

1 Scott M. McNair (Complainant, Pro Se)

2 [REDACTED]

3 Phoenix, Arizona [REDACTED]

4 [REDACTED]

6 **MARICOPA COUNTY**

7 **EMPLOYEE MERIT SYSTEMS COMMISSION**

8 SCOTT M. MCNAIR
9 Complainant

10 V.

11 MARICOPA COUNTY, et al
12 Respondents

CASE NO. MC-WB-2004-1

MOTION FOR DEFAULT JUDGEMENT

Assigned to Hearing Officer David Gering

15 **I. PLEA FOR LENIENCY AND WAIVER OF FORMAL REQUIREMENTS**

16 In that the Complainant (McNair) is neither represented by counsel nor had any formal legal
17 training, he does hereby request leniency from the Commission for the form and content of this
18 pleading, and requests that the Commission waive and/or suspend any formal procedural
19 requirement necessary in order to insure the Complainant due process and equitable justice, and
20 to insure that a fair and just determination can be made. (*“Pro se litigants’ pleadings are not to be*
21 *held to the same high standards of perfection as lawyers.”*¹)

22 ...

¹ Haines V. Kerner, 92 S.Ct. 594; Jenkins V. McKeithen, 395 US 411, 421 (1969); Picking V. Penna. Rwy. Co. 151 F.2d 240; Puckett V. Cox, 456 F.2d 233.)

1
2 **II. MOTION**

3 For the reasons and points of authority contained herein, the Complaint does hereby move the
4 Maricopa County Employee Merit Commission (Commission) to grant a default judgment in the
5 Complainant's favor, and to grant the relief sought to the Complainant.

6 **III. STATEMENT OF FACTS**

7 From March of 1998 through June of 2002, McNair worked at the Maricopa County
8 Department of Transportation as a Database Administrator and programmer.

9 On June 30 2002 the County ended his employment and denied him proper consideration for
10 future re-employment.

11 On July 17 2002, McNair filed complaints and a Notice of Claim with the County and the
12 individually named Respondents. In his complaints, he alleged that county employees had been
13 involved or committed numerous unlawful and unethical acts.

14 The County summarily and unlawfully refused to accept or hear McNair's complaints.

15 On November 20 2002, McNair filed charges with the United States Equal Employment
16 Opportunity Commission against the County alleging that he had been subjected to sexual
17 harassment and denial of employment as a means of retaliation for reporting and opposing sexual
18 harassment.

19 On December 30 2002, McNair filed a "*Whistleblower Complaint*" under A.R.S. 38-532 against
20 county employees and officials with the State of Arizona Personnel Board.

21 That complaint was later denied alleging that McNair failed to file his complaint within the ten-
22 day statutory limit. (That complaint is currently under appeal.)

23 On October 30 2003, McNair filed suit in the United States District Court against the County
24 alleging among other things, subjecting him to sexual harassment, retaliation for opposing sexual

1 harassment, and unlawful denial of employment.

2 On May 21 2004 in response to an advertisement by Maricopa County (County) for a
3 Database Administrator the Complainant filed a timely application for the open position.

4 On June 8 2004, the County mailed a postcard to the Complainant informing him that he was
5 again being denied proper consideration for future employment.

6 On **June 14 2004**, the Complainant filed a complaint with the Commission alleging that he had
7 been unlawfully denied proper consideration for employment in retaliation for his previous
8 complaints and legal actions against the County, its officials, and a number of its employees.

9 Following such, the Complainant wrote a number of letters to the Commission, including
10 requests for disclosure and discovery items and the case number assigned to the complaint.

11 On **July 19 2004**, the Commission **mailed** a notice to McNair stating that a *PREHEARING*
12 *CONFERENCE* would be held on **Wednesday July 28 2004**. (See attached Exhibit A)

13 On July 26 2004, hearing officer David Gering issued a *PROCEDURAL ORDER AND*
14 *BRIEFING SCHEDULE* in this matter, vacating the *PREHEARING CONFERENCE* scheduled for
15 July 28 2004.

16 On August 25 2004, hearing officer David Gering issued an *ORDERS ON MOTIONS AND ON*
17 *CONDUCT AND SCHEDULING OF HEARING*. In it, he specified that a hearing would be held
18 into McNair's Complaint on Wednesday October 6 2004.

19 **IV. MEMORANDUM AND POINTS OF AUTHORITY**

20 McNair filed a timely complaint on June 14 2004. According to ARS 41-785.A, the Commission
21 was required to hold a hearing of the complaint **within 30 days** of receiving such. The statute
22 reads in part:

23 ...Such appeal shall be in writing and must state specific facts relating directly
24 to the charges on which the appeal is based and **shall be heard by the**
personnel board within thirty days after its receipt...

1 Subsequently, the Commission was required by statute to hold a hearing into McNair's
2 complaint no later than July 14 2004.

3 Additionally, according to ARS 38-532.G the Commission was required to provide Complainant
4 with a copy of ARS 38-532. The statute reads in part:

5 G. On request or at any time an employee alleges reprisal, an
6 employer shall provide an employee who is subject to disciplinary or
7 corrective action, suspension, demotion or dismissal with a copy of
8 this section

8 The Commission has never provided the Complainant with a copy of the statutes as required
9 by law, and therefore has deliberately sought to deprive him of his due process rights by
10 withholding information concerning those laws relevant to this case and situation.

11 Furthermore, the Commission's letter (dated July 13, postmarked July 19) is **not** a notice of a
12 "Hearing", but rather a notice of a *"prehearing conference"*.

13 While the Commission must recognize that its "notice" must be tolled against the date
14 postmarked, since it could have easily been deliberately backdated and mailed at any time, this
15 would be a moot argument as the more significant point is that this was not a notice of a hearing.

16 The letter clearly shows that the Commission had no intent of holding a hearing within the time
17 allowed by law. Instead, it scheduled a *"prehearing conference"* that itself would be fourteen days
18 later than the law required it to hold an actual hearing.

19 To compound the Commission's failure to abide by the law, its notice of the prehearing
20 conference itself was unlawful. Under ARS 41-785.B, the Commission was to notify all parties
21 *"...not less than ten days in advance of a meeting..."* Since the notice of a July 28th "meeting" was
22 mailed on July 19th, the Commission gave only eight days prior notice. Thereby making the
23 prehearing conference unlawful itself.

24 On July 26 2004, two days after the **STATUTORY** deadline for a hearing, without motion by

1 any party, hearing officer David J. Gering took it upon himself to vacate the unlawful *prehearing*
2 *conference* and requested duplicitous pleadings from the Complainant.

3 On August 25 2004, **thirty-two** days after the **STATUTORY** deadline hearing officer David
4 Gering issued an *ORDERS ON MOTIONS AND ON CONDUCT AND SCHEDULING OF*
5 *HEARING*. In it, he specified that a hearing would be held into McNair's Complaint on Wednesday
6 October 6 2004.

7 While one would expect opposing parties to attempt to argue that the **unlawful** delay of the
8 hearing could be justified by the hearing officer's vacating such for procedural memorandum, this
9 point would also be mooted. The hearing officer's order itself shows a failure to abide the statute.

10 The hearing officer's order of August 25 2004 scheduled a hearing for October 6 2004. The
11 time between the order and the actual date of the hearing is **forty-one days**. Which even if
12 Gering's order was allow as grounds for delaying the hearing, the order itself makes the hearing
13 **eleven days late**.

14 Furthermore, since McNair's complaint was received on June 14 2004 and since hearing
15 officer David J. Gering scheduled a hearing for October 6 2004, the total number of days between
16 the date the complaint was received and the date of a hearing is **EIGHTY-FOUR DAYS**. This is
17 almost **TRIPLE** the time allowed by law.

18 McNair's complaint against the County to the State of Arizona Personnel Board was denied
19 because the County asserted that he filed it seven days late. In this case, filed under the same
20 statutes, and subject to the same provisions, the County is now **fifty-four days late**.

21 If the Complainant is to be bound by strict interpretation of the law, then the Respondents and
22 Commission must be held to the same strict interpretations of **the same law**. Anything less would
23 be prejudicial and a deliberate denial of McNair's right to due process.

24 Failure to grant this motion would be grounds for appeal, and a waste of the Commission's

1 time, money, and resources by holding an unlawful hearing.

2 **V. CONCLUSION**

3 The Commission has shown through its own actions that it had no intent to hold a hearing
4 within the time prescribed by law and therefore the Complainant is entitled to Default Judgment
5 against the Respondents and should be granted all relief sought.

6 **VI. RELIEF SOUGHT**

- 7 1) In accordance with A.R.S. § 38-532 (C), each Respondent shall be found guilty of
8 committing a prohibited personnel practice and shall pay to the general fund the
9 maximum fine of five thousand dollars (\$5,000.00), for each violation.
- 10 2) In accordance with A.R.S. § 38-532 (C) and (D), each Respondent shall be found
11 guilty of committing a prohibited personnel practice and shall be immediately
12 terminated and permanently barred from employment with the County and/or State of
13 Arizona and all its political subdivisions.
- 14 3) In accordance with A.R.S. § 38-532 (D), the Commission shall order the Respondents
15 to pay the Complainant all attorney fees, costs, and back pay.
- 16 4) In accordance with A.R.S. § 38-532 (D), the Commission shall order the County to
17 immediately employ the Complainant in the position he applied for at the maximum
18 salary for that position.
- 19 5) In accordance with A.R.S. § 38-532 (K), and to prevent future retaliation against the
20 Complainant, the Commission shall order that the County be barred from terminating
21 the Complainant's employment for a period of no less than five years.
- 22 6) In accordance with A.R.S. § 38-532 (D), the Commission shall order the Respondents
23 to pay the Complainant general and special damages in an amount no less than two
24 hundred and fifty thousand dollars (\$250,00.00).

1 7) In accordance with A.R.S. § 38-532 (D), the Commission shall issue an order to the
2 State of Arizona Attorney General demanding a full investigation and criminal
3 prosecution of this matter, seeking the maximum penalty allowed by law, including but
4 not limited to violations of A.R.S. § 41-772 and A.R.S. § 41-773.

5
6 **RESPECTFULLY SUBMITTED** this 17th day of SEPTMBER 2004.

7 By _____

8 Scott M. McNair

9 Complainant (Pro Se)

10
11 ORIGINAL of the foregoing FILED this 17th day of SEPTMBER 2004 with:

12 Maricopa County Employee Merit System Commission

13 Attn: Ms. Janice Stratton

14 301 West Jefferson, Suite 219

15 Phoenix, Arizona 85007

16
17 COPY of the foregoing mailed to Counsel for Respondents:

18 Division of County Counsel

19 Attn: Mr. Daniel Brenden

20 222 North Central Avenue, Suite 1100

21 Phoenix, Arizona 85004