record transferred from the Board, and without **ever** having been told what is contained
22 in the **three sealed envelopes** provided to the Court by the Board.

23 VII. DISCUSSION

24 Originally, McNair made reports of corruption and unlawful activity to the Maricopa County Board
25 of Supervisors. The County refused to accept or act upon his complaints. Additionally, there is no
26 indication in the record that the County ever made any attempt to investigate McNair's allegations.
27 Instead, the County (at the direction of the Board of Supervisors) chose to begin a campaign of

1 retaliation and “stonewalling”. Refusing all discover and disclosure, and even going so far as to attempt
2 to criminally extort money from McNair for public records he is entitled to for free.

3 After months of the County’s stonewalling, McNair contacted the Board. In December of 2002, the
4 Board instructed McNair to file a “Whistleblower Complaint.” Which he did.

5 In McNair’s original complaint before the Board, he alleged that he had been subjected to prohibited
6 personnel practices in retaliation for exposing and reporting unlawful and corrupt activity within
7 Maricopa County Government. He also alleged that high ranking elected officials within Maricopa
8 County (Board of Supervisors) had knowledge of and involvement in such, which led to further
9 retaliatory action against McNair. In order to prevent McNair from exposing the corrupt and unlawful
10 activity of Maricopa County and its Board of Supervisor’s (near an election year), the County chose to
11 illegally and completely deny McNair all discovery and disclosure into the matter.

12 Rather than allow the fruit of his complaint to be born and exposed, the Board then became a willing
13 accomplice to the County’s corruption, by taking extreme and unlawful steps to squash his complaint.
14 The Board refused to issue subpoenas on McNair’s behalf, allowed the County to continue it campaign
15 of stonewalling concerning discovery and disclosure, ignored motions by McNair, and allowed counsel
16 for the Defendant’s to unlawfully appear in direct violation of ER 1.7. To compound this, in a blatant
17 denial of due process, the Board arbitrarily cancelled the hearing of McNair’s complaint⁷. In order to
18 attempt to legitimize its violation of McNair’s right to due process, the Board then held a bastardized
19 “evidentiary hearing” in which it unlawfully denied McNair the opportunity to present evidence,
20 witnesses, or testimony on his own behalf⁸. The sole purpose of this “evidentiary hearing” was clearly to
21 manufacture grounds by which to dismiss McNair’s complaint. It even went so far as to allow witnesses
22 for the Defendants to commit repeated and blatant acts of perjury. Through the County’s own faulty
23 actions, if failed to give grounds for the Board to assist the County in its cover-up. Therefore, the Board

⁷ An essential element of due process is that a deprivation of life, liberty, or property be preceded by notice and an opportunity for a hearing appropriate to the nature of the case.(Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 , 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).)

⁸ The rights of due process include not only the right to notice of the time and place of hearing, but also the opportunity to be present at that hearing to present evidence and otherwise defend oneself. (Unpublished, from CV 2002-007216, Hon. Michael D. Jones, Superior Court of Arizona, In and For the County of Maricopa)

1 specifically instructed the County as to what to file in order for the Board to give a **predetermined**
2 ruling that would dismiss McNair's complaint.

3 The Board ignored all pleas from McNair for due process, ignored all citations of statute, authority
4 and reason, and summarily issued its **predetermined** ruling. Dismissing McNair's complaint on faulty
5 grounds, after denying McNair any opportunity to submit evidence, witnesses, or testimony into the
6 record.

7 Following the willingly unlawful actions of the Board, McNair sought to pursue justice before the
8 Superior Court by filing this timely action under Arizona the Administrative Review Act.

9 Since a successful appeal on McNair's behalf would expose the Board as willing accomplices to the
10 corrupt acts of Maricopa County, the Board was then burdened with the task of not only preventing
11 McNair from winning his appeal, but also preventing him from even presenting one. To do this, the
12 Board began its own campaign of stonewalling. It withheld from McNair (and this Court) a proper index
13 of the Board's record (as required by statute), and "piece-mealed" portions of the record to the Court,
14 claiming each time that it had "completed the record". When in fact, there is no way for this Court to
15 determine if the record is complete, without a proper index of such and an related evidentiary hearing.

16 Throughout the proceedings in this Court, McNair has continually raised issues concerning the
17 incompleteness of the record, and, that McNair had been denied access to the record by this Court.

18 The purpose of requiring an "index of the record" and a "*Certification of Record on Review*" is: a) to
19 ensure that the reviewing court (and all affected parties) have a complete record, and, b) provide a
20 means for each party to reference that record in their memorandum. The Board's vague letter in no way
21 constitutes an "*index of the record*", thereby making it impossible for any party to reference the record
22 in their memorandum.

23 In fact, its "index" is clearly flawed in its content. The Board's "letter" lists "Respondent's and
24 Appellant's Exhibits" as items in the record. How can the Board list "Appellant's Exhibits" as part of
25 the record when McNair has never been allowed to submit anything in to the record?

26 This Court, has compounded this denial of due process, by continuing to deny McNair access to the
27 record, allowing sealed documents to be entered into the record without allowing McNair to review

1 such, and by refusing to allow McNair opportunity to supplement the record even though such is
2 allowed by law and vaguely offered by this Court.

3 **By withholding the record from McNair, the Defendant's and this Court, have made it**
4 **impossible for McNair to cite from the record for this memorandum, and as such, have willfully**
5 **interfered McNair's right to due process. (Emphasis added.)**

6 Beyond the Defendants and this Court's constant denial of access to the record by McNair, are the
7 issues of allowing the Defendants to be represented unlawfully, refusal to give McNair's motion due
8 consideration (and in some instances question as to whether the Court even read them before ruling on
9 such), and most importantly, denial of McNair's **statutory right to trial de novo** (and trial by jury).

10 Since the Board unlawfully cancelled the hearing of McNair's complaint, the substance and issues of
11 McNair's complaint **have never been heard**. He therefore has a **statutory right to a trial de novo** (and
12 a trial by jury)⁹. Regardless of whether the substance and issues of McNair's complaint were or were not
13 ever heard, appeals to the superior court must be tried de novo¹⁰.

14 **VIII. CONCLUSION**

15 The Defendant's have continually acted in a manner that is illegal, arbitrary, capricious, and an
16 abuse of discretion. They have willfully and maliciously violated McNair's rights to due process, and
17 compromised this Court's integrity by continuing their unlawful activities before such.

18 This Court has itself has violated McNair's rights, not only by allowing the Defendants to persist
19 with their unlawful acts, but by endorsing and protecting such. This Court has knowingly allowed the
20 record to be withheld from McNair in order to prevent him pursuing his right to due process, violated
21 statute by denying him a trial de novo (and trial by jury), and by failing to give his pleadings due and
22 just consideration.

23 The only way this Court can redeem itself in the eyes of justice is to reverse the Board's decision
24 and grant McNair the relief he has sought.

25

⁹ A.R.S. § 12-910.C

¹⁰ A.R.S. § 38-532.I Notwithstanding section 12-910, an appeal to the superior court under this subsection shall be tried de novo.

1 SUBMITTED this 31ST day of MARCH 2004.

2
3 By _____

4 Scott M. McNair, Plaintiff Pro Per

5
6 FILED and delivered this 31ST day of MARCH 2004.

7
8 By _____

9 Scott M. McNair, Plaintiff Pro Per

10
11 ORIGINAL of the foregoing FILED with:

12 Clerk of the Court
13 Superior Court of Arizona, Maricopa County
14 201 West Jefferson Street
Phoenix, Arizona 85003

15 COPY of the foregoing HAND DELIVERED to:

16 Honorable Michael D. Jones
17 Maricopa County Superior Court
18 201 West Jefferson
Phoenix, Arizona 85003

19 COPIES of the foregoing MAILED to Defendants:

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26 (Counsel for Defendants: Maricopa County, Maricopa County Department of Transportation,
27 Brock, Stapley, Kunasek, Wilson, Wilcox, Medlin, Peterson, & Ramsey)