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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7
8 IN AND FOR THE COUNTY OF MARICOPA

9 SCOTT M. MCNAIR,

10 Plaintiff,

) NO: LC 2003-000539-001

11 v.

) ORDER AND JUDGMENT

12 MARICOPA COUNTY DEPARTMENT)
OF TRANSPORTATION, STATE OF)
13 ARIZONA PERSONNEL BOARD,)
14 KENNETH MEDLIN,)
TERRY PETERSON,)
15 JENNIPHER RAMSEY,)

16 Defendants.
17

18 After review of this matter the Court finds:

19 This Court has jurisdiction of this Administrative appeal pursuant
20 to the Administrative Review Act, AR.S. Section 12-901 et seq.
21

22 This case has been under advisement since the time of oral
23 argument on June 21, 2004. This decision is made within 60 days as required
24 by Rule 9.9, Maricopa County Superior Court Local Rules of Practice. This
25 Court has considered and reviewed the record of the proceedings, the
26 memoranda and oral arguments submitted by the parties and counsel.
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1 Pursuant to AR. S. Section 12-901(e) this Court may review
2 administrative decisions in Special Actions and proceedings in which the State
3 is a party:
4

5 The court may affirm, reverse, modify or vacate and remand the
6 agency action. This court shall affirm the agency action unless after
7 reviewing the administrative record and supplementing evidence
8 presented at the evidentiary hearing the court concludes that the
9 action is not supported by substantial evidence, is contrary to law, is
10 arbitrary and capricious or is an abuse of discretion.

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

19 Plaintiff, Scott McNair, has requested a trial de novo and an

20 ¹Sundown Imports, Inc. v. Ariz. Dept. of Transp., 115 Ariz. 428, 431, 565 P.2d
21 1289, 1292 (App. 1977); Klomp v.

22 ²Ariz. Dept. of Economic Security v. Lidback, 26 Ariz. App. 143, 145, 546 P.2d
23 1152, 1154 (1976)

24 ³Slier v. Arizona Dept. of Real Estate, 193 Ariz. 374, 972 P.2d 1010 (App.
25 1998).

26 ⁴Schade v. Arizona State Retirement System, 109 Ariz. 396, 398, 510 P.2d 42, 44
27 (1973); N_lsh v. Arizona State Board of Accountancy, 14 Ariz. App. 432, 484
28 P.2d 201 (1971).

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

1 evidentiary hearing in this case, claiming that no record was preserved of the
2 proceedings before the Arizona State Personnel Board or the hearing officer (the
3 Honorable Harold Merkow). However, it appears that a record was made of the
4 proceedings before Hearing Officer Merkow, but Plaintiff McNair has failed to
5 order a copy of that transcript. This Court will not grant a trial de novo or
6 evidentiary hearing where the Plaintiff has failed to order a transcript of the
7 proceeding from which he has appealed and seeks a trial de novo. Additionally,
8 it clearly appears that the hearing officer's determination was predicated upon
9 lack of jurisdiction, a legal issue, not a factual issue.
10

11 IT IS ORDERED denying Plaintiffs request for a trial de novo.
12

13 IT IS FURTHER ORDERED denying Plaintiff's request for an
14 evidentiary hearing in this case, as it clearly appears that additional evidence
15 would not have changed the determination of the hearing officer and the State
16 Personnel Board.
17

18 Plaintiff McNair was previously employed by Maricopa County in
19 the Department of Transportation from late 2000 until June 30, 2002. McNair
20 was a contract employee subject to termination without cause. Following the
21 end of the employment contract, McNair sent a complaint to eight county
22 employees and the Maricopa County Board of Supervisors alleging
23 inappropriate behavior by other employees of the Maricopa County Dept. of
24 Transportation. Thereafter on September 6, 2002, Plaintiff mailed a written
25 complaint to Diane Weikamp, an Employee Relations Specialist in the Maricopa
26 County Human Resources Department. And, in December 2002, the Plaintiff
27
28

1 filed an appeal with the State of Arizona Personnel Board. The State of Arizona
2 Personnel Board referred the matter to Hearing Officer Harold Merkow who
3 determined that the Plaintiff failed to meet the jurisdictional requirements of
4 AR.S. Section 38532 (the "whistle blower statute") because the Plaintiff failed to
5 submit a written complaint prior to the expiration of his contract or to submit a
6 written request for hearing within ten days from his separation from Maricopa
7 County. The hearing officer concluded that the State Personnel Board did have
8 jurisdiction to hear appeals and whistle blower complaints from Maricopa
9 County employees, for the reason that Maricopa County did not have an
10 appropriate administrative or appellate body to hear whistle blower
11 complaints.⁶ The hearing officer concluded:

12
13
14 3. Complainant has failed to show that he meets the
15 jurisdictional requirements of the whistle blower statute since
16 complainant has failed to produce any written complaint that he
17 submitted to a public body prior to the expiration of his contract on
18 June 30, 2002.

19
20 4. Complainant has failed to show that he meets the
21 jurisdictional requirements of the whistle blower statute since
22 complainant has failed to produce any written request for a hearing to
23 any administrative body within ten days from his separation from
24 Maricopa County.

25
26 5. Complainant is not entitled to a hearing before the Arizona
27 State Personnel Board to review the circumstances of his separation
28 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

66 Hearing officer's report and recommendation for dismissal of complaint, at
pages 6-7.

1 and adopted by the Arizona State Personnel Board (on April 29, 2003) are
2 clearly supported by the record in this case. This Court can discern no abuse of
3 discretion, and that the decision was not arbitrary and capricious, but rather
4 based upon uncontested facts that the Plaintiff McNair failed to establish that
5 his complaint was such a complaint as covered by Arizona's whistle blower
6 statute. This Court finds no error from the hearing officer or the Arizona
7 Personnel Board.
8

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

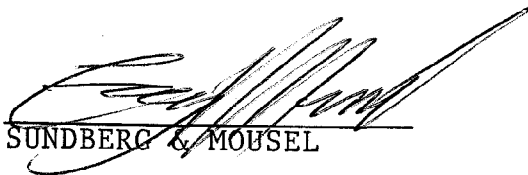
11 IT IS FURTHER ORDERED affirming the determination by the
12 Arizona State Personnel Board dismissing Plaintiff Scott McNair's Whistle
13 Blower Complaint, filed with that agency.
14

15 Dated this _____ day of _____, 2004.
16

17
18 _____
19 Michael D. Jones
20 Maricopa County Superior Court

21 Original lodged this 11
22 day of August, 2004, with:

23 Honorable Michael D. Jones
24 Maricopa County Superior Court

25 
26 SUNDBERG & MOUSEL

27 Id., at page 7.
28

LAW OFFICES OF
SUNDBERG AND MOUSEL

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Copy of the foregoing
mailed this 11 day of
NOV, 2004 to:

Scott M. McNair

[REDACTED]

Phoenix, Arizona [REDACTED]

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Sundberg & Mousel