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FAX COVER SHEET

Date: September 28, 2004

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Number of pages following cover: 2

Message:

Attached is the Orders on Motions issued by the Hearing Officer in
MC-WB 2004-1.

MARICOPA COUNTY
EMPLOYEE MERIT SYSTEM CO

SCOTT McNAIR

Docket No. MC-WB 20044

Complainant,)

vs.)

MARICOPA COUNTY, et. al.,)

Respondents.)

ORDERS ON MOTIONS

III. Motion for Extension in f

In the Order of August 25, 2004, the Hearing Officer set September 17, 2004 as the date for the filing of any pre-hearing motions, contemplating that the opposing party would receive any such motions on the following Monday, and would have four days to respond or request additional time. This is exactly what occurred in the instant matter, Respondent Maricopa County having received the Motion for Default Judgment on September 20. Moreover, the Motion for Extension of Time sets forth no good cause for the County's failure to timely respond, as required by the August 25, 2004 Order Accordingly the Motion is denied.

II. Motion for Default Judgment

Even in the absence of a response, there are certain considerations which *militate against the* granting of the Motion for Default Judgment.

First, a motion for default judgment is normally granted pursuant to rule, where a plaintiff has filed a lawsuit, and a defendant has failed to answer or appear. However, this is not a judicial proceeding. As expressly noted in Merit System Rule 10.03 "No answer to the appeal is required." A similar review of the statutes and rules governing the State Personnel Board reveals no mention whatsoever of any need to file an answer or response. Accordingly, there appears to be no provision anywhere even permitting entry of a default judgment.

Second, it is a well established principle of law that defaults are not favored, and disposition on the merits is to be obtained wherever possible For example, see "ICM v , United States Court of International Trade, Slip Opinion 99-21 (1999), denying a motion for default judgment in an administrative proceeding, and holding that even in the absence of a response, it is necessary for the party moving for a default to demonstrate its *right to relief on* the claim.

Finally, it is noted that the Motion for Default Judgment is based almost entirely on the failure of the Merit System Commission to conduct the hearing within 30 days, i.e., by July 14, 2004. In point of fact, this Hearing Officer was appointed to this case while on vacation in California, and was not even able to review his calendar to determine possible hearing dates until his return on July 12, 2004.

However, as noted in R2-5.1-104.1, "The Board shall provide the complainant and respondent with written notice of the time, date, and place of *hearing* of a complaint, and the name of the hearing officer at least 20 days before the date of the hearing" Thus, it was a temporal impossibility for this case to be set and heard by July 14, 2004

Moreover, prior to a notice of hearing being issued, it was still necessary to deal with certain motions Complainant included in his Complaint, including particularly, his motion for disqualification of counsel. Obviously, it was not possible to notice the hearing until it was known who represented the agency, so this was a threshold issue which had to be addressed prior to setting an actual hearing date.

Although the statute states that hearings are to be held within 30 days, this is not absolute, and as a practical matter, the majority of appeals to the State Personnel Board are not heard within 30 days. See, *Damn v. State ex rel. Dept. of Economic Security*, 145 Ariz, 99, 100, 699 P.2d 1330 (App. 1985), holding that the time limits in A.R.S . 41-785 are non jurisdictional and may *be waived* where appropriate,

In this case, there is good cause to extend the time for the hearing, particularly in that this is a whistleblower action involving more legal issues than a normal personnel appeal. The scheduling has been reasonable under the circumstances, and it would therefore be inappropriate to enter a judgment based solely on the failure of the Commission to meet an impossible deadline.

Accordingly, the Motion for Default Judgment is denied_

ORDER FOR NOTICE

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

DATED this 28thth day of September, 2004.

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DAVID J. GERING
Hearing Officer