



Maricopa County

Human Resources Department

Merit Systems Commission
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April 19, 2005

Mr. Scott McNair
[REDACTED]
Phoenix, Arizona [REDACTED]

Mr. Dan Brenden
Deputy County Attorney

RE: Scott M. McNair v. Maricopa County MC-WB-2004-1

Dear Mr. McNair:

Enclosed is a copy of the Merit Commission's proposed Final Order 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 you might have concerning the Commission's proposed Final Order.

You will be notified by mail of the time and place of the Merit Commission meeting at which this final order will be approved.

If you have any questions, please call me at (602) 506-3792.

Sincerely,

A handwritten signature in cursive script that reads "Pat Soria".

Pat Soria
Merit Systems Administrator

cc: Mike Ellegood, Transportation
Donna Brown, Transportation

DAN REEB
CHAIRMAN
DUSTIN JONES
SARA VANUCCI
CHARLES GOODWIN
ADELITA VILLEGAS
COMMISSIONERS

MARICOPA COUNTY EMPLOYEE MERIT SYSTEM COMMISSION

In the Matter of the Appeal of:

SCOTT MCNAIR,

Complainant,

vs.

MARICOPA COUNTY, et al.,

Respondents.

Docket No. McCormick-^{WB} 2004-1

**MARICOPA COUNTY EMPLOYEE
MERIT SYSTEM COMMISSION'S
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

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 read the testimony of the witnesses, having read and considered the exhibits offered by the parties and admitted into evidence, having heard argument and being fully advised, the Maricopa County Employee Merit System Commission ("Merit Commission") hereby makes the following Findings of Fact, Conclusions of Law, and enters the following Order.

BACKGROUND

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, a 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. The 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. That 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, 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.

Id.

In accordance with the request of Complainant, an order was entered on November 24, 2004, vacating the hearing and the matter proceeded 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. Scott McNair, the Complainant, was the only witness who testified at the hearing.

- 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 ("TR."), p. 39].
2. In 2000, Maricopa County hired Complainant directly as a contract employee [TR., p. 40].
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 the individual members of the Maricopa County Board of Supervisors, *inter alia*, a document alleging sexual harassment and violations of ethics [TR., pp. 44-45 and Exhibit 10].
6. Complainant applied for a position with Maricopa County as a Database Administrator, sometime after May 17, 2004, the date the position was published [TR., p. 46 and Exhibit 1].
7. On June 8, 2004, Complainant's application for Database Administrator was removed from the database for the stated reason that Complainant "Lacks Required Education." [TR., p. 59 and 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. 38-531 *et seq.* (the "Whistleblower Act").

3. The matters alleged in the Complaint, other than those relating to matters falling under the Whistleblower Act, are outside the jurisdiction of the Merit Commission in this proceeding. The Merit Commission does not receive its authority to hear whistleblower complaints under its enabling statutes, A.R.S. § 11-351 *et seq.*, but from the Whistleblower Act itself. A.R.S. § 38-531 *et seq.* Therefore, contrary to Complainant's argument otherwise, the Resolution establishing the Merit Commission and the Rules implementing procedures for merit hearing are not applicable to the instant proceeding. The terms, definitions, procedures and jurisdiction of the Merit Commission, as set forth in the Merit Commission Resolution and Rules, do not apply to whistleblower complaints.

4. The Whistleblower Act mandates that the Merit Commission, as an independent personnel board for the county, determine the validity of a whistleblower complaint and "[w]hether 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." A.R.S. § 38-532.H.

5. Protection under the Whistleblower Act is afforded to employees, including former employees. A.R.S. § 38-531.1. and 2. "Employee" is defined as including employees of Maricopa County and does not distinguish between regular versus unclassified employees. A.R.S. § 38-531.1. A "former employee" is defined as "an employee who was dismissed." *Id.* at ¶ 2.

6. The Whistleblower Act defines the term "personnel action" as including dismissal and reemployment. A.R.S. § 38-531.3.(e) and (h).

7. "Reprisal" is defined under the Whistleblower Act as meaning "to take a personnel action the result of which is adverse to an employee." A.R.S. § 38-531.5.

8. In order for Complainant to obtain the protections afforded under the Whistleblower Act, he must be an employee or former employee, he must have been subjected to a prohibited personnel action, he must have disclosed a matter of public concern to a public body evidencing a violation of law, mismanagement, gross waste of monies or abuse of authority and he must have made his disclosure in writing containing the requisite information. Complainant meets all of the jurisdictional prerequisites except for the requirement that he be an employee or former employee.

9. The Complainant was not an "employee" as that term is defined under A.R.S. § 38-531.1, on July 17, 2002, the date the purported disclosure was made, because his contract had previously expired on June 30, 2002.

10. The Complainant was not a "former employee" as that term is defined under A.R.S. § 38-531.2, on July 17, 2002, the date the purported disclosure was made, because he was never dismissed from his position with Maricopa County.

11. Similarly, the Complainant herein was neither an "employee" nor a "former employee" on June 8, 2004, the date his name was removed from the list of candidates for the position of Database Administrator.

12. The Complaint filed herein does not validly assert a claim under the Whistleblower Act because it does not constitute a claim by an "employee" or a "former employee" of Maricopa County.

13. There has been no prohibited "personnel action" as that term is defined under A.R.S. § 38-531.3, committed against Complainant by Maricopa County or any of its employees.

14. The Merit Commission has no jurisdiction over the Complainant's complaint.

ORDER

It is the Order of the Maricopa County Employee Merit System Commission that the Complaint filed by Scott McNair is dismissed for lack of jurisdiction.

DATED this _____ day of May, 2005.

Dan Reeb
Chairman
On Behalf of the Maricopa County Employee
Merit System Commission

Voting in favor of Order:

Dan Reeb
Dustin Jones
Sara Vanucci
Charles Goodwin
Adelita Villegas