



# Maricopa County

Human Resources Department

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Merit Systems Commission  
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December 10, 2004

Scott McNair  
5401 North Black Canyon Highway  
Phoenix, AZ 85015

Dan Brenden  
Deputy County Attorney

**RE: Merit Commission Meeting – Scott McNair  
MC-WB 2004-1**

Enclosed is a copy of the *Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation* regarding the above-referenced appeal.

You have **ten (10) business days** from the date of receipt of this letter to file with the Merit Commission any written objections (not post-hearing evidence) you might have concerning the Hearing Officer's Recommendation. You must serve a copy of your written objections upon the other interested parties.

You will be notified by mail of the time and place of the Merit Commission meeting at which this appeal will be considered.

If you have any questions, please call me at (602) 506-5007.

Sincerely,

Janice Stratton  
Merit Systems Administrator

Enclosure: Hearing Officer Recommendation

MARICOPA COUNTY  
EMPLOYEE MERIT SYSTEM COMMISSION

HUMAN RESOURCES  
RECRUITING & SELECTION  
DEC 08 2004  
RECEIVED

SCOTT McNAIR, )  
Complainant, )  
vs. )  
MARICOPA COUNTY, et. al., )  
Respondents. )

Docket No. MC-WB 2004-1

HEARING OFFICER'S FINDINGS OF  
FACT, CONCLUSIONS OF LAW  
AND RECOMMENDATION

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This matter came on for hearing on October 6, 2004, in Phoenix, Arizona, on the Complaint filed by SCOTT McNAIR, Complainant, alleging prohibited personnel practices on the part of the MARICOPA COUNTY, et. al., Respondents. Complainant appeared in person and represented himself. Respondents were represented by Daniel Brenden, Deputy County Attorney. No agency representative was present.

Having heard the testimony of the witnesses, having read and considered the exhibits offered by the parties and admitted into evidence, having heard argument of the parties and being fully advised in the premises, the undersigned Hearing Officer hereby makes the following findings of fact, conclusions of law, and recommendation to the Merit System Commission.

**COURSE OF PROCEEDINGS**

This matter was initiated by the filing of a Complaint on June 14, 2004 seeking relief under A.R.S. 38-531 et. seq. (the "Whistleblower Act"). On or about July 13, 2004, the instant Hearing Officer was appointed, and a pre-hearing conference was set for July 28, 2004. Upon reviewing the Complaint, it was determined that there were preliminary motions contained therein which needed to be ruled on, and on July 26, 2004, an order was entered vacating the conference and directing Complainant to supplement his Motion for Change of Venue and Motion for Disqualification of Counsel. He failed to do so, and his motions were denied by order dated August 25, 2004.

In addition to denying Complainant's motions, the August 25 order also set forth the procedures to be followed at the hearing, along with statements of the burden of proof and standard of causation which would be applicable at the hearing. This order also pointed out that discovery was inapplicable, but that continuances would be liberally granted to prevent prejudicial surprise. The

hearing date was set for October 6, 2004, and a briefing schedule was given to govern the filing of motions and the issuance of subpoenas.

On September 17, 2004, Complainant filed a Motion for Default Judgment, alleging delay in the hearing process, which motion was denied by order dated September 28, 2004.

On October 6, 2004, the matter came on for hearing. Complainant appeared, as did Daniel Brenden, as counsel for Respondent Maricopa County. No one else was present, and Complainant admitted that he had not subpoenaed any witnesses. Complainant's testimony was taken, and his exhibits accepted into evidence. Then, on motion of Complainant, the matter was continued until December 3, 2004, to permit Complainant time to subpoena witnesses. Despite the continuance, however, no subpoenas were requested by Complainant.

On October 19, 2004, Respondent filed a Motion to Dismiss, and Complainant timely filed a Response thereto.

On or about November 12, 2004, Complainant filed a Withdrawal of Complainant's Motion for Continuance in which he asserted:

In that the continuance was issued solely in response to the Complainant's request, he therefore withdraws such, and demands that Hearing Officer David Gering immediately issue his recommendation to the Commission, based solely upon the evidence contained in the record as of October 6, 2004.

In accordance with the wishes of Complainant, an order was entered on November 24, 2004, vacating the hearing so that the matter can proceed on the existing record. The hearing process was formally concluded upon the filing of that order.

#### **WITNESSES AND EXHIBITS**

At the request of Complainant, the hearing was open to the public. The exclusionary rule was invoked.

A. The following witnesses were sworn and gave testimony during the hearing:

Scott McNair, Complainant

B. The following exhibits were offered and admitted:

Exhibit 1 - Position Notice for Database Administrator

Exhibit 2 - Contract Employment Revision/Renewal

Exhibit 3 Performance Management Evaluation Form, dated 7/26/2000

Exhibit 4 Performance Management Evaluation Form, dated 5-3-02

Exhibit 5 - Position Notice for Database Administrator

- Exhibit 6 - Hearing Transcript, dated February 10, 2003, pages 1, 14
- Exhibit 7 - Hearing Transcript, dated February 10, 2003, pages 19-22
- Exhibit 8 - Proposed Case Management Plan, pages 1, 2, 9
- Exhibit 9 E-mail dated May July 24, 2002
- Exhibit 10 - E-mail dated July 17, 2002
- Exhibit 11 - E-mail dated July 19, 2002
- Exhibit 12 - EEOC Dismissal and Notice of Rights
- Exhibit 13 - Postcard dated June 8, 2004
- Exhibit 14 - Unemployment Insurance Wage Claim, dated 11/27/2002
- Exhibit 15 - Retirement Enrollment Form, dated 10/12/00
- Exhibit 16 - Retirement Benefit Statement
- Exhibit 17 - Notice of Right to COBRA, dated 7/12/02
- Exhibit 18 - Letter dated December 10, 2002
- Exhibit 19 - McNair Exhibits (Excerpt)

### **FINDINGS OF FACT**

1. Complainant initially came to work for Maricopa County in March of 1998, as a contract employee through an outside agency [Transcript, page 39, lines 18-19].
2. In 2000, Maricopa County hired Complainant directly as a contract employee [Transcript, page 40, lines 4-6].
3. Complainant's contract with Maricopa County contained the following provision:

"The employee **shall not be covered** by the provisions of the Maricopa County Employee Merit System, but shall be a Contract Employee as defined in the Maricopa County Human Resources Compensation Plan." [Exhibit 2, emphasis in original]
4. On June 30, 2002, Complainant's contract with Maricopa County expired in accordance with its own terms [Exhibit 2].
5. On July 17, 2002, Complainant e-mailed to, *inter alia*, the individual members of the Maricopa County Board of Supervisors, a document alleging sexual harassment and violations of ethics [Transcript, page 44, line 24 through page 45 line 5; Exhibit 10].
6. Complainant later applied for a position with Maricopa County as Database Administrator, published on May 17, 2004 [Transcript, page 46, lines 18-23; Exhibit 1].

7. On June 8, 2004, Complainant's application for Databases Administrator was removed from the database for the stated reason that Complainant "Lacks Required Education." [Transcript, page 59, lines 4-6; Exhibit 13].

8. On June 14, 2004, Complainant filed the Complaint initiating these proceedings.

### **CONCLUSIONS OF LAW**

1. At no time during his tenure with Maricopa County was Complainant ever covered by the provisions of the Maricopa County Merit System.

2. The Maricopa County Employee Merit System Commission has jurisdiction to proceed in this case solely through the provisions of A.R.S. 38-534.

3. All matters alleged in the Complaint other than allegations of whistleblowing are outside the jurisdiction of the Commission in this proceeding.

4. The Complainant herein was not an "employee" or "former employee" at the time the purported disclosure was made.

5. The Complainant herein was not an "employee" or "former employee" at the time his name was removed from the list of candidates for the position of Databases Administrator.

6. The Complaint filed herein is not valid.

7. There has been no prohibited personnel practice committed against Complainant by Maricopa County or any of its employees.

### **RECOMMENDATIONS**

It is the recommendation of the Hearing Officer that the Commission dismiss the instant Complaint and deny any and all relief sought therein.

### **BASIS FOR RECOMMENDATIONS**

During his contract employment by Maricopa County, the Complainant was not subject to the provisions of the Merit System. Then, seventeen days following the expiration of his contract in 2002, he made a purported disclosure alleging that during his employment, he had been subjected to sexual harassment. Now, in the instant Complaint, he alleges that he was denied rehire in 2004 on the basis of that disclosure.

Following the hearing, Respondents filed a Motion to Dismiss, in which they asserted that the Maricopa County Employee Merit System Commission lacks jurisdiction to consider whistleblower complaints filed by employees not in the classified service of Maricopa County.

In his Response to that Motion, Complainant disputed this proposition, and further argued that the Commission has authority, and indeed the duty, to review and investigate any complaints by employees, regardless of status, as well as by applicants for new positions.

The following are therefore the issues to be addressed in reaching a determination on the instant Complaint:

1. The extent of the Commission's jurisdiction to accept whistleblower complaints filed by individuals who do not occupy classified positions.

2. If the Commission has jurisdiction to consider the instant Complaint, (i) whether it is valid and (ii) whether there has been a prohibited personnel action against an employee or former employee as a result of disclosure of information by the employee or former employee.

### **Jurisdiction of the Commission**

The Maricopa County Employee Merit System Commission (the "Commission") derives its authority to administer the Merit System through its appointment by the Board of Supervisors pursuant to A.R.S. 11-353. A.R.S. 11-354 provides that the Commission shall perform such duties and exercise such powers "as are necessary to carry out the provisions of this article," the "article" referred to being Article 10 of Title 11, entitled "County Employee Merit System."

From this provision, it is apparent that the Commission has authority under this section only to administer the Maricopa County Merit System, and not general authority to pursue matters outside the Merit System. However, as set forth in the Findings of Fact, the contract with Complainant expressly stated that Complainant "**shall not be covered** by the provisions of the Maricopa County Employee Merit System." Accordingly, the Commission has no authority to perform any acts at the request of Complainant, including review or investigation of complaints, pursuant to Article 10 of Title 11 of the Arizona Revised Statutes.

In his Response, Complainant disputed this proposition, citing the language of the Merit System Rule 2.10.D, which states in its entirety:

#### 2.10 Discrimination in Employment

The Director shall establish a procedure to address employee complaints regarding discrimination in employment. No appointing authority shall, because of the political affiliations, race, sex, religion, color, national origin, ancestry, age, disability, or any other non-merit factor (as determined by the Maricopa County Employee Merit System Commission) of any person:

- A. Refuse to appoint or promote any individual.
- B. Suspend, demote or discharge an employee from a position in the classified service.

- C. Discriminate in compensation or in terms, condition and privileges of employment.
- D. Refuse to review any complaint based on discrimination, including disability, by an employee regardless of status or an applicant.

Indeed, this language does seem to be broader than the jurisdiction granted to the Commission by the statutes set forth above. However, there still remain two problems with respect to Complainant's argument.

First, the authority for this rule is unclear, and to the extent the rule is inconsistent with the statutory language, the narrower statutory language must prevail. A board or agency cannot expand its own jurisdiction beyond that set by statute:

"Because agencies are creatures of statute, the degree to which they can exercise any power depends upon the legislature's grant of authority to the agency." *Facilitec v. Hibbs*, 206 Ariz. 486, 488, ¶ 10, 80 P.3d 765, 767 (2003).

Second, even if the Commission has authority to review discrimination complaints by applicants, Complainant must follow the procedure established by the Director under that rule for the rule to apply. The mechanism for doing this is not the initiation of a whistleblower proceeding, for which the Commission derives its jurisdiction from an entirely separate statutory provision.

Where there exist two separate remedies, an employee cannot confer jurisdiction on an agency to entertain both of them by mixing them in a single process, but rather must properly follow the requirements of both processes independently. See *City of Phoenix v. Phoenix Employment Relations Board*, 1 CA-CV 02-0810 filed on March 25, 2004. Thus the addition of allegations of general reprisal or discrimination in the instant Complaint does not confer jurisdiction on the Commission to consider them in a whistleblower action, but rather, they must be pursued by whatever process is mandated by the rules for matters of that nature.

However, it does not follow that the Commission is without authority to entertain a whistleblower complaint filed by an uncovered employee. With all due respect to the argument of Respondents as set forth above, the authority of the Commission to adjudicate whistleblower complaints comes not from Title 11, which confers authority to administer the Merit System, but rather from A.R.S. 38-534 which confers jurisdiction on the Commission in whistleblower actions.

Thus, in order to determine the class of individuals to be protected by the Whistleblower Act, it is necessary to look, not to Title 11, but rather to the Whistleblower Act itself. Doing this, it can be seen that pursuant to A.R.S. 38-531.1,

"Employee" means an officer or employee of this state or any of its departments, commissions, agencies or boards. Employee includes employees and officers of community college districts, school districts and counties of this state but does not include officers or employees of a municipal corporation established for the purpose of reclamation and distribution of water and the generation of electricity.

It is apparent, as correctly pointed out by Complainant, there is no evidence of any intention by the legislature to restrict the provisions of the Whistleblower Act to employees based on whether they are full-time, part-time, permanent, temporary, classified or unclassified. On the contrary, it appears that all employees, regardless of status, fall under its protection.

Accordingly, Complainant's status as a contract employee in an unclassified position does not serve to deprive the Commission of jurisdiction to consider the whistleblower allegations in his Complaint.

### **Validity of the Complaint/Prohibited Personnel Action**

Having determined that the Commission has jurisdiction to review complaints filed by unclassified employees, A.R.S. 38-532(H) requires that the Commission "make a determination concerning: (1) the validity of the complaint [and] (2) whether a prohibited personnel practice was committed against the employee or former employee as a result of disclosure of information by the employee or former employee."

In a whistleblower action, a complainant must first show that a protected disclosure was made, and must then show some causal connection between that disclosure and the taking of an adverse personnel action. *Stanek v. Dept. of Transportation*, 805 F.2d 1572 (Fed.Cir. 1986).

It would appear that the mandate of A.R.S. 38-532(H) regarding "the validity of the complaint" is directed toward the former, i.e., the showing of a protected disclosure, and the mandate regarding the "prohibited personnel practice" is directed toward the latter, i.e., the showing of reprisal. It is evident from the statute that in order for relief to be granted to a complainant, both requirements must be met.

#### **1. Validity of the Complaint**

Pursuant to the terms of A.R.S. 38-532(A), it is a prohibited personnel practice for an employee who has control of personnel actions to take reprisal against an employee for a disclosure of information *of a matter of public concern* by the employee to a *public* body which the employee reasonably believes evidences (1) a violation of any law, or (2) mismanagement, a gross waste of monies or an abuse of authority.

Thus, the requisite elements of a protected disclosure include (1) a disclosure of information of a matter of public concern, (2) to a public body, (3) by an employee.

Regarding the first element, the leading case on this issue appears to be *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), in which the United States Supreme Court held that a matter of public concern must be something more than a personal grievance. In *Connick*, an assistant district attorney was transferred to prosecute cases in a different section of the office. She was strongly opposed to the transfer, and she prepared an office questionnaire soliciting the views of her co-workers concerning, *inter alia*, transfer policies, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. When she distributed the questionnaire, she was terminated for insubordination, and she filed a wrongful termination suit seeking reinstatement and back pay. She prevailed at the trial level, and through appeal, until the case was reversed by the United States Supreme Court.

In *Connick*, the Supreme Court held that the issues relating to confidence and trust in supervisors, office morale, and the need for a grievance committee were "mere extensions of Myers' dispute over her transfer to another position," but that the question of whether employees were being pressured to work in political campaigns did touch on a matter of public concern. In so doing, the Supreme Court clearly held that not all of the issues must be of public concern. Following *Connick*, the court in *Dishnow v. School District of Rib Lake*, 77 F.3d 194 (7th Cir. 1996), held that a school counselor's articles and letters in a newspaper in which he "spilled the beans" about the school board's violation of public meeting laws was a "public dialog on matters of interest to the public" even though they were not matters of "transcendent importance, such as the origins of the universe or the merits of constitutional monarchy."

Perhaps the key to the instant analysis occurs in footnote 8 of *Connick*, where the Supreme Court notes that racial discrimination is "a matter inherently of public concern." If this is so with respect to racial discrimination, then it must also be the case where abuse of authority and sexual harassment are alleged, as in the instant disclosure.

Regarding the second necessary element, pursuant to A.R.S. 38-531.4, the phrase "public body" includes the board of supervisors of a county, so it appears that requirement is met.

Finally, having ascertained that elements 1 and 2 of a protected disclosure are present, it is necessary to consider the third element, i.e., whether the disclosure was filed by an employee. As

set forth above, there is nothing in the statute to indicate that its scope is limited by the type of employment, but there is a clear intention that its applicability is limited to "employees" and "former employees," the latter being defined in A.R.S. 38-531.2 as "an employee who was dismissed."

In the instant case, neither of the foregoing definitions covers the status of Complainant at the time the disclosure was made. He was not an "employee," since his employment had expired on June 30, 2002 pursuant to the terms of his contract. Similarly, he was not a "former employee" in that he had not been dismissed. Thus, at that point in time when Complainant made the purported disclosure, he stood in the position of a general member of the public, with no special protection accorded by statute.

It must be emphasized that this requirement of current employment or having been dismissed may not be simply disregarded. On the contrary, a statute must be read so as to give meaning to each word, phrase, clause, and sentence so that no part of the statute will be void, inert, redundant, or trivial. *In re Estate of Zaritsky*, 198 Ariz. 599, 12 P.3d 1203 (App. 2000); *Ariz. Dept. of Revenue v. Superior Court*, 189 Ariz. 49, 938 P.2d 98 (App. 1997). In the instant case, this requirement of being an employee or former employee appears in A.R.S. 38-532 not once, but several times. As a consequence, the intent of the legislature to limit the operation of the Act to employees and former employees is clear and unequivocal.

Since Complainant was expressly excluded from the class of persons covered by A.R.S. 38-531 et. seq., the disclosure confers no special benefit, and his Complaint of a prohibited personnel is not valid.

## 2. Prohibited Personnel Practice

The second prerequisite for relief under the Whistleblower Act is reprisal, i.e., the finding that a prohibited personnel practice was committed against the employee or former employee as a result of disclosure of information by that employee or former employee.

Once again, it is noted that relief is expressly predicated on the disclosure having been made, and the personnel action having been taken, against an "employee or former employee."

The analysis is exactly the same as above, and the result is also the same. The Complainant herein was neither an "employee" nor a "former employee," as those terms are defined in the Act, at the time of the adverse personnel action (i.e., the removal of his name from the list of candidates).

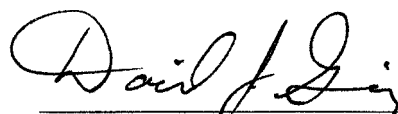
As can be seen, neither of the two requirements for the Whistleblower Act is present in the instant case, and accordingly, relief is not available to Complainant as a matter of law.

**Conclusion**

It is unknown whether Complainant's allegations of sexual harassment and abuse of authority have merit; if events occurred as he has alleged, there is certainly cause for concern by Maricopa County. We do not reach that question, though, in the cause at bar, the jurisdiction of which is limited by statute. However serious Complainant's allegations might be, they do not fall within the ambit of the Whistleblower Act, and since that is the sole jurisdiction under which the Commission is proceeding in the instant action, there is no legal basis for the Commission to proceed. It is therefore recommended that the Complaint be dismissed.

DATED this 7th day of December, 2004.

Respectfully Submitted,



DAVID J.  
Hearing Officer  
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(480) 296-9278

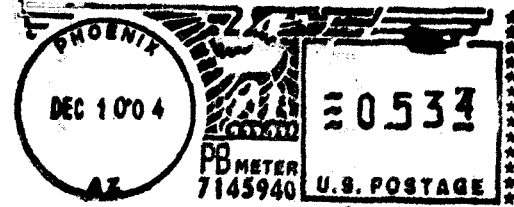
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**Maricopa County**  
Human Resources Department

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**PRESORTED  
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