



Maricopa County
Human Resources Department

Merit Systems Commission
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[REDACTED]

Phoenix, AZ 85016

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County Attorney's Office

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301 W. Jefferson, 10th Floor
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Mary Rose Wilcox
Board of Supervisors, District 5
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David Smith, Maricopa County Administrator
301 W. Jefferson, 10th Floor
Phoenix, AZ 85003

Richard Romley, Maricopa County Attorney
301 W. Jefferson, 10th Floor, Phoenix, AZ 85003

RE: **Scott McNair Complaint - MC WB 2004-1**

The above-referenced hearing has been continued to **Wednesday, October 6, 2004, at 9:30 a.m.** in accordance with the enclosed Orders *on Motions and on Conduct and Scheduling of Hearing*. The hearing will be conducted in the **Merit Commission Hearing Room, Suite 220, County Administration Building, 301 West Jefferson Street, Phoenix.**

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HUMAN RESOURCES
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Scott McNair
August 26, 2004
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Subpoena requests are due no later than 5:00 p.m. **September 10, 2004**, must be in writing, and be submitted to the Human Resources Department, 301 West Jefferson Street, Suite 219, Phoenix, AZ 85003. Requests for subpoenas must include the full name of the individual, an accurate street address where the subpoena will be delivered, and telephone number. The deadline for filing of pre-hearing motions is 5:00 p.m. on **September 17, 2004** and the deadline for responding to motions is **September 24, 2004**.

Questions may be directed to the Human Resources Department at (602) 506-5007.

Sincerely,

A handwritten signature in cursive script that reads "Janice Stratton".

Janice Stratton
Merit Systems Administrator

cc: David Gering, Hearing Officer

MARICOPA COUNTY
EMPLOYEE MERIT SYSTEM COMMISSION

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MARICOPA COUNTY
EMPLOYEE MERIT SYSTEM COMMISSION

SCOTT McNAIR,)
Complainant,) Docket No. MC-WB 2004-1
vs.)
MARICOPA COUNTY, et. al.,) ORDERS ON MOTIONS AND ON
Respondents.) CONDUCT AND SCHEDULING OF HEARING
_____)

ORDERS ON MOTIONS

The Complaint in this case was filed on our about June 14, 2004. In a follow-up letter dated June 28, 2004, relating to the pending action, Complainant "[demanded] a change of venue."

Then, in a letter dated June 29, 2004, Complainant stated that Deputy County Attorneys Daniel Brenden and Mary Cronin are "expected to be called as witnesses [and] they are precluded by law from representing anyone other than themselves in this matter."

On or about July 26, 2004, an Order was entered stating that the foregoing would be considered as a Motion for Change of Venue, and Motion for Disqualification of Counsel, respectively, and directing Complainant to supplement his motions with any facts and law he wished considered by August 6, 2004. This Order further directed Respondent to file any responses by August 20, 2004. No supplementation was received from Complainant with respect to either motion, and Respondents filed a response only to the Motion for Disqualification of Counsel.

I. Motion for Change of Venue

Complainant's Motion for Change of Venue states as its basis that Complainant wishes a change of venue "to avoid any inappropriate conduct or conflict of interest by the Commission." It is unclear to the Hearing Officer how a change in venue would materially alter any facet of the hearing except to make it less convenient for parties and witnesses, depending on which new venue was selected (and Complainant does not elaborate on what venue he seeks). There is no jury, and thus no passions to be cooled; the matter will ultimately be decided by the Commission on the record of the hearing, as required by statute. Moreover, the Hearing Officer is unaware of any

provision in the law or in the rules or policies of the Commission which even permit a change of venue, since the Merit System Commission functions only in Maricopa County.

Accordingly, the Motion for Change of Venue is denied.

II. Motion for Disqualification of Counsel

As set forth above, Complainant seeks to disqualify Deputy County Attorneys Mary Cronin and Daniel Brenden from participating in the hearing on the basis that they are expected to be called as witnesses. However, as set forth in the law cited by Respondents in their Response, this, standing alone, is legally insufficient. Motions to disqualify counsel are not favored by the law, so certain tests must be met. To disqualify an attorney, it must be shown that the testimony which is sought is not privileged, that the testimony is relevant, and that the evidence may not be obtained through other means. Since Complainant failed to timely provide any facts necessary to support his motion, the Motion to Disqualify Counsel is denied.

ORDER ON CONDUCT AND SCHEDULING OF HEARING

I. Applicable Procedures

Pursuant to A.R.S. 38-532(H), the applicable procedures to be followed are those set forth for appeals under A.R.S. 41-785, which provides that the hearing will be informal with technical rules of evidence not applying, except the rule of privilege recognized by law, and that both parties will have the opportunity to examine and cross-examine witnesses. Also, pursuant to AAC R2-5.1-103.K a party wishing to introduce an exhibit into evidence must supply a copy for the opposing party as well as the hearing officer at the time the exhibit is offered.

II. Open Hearing

Pursuant to Complainant's request, the hearing will be open to the public.

III. Discovery

The applicable procedures set forth above make no provision for pre-hearing discovery, or for the exchange of witness and/or exhibit lists. Accordingly, continuances will be granted liberally at the hearing to prevent prejudicial surprise to either party.

IV. Burden of Proof

Because the burden of proof is on the party asserting a fact or condition, e.g., 2 Am.Jur.2d Administrative Law, Section 360, Complainant will bear the burden of going forward and the ultimate burden of proof at the hearing. In Whistleblowing (or retaliatory discharge) litigation,

however, the burden of proof may, and often does shift at least once. The general rule regarding the burden of proof is set forth in *Grimes v. District of Columbia*, 630 F.Supp. 1065 (D.D.C. 1986):

"Plaintiff must show that (1) he engaged in a statutorily protected activity; (2) that the employer took an adverse employment action against him; and (3) that there is a causal connection between the two. If he carries this relatively light burden, defendants must advance legitimate, nondiscriminatory reasons for the adverse actions. The burden then shifts to plaintiff to show by a preponderance of the evidence that the proffered reason is but a pretext." 630 F.Supp. at 1070.

In accord, see *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986); *Taylor v. Houston Lighting and Power Co.*, 756 F.Supp. 297 (S.D.Tex. 1990); *Duffy v. State Farm Mutual Auto Insurance Co.*, 927 F.Supp. 587 (E.D.11, Y. 1996).

The burden of going forward will therefore be as follows: Complainant will go first to establish *prima facie* case for the whistleblower action, i.e., that there has been a disclosure as defined by statute, which has been followed in time by a personnel action. The burden of going forward will then shift to Respondents, to show non-prohibited reasons for the personnel action. The burden will then shift back to Complainant to establish the nexus between the disclosure and the personnel action and/or that the reasons given by Respondents for the personnel actions were pretextual. Finally, Respondents will have an opportunity for rebuttal, if required.

V. Standard of Causation

The standard which will be applied to causation is as set forth in *Taylor v. Houston Lighting, supra*, that the filing of a whistleblower disclosure be a necessary cause of the personnel action:

"The connection required is causation-in-fact or 'but for' causation. Whether or not there were other reasons for the employer's action, the employee will prevail only by proving that 'but for' the protected activity she would [not] have been subjected to the action of which she claims. " 756 F.Supp. at 300.

Moreover, this causation is not presumed; it must be proved by a preponderance of the evidence that the personnel action would not have taken place when it did in the absence of the disclosure. *Id.*

VT. Scheduling


1. The hearing is hereby set to commence at 9:30 A.M. on Wednesday, October 6, 2004. Continuances will be granted only on a showing of good cause.
2. The deadline for requesting subpoenas is 5:00 P.M. on September 10, 2004.

3. The deadline for the filing of any pre-hearing motions is 5:00 P.M. on September 17, 2004.
4. The deadline for responding to motions is September 24, 2004.
5. Copies of all requests for subpoenas, motions and responses must be timely sent to the opposing parties.
6. Time limits will be strictly enforced, and will be waived only on a showing of good cause.

ORDER FOR NOTICE

The Merit Systems Administrator is directed to send copies of this Order to all of the named parties.

DATED this 25th day of August, 2004.


DAVID J. GERING
Hearing Officer
State Bar #012721