

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000539-001 DT

07/28/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED: 07/30/2004

SCOTT M MCNAIR

SCOTT M MCNAIR  
[REDACTED]  
PHOENIX AZ [REDACTED]

v.

MARICOPA COUNTY DEPARTMENT OF  
TRANSPORTATION (001)  
STATE OF ARIZONA PERSONNEL BOARD  
(001)  
KENNETH MEDLIN (001)  
TERRY PETERSON (001)  
JENNIPHER RAMSEY (001)

DANIEL R BRENDEN  
CRAIG L MOUSEL  
MARY COLLINS CRONIN

OFFICE OF ADMINISTRATIVE  
HEARINGS

MINUTE ENTRY

This Court has jurisdiction of this Administrative appeal pursuant to the Administrative Review Act, A.R.S. Section 12-901 et seq.

This case has been under advisement since the time of oral argument on June 21, 2004. This decision is made within 60 days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings, the memoranda and oral arguments submitted by the parties and counsel.

Pursuant to A.R.S. Section 12-901(e) this Court may review administrative decisions in Special Actions and proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. This court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000539-001 DT

07/28/2004

evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under the administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.<sup>1</sup> The reviewing court may not substitute its own discretion for that exercised by the agency,<sup>2</sup> nor may it act as the trier of fact,<sup>3</sup> but may only determine if there is any competent evidence to sustain the decision.<sup>4</sup> This court may not function as "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.<sup>5</sup>

Plaintiff, Scott McNair, has requested a trial de novo and an evidentiary hearing in this case, claiming that no record was preserved of the proceedings before the Arizona State Personnel Board or the hearing officer (the Honorable Harold Merkow). However, it appears that a record was made of the proceedings before Hearing Officer Merkow, but Plaintiff McNair has failed to order a copy of that transcript. This Court will not grant a trial de novo or evidentiary hearing where the Plaintiff has failed to order a transcript of the proceeding from which he has appealed and seeks a trial de novo. Additionally, it clearly appears that the hearing officer's determination was predicated upon lack of jurisdiction, a legal issue, not a factual issue.

IT IS ORDERED denying Plaintiff's request for a trial de novo.

IT IS FURTHER ORDERED denying Plaintiff's request for an evidentiary hearing in this case, as it clearly appears that additional evidence would not have changed the determination of the hearing officer and the State Personnel Board.

Plaintiff McNair was previously employed by Maricopa County in the Department of Transportation from late 2000 until June 30, 2002. McNair was a contract employee subject to termination without cause. Following the end of the employment contract, McNair sent a complaint to eight county employees and the Maricopa County Board of Supervisors alleging inappropriate behavior by other employees of the Maricopa County Dept. of Transportation. Thereafter on September 6, 2002, Plaintiff mailed a written complaint to Diane Weikamp, an Employee Relations Specialist in the Maricopa County Human Resources Department. And, in December 2002, the Plaintiff filed an appeal with the State of Arizona Personnel Board. The State of Arizona Personnel Board referred the matter to Hearing Officer Harold Merkow who

---

<sup>1</sup> Sundown Imports, Inc. v. Ariz. Dept. of Transp., 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); Klomp v. Ariz. Dept. of Economic Security, 125 Ariz. 556, 611 P.2d 560 (App. 1980).

<sup>2</sup> Ariz. Dept. of Economic Security v. Lidback, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976)

<sup>3</sup> Siler v. Arizona Dept. of Real Estate, 193 Ariz. 374, 972 P.2d 1010 (App. 1998).

<sup>4</sup> Schade v. Arizona State Retirement System, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); Welsh v. Arizona State Board of Accountancy, 14 Ariz. App. 432, 484 P.2d 201 (1971).

<sup>5</sup> DeGroot v. Arizona Racing Com'n., 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App 1984).

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000539-001 DT

07/28/2004

determined that the Plaintiff failed to meet the jurisdictional requirements of A.R.S. Section 38-532 (the "whistle blower statute") because the Plaintiff failed to submit a written complaint prior to the expiration of his contract or to submit a written request for hearing within ten days from his separation from Maricopa County. The hearing officer concluded that the State Personnel Board did have jurisdiction to hear appeals and whistle blower complaints from Maricopa County employees, for the reason that Maricopa County did not have an appropriate administrative or appellate body to hear whistle blower complaints.<sup>6</sup> The hearing officer concluded:

3. Complainant has failed to show that he meets the jurisdictional requirements of the whistle blower statute since complainant has failed to produce any written complaint that he submitted to a public body prior to the expiration of his contract on June 30, 2002.

4. Complainant has failed to show that he meets the jurisdictional requirements of the whistle blower statute since complainant has failed to produce any written request for a hearing to any administrative body within ten days from his separation from Maricopa County.

5. Complainant is not entitled to a hearing before the Arizona State Personnel Board to review the circumstances of his separation from Maricopa County or to consider whether Complainant's separation from Maricopa County was as a result of a prohibited personnel practice.

The hearing officer's findings and conclusions that were approved and adopted by the Arizona State Personnel Board (on April 29, 2003) are clearly supported by the record in this case. This Court can discern no abuse of discretion, and that the decision was not arbitrary and capricious, but rather based upon uncontested facts that the Plaintiff McNair failed to establish that his complaint was such a complaint as covered by Arizona's whistle blower statute. This Court finds no error from the hearing officer or the Arizona Personnel Board.

IT IS THEREFORE ORDERED denying the relief requested by the Plaintiff in his complaint.

IT IS FURTHER ORDERED affirming the determination by the Arizona State Personnel Board dismissing Plaintiff Scott McNair's Whistle Blower Complaint, filed with that agency.

---

<sup>6</sup> Hearing officer's report and recommendation for dismissal of complaint, at pages 6-7.

<sup>7</sup> Id., at page 7.

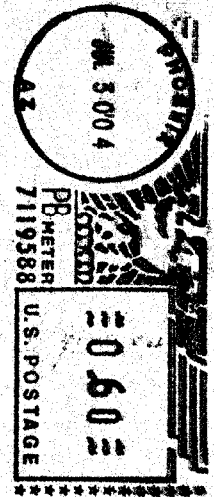
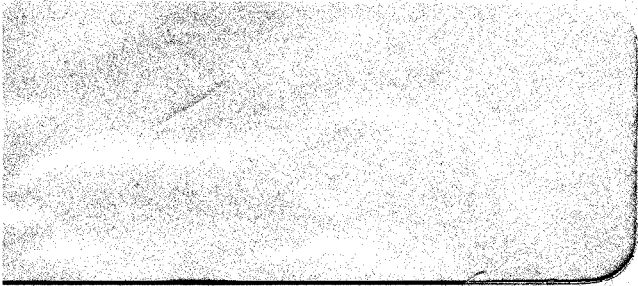
SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000539-001 DT

07/28/2004

IT IS FURTHER ORDERED directing Defendant Arizona State Personnel Board to lodge an order consistent with this opinion no later than August 27, 2004.

201 W. JEFFERSON ST.  
PHOENIX, ARIZONA 85003-2291



FIRST CLASS