

1 Scott M. McNair (Complainant, Pro Se)  
2 [REDACTED]  
3 Phoenix, Arizona [REDACTED]

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HUMAN RESOURCES  
RECRUITING

4  
5 **MARICOPA COUNTY**  
6 **EMPLOYEE MERIT SYSTEMS COMMISSION**

8 SCOTT M. MCNAIR  
9 Complainant

**CASE NO. MC-WB-2004-1**

10 v.

**COMPLAINANT'S RESPONSE TO  
RESPONDENTS' MOTION TO DISMISS**

11 MARICOPA COUNTY, et al  
12 Respondents

**Assigned to Hearing Officer David Gering**

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14  
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."*)  
22

<sup>1</sup> Haines V. Kerner, 92 S.Ct. 54; 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 On June 8 2004, the County sent the Complainant a postcard informing him that he was being  
2 removed from consideration for the open Database Administrator position in question.

3 On June 14 2004, the Complainant filed a timely complaint with the Commission asserting that  
4 he had been denied consideration for reemployment in retaliation for his previous public  
5 disclosure(s), sexual harassment complaint(s), and for asserting his Constitutional Rights to Free  
6 Speech and Due Process.

7 Subsequent to his complaint, on June 28 2004 the Complainant filed a request for a “Change  
8 of Venue” in this matter. This request was based upon the facts that the Commission is appointed  
9 by and serves at the leisure of the Respondents, and it would therefore be a clear conflict of  
10 interest for the Commission to judge its own superiors.

11 Additionally, since the Complainant has notified the Commission that he intends to pursue  
12 litigation against it for previous acts, it would be a conflict of interest for the Commission to judge  
13 any complaint from him.

14 The Commission ignored its clearly evident conflict of interest, and chose to accept the  
15 complaint for its own.

### 16 III. MEMORANDUM AND POINTS OF AUTHORITY

#### 17 1) JURISDICTION

18 The Respondents assert that the Commission does not have jurisdiction in this matter. To  
19 support this they make of number of statements that are misleading by design, self-contradictory,  
20 and grossly flawed.

21 First they assert that the Commission does not have jurisdiction over “contract employees”  
22 or “*applicants such as the Complainant.*” Nowhere in their pleading do they explain what is meant  
23 by the term “*applicants such as the Complainant.*” No legal authority is cited to show that there  
24 exist different categories of “applicants”. Nor is any authority cited which exempts the Commission

1 from hearing a complaint from any specific category or group of applicants. Since no authority  
2 exists to specifically exclude any category of applicants, then the Commission must accept  
3 jurisdiction over all applicants.

4 The Respondents then contend that the Commission is barred from hearing complaints  
5 from “contract employees”. This argument is grievously flawed.

6 The Respondents cite ARS § 11-351 through 356 as the basis of its formation and authority  
7 to act, and then cite Resolution Sections 5 & 6 as a means of excluding “contract employees” from  
8 its jurisdiction. By citing both of these authorities, the Respondents show that Resolution Section 5  
9 & Section 6 are unlawful.

10 ARS § 11-352(A) sets the conditions under which a county may create an employee merit  
11 system. That statute reads as follows:

12 Any county may by resolution of the board adopt a limited county  
13 employee merit system for any and all county appointive officers and  
employees.

14 The language of the legislation affords counties the option of forming their own employee  
15 merit system, but, in doing so, the county agrees to take full responsibility for all its employees.

16 The language of the statute is clearly an “all-or-nothing” option. It does not allow for the county to  
17 “piecemeal” or pick-and-choose what employees or group of employees it will or will not cover.

18 The statute specifically requires the county to adopt an employee merit system that covers “any  
19 and ALL” employees.

20 The ability for a county to exempt or exclude positions from its employee merit system is  
21 strictly limited and explicitly set forth in ARS 11-352(B). Nowhere in that section does it allow for  
22 the exclusion of “contract employees”. Since the law does not allow for the Commission to exclude  
23 contract employees, then the exemption of such is illegal and the Commission is therefore bound  
24 by law to accept complaints from “contract employees” such as the Complainant.

1 Next, the Respondents assert that “County Service” does not include “independent  
2 contractors”. The Complainant has never asserted himself as an “independent contractor”, and  
3 denies that he is or ever was such, thereby making any such argument moot. Likewise, at no time  
4 have the Respondents asserted such or provided any evidence that the Complainant is or was an  
5 “independent contractor”.

6 This vague reference to “independent contractor” is ambiguous, contradictory to  
7 Respondents’ assertion that the Complainant is a “contract employee”, and therefore is of no  
8 relevance to the question of jurisdiction before Commission.

9 What the Respondents have deliberately omitted from their pleading are the points that  
10 show that the Commission does have jurisdiction in this matter.

11 First, there is the undeniable point that the complaint in this matter was filed in accordance  
12 with ARS 38-532(H). The Complainant has clearly alleged that he was denied reemployment in  
13 retaliation for a “Public Disclosure” he made to County Officials (and the respondents) on July 17  
14 2002. The Respondents themselves acknowledge that under Resolution Section 10(F) the  
15 Commission is required to hear such complaints.

16 Secondly, the complaint in this matter clearly and specifically alleges denial of  
17 employment/reemployment as an act of discrimination (i.e. retaliation for his complaints to the  
18 EEOC) According to Maricopa County Employee Merit System Rule 2.10.D, “*No appointing  
19 authority shall...Refuse to review any complaint based on discrimination...by an employee  
20 regardless of status or an applicant.*” By the Merit System’s own rules, it is specifically barred  
21 from refusing to review this complaint.

22 This same rule also nullifies any argument by the Respondents concerning jurisdiction due  
23 to the Complaint’s past employment status, as the issue is that of his status as an applicant.

1 2) STANDING

2 In this section of the Respondents' pleading, they now contradict all of their previous  
3 arguments and attempt an about face with the argument of *"Only employees who are in Classified*  
4 *Service have standing to appear before the Merit Commission."* Recognizing the lack of  
5 substance in their contradictory arguments over whether the Complainant was a "contract  
6 employee" or "independent contractor", Respondents now attempt to assert that the Complainant  
7 has no right to be heard because he is not currently an employee (of any status).

8 In response to such, the Complainant again cites Maricopa County Employee Merit System  
9 Rule 2.10(D). Which states, *"No appointing authority shall...Refuse to review any complaint based*  
10 *on discrimination...by an employee regardless of status or an applicant."*

11 Rule 2.10 clearly and specifically states that a complaint by an "applicant" must be heard if  
12 it alleges discrimination due to race, religion, sex... or any other non-merit factor. The rule further  
13 states that it is the duty of the Commission to make that determination.

14 3) WHISTLEBLOWER COMPLAINTS

15 Respondents next admit that the Commission has the authority to hear "Whistleblower"  
16 complaints, but assert that they do not have the authority to hear one from this particular  
17 Complainant. While they cite their authority to hear complaints under ARS 38-532(H), they argue  
18 that since the Complainant "was" not a "regular employee" his complaint should not be heard. To  
19 this, the Complainant again cites Maricopa County Employee Merit System Rule 2.10(D). Which  
20 states, *"No appointing authority shall...Refuse to review any complaint based on*  
21 *discrimination...by an employee regardless of status or an applicant."* Clearly retaliation against  
22 "Whistleblowers" is a form of discrimination. Furthermore, since denial of re-employment in  
23 retaliation for a making public disclosure is a "non-merit factor", the same rule again forces the  
24 Commission to hear the complaint.

1 Furthermore, and of the greatest importance, is the basis of the complaint. In it the  
2 Complainant alleges he was denied "reemployment". Arizona's Whistleblower statute states that  
3 an adverse "Personnel Action" is a prohibited as a means of retaliation against those that make a  
4 public disclosure. Under ARS 38-531(2)(h), "reemployment" is a "personnel action".

5 Since the Complainant has alleged that he was denied "reemployment" in a "covered  
6 position", it is therefore within the jurisdiction of the Commission to hear his complaint.

#### 7 4) DISCRIMINATION COMPLAINTS

8 Included in the complaint before the Commission, are allegations that the Complainant was  
9 denied employment/reemployment in retaliation for his complaints of discrimination to the EEOC.

10 As such, the Complainant again cites Merit System Rule 2.10(D). Which states, "*No*  
11 *appointing authority shall...Refuse to review any complaint based on discrimination...by an*  
12 *employee regardless of status or an applicant.*"

13 Furthermore, since denial of employment in retaliation for filing a complaint of  
14 discrimination is a "non-merit factor", the same rule forces the Commission to hear the complaint.

#### 15 5) OTHER ADMINISTRATIVE & COURT DECISIONS

16 In their pleading, (Daniel Brenden and Mary Cronin) Counsel for Respondents make a  
17 number of references to decisions from other courts and administrative bodies related to other  
18 complaints filed by the Complainant. What counsel fails to mention is that that case is currently  
19 under appeal.

20 While they assert that the State Personnel Board found that the "*Complainant failed to*  
21 *meet the jurisdictional requirements of a Whistleblower...*", what they deliberately withhold are the  
22 facts that this were based on a supposed failure to file a complaint in a timely manner, and, the  
23 deliberate interference by an unscrupulous hearing officer in order to maliciously prevent the  
24 Complainant from presenting evidence and testimony in his own behalf.

1 Furthermore, while the Complainant is a layperson, both Cronin and Brenden are bar  
2 certified attorneys and are fully aware of the prohibition of citing unpublished cases. They  
3 compound these unprofessional acts and further insult the Commission by citing a case that has  
4 not yet even concluded.

5 In any court where the judicial officer had even the smallest amount of personal integrity or  
6 even the least sense of respect to the duties of his office, Cronin and Brenden would be severely  
7 sanctioned for these acts. As such, the Complainant does hereby demand that the Hearing Officer  
8 and the Commission acknowledge their duty to protect the integrity of their office and these  
9 proceedings, by harshly sanctioning the pair and by reporting their unethical actions to the State  
10 Bar of Arizona.

11 6) “CONTRACT EMPLOYEE” OR “INDEPENDENT CONTRACTOR”?

12 Throughout their pleading, the Respondents have repeatedly referred to the Complainant  
13 as being a “contact employee” and/or an “independent contractor”. The use of these terms is  
14 clearly intended to exempt the Complainant from the jurisdiction of the Merit System and the  
15 Commission. Though they have used these terms in an interchangeable manner, there is a vast  
16 difference between the two.

17 There is nothing in the record to substantiate the Respondents’ assertion that the  
18 Complainant was an “independent contractor”. In fact, Complainant’s Exhibit 2 clearly states that  
19 was a “Contract Employee” of the County.

20 Should the Commission question the legal stance of these assertions, it should review the  
21 Arizona Administrative Code on the subject. And when doing so, it should note: a) the  
22 Complainant worked in a cubicle in at County office, b) his hours were set by a County manager,  
23 c) his duties were routinely changed, augmented, and assigned by a County manager, d) the  
24 equipment he used was the property of, supplied by and maintained by the County, e) he received

1 medical and dental benefits paid for by the County, f) he was subject to regular “performance  
2 appraisals” by a County manager, and, f) the tax statements, Unemployment Insurance records,  
3 and numerous other government records filed by the County with other government entities, all  
4 show “Maricopa County” as the Complainant’s employer. Any assertion that he was an  
5 “independent contractor” is so ludicrous, that such an assertion should be met with charges of  
6 willful perjury and contempt of court.

7) CONFLICT OF INTEREST

8 The Complainant is entitled to an “impartial” review of his complaint(s). As such, it is not his  
9 responsibility to search out or recognize any possible conflict of interests. It is the responsibility  
10 (duty) of the Board of Supervisors, County Attorney, Merit Commission, Hearing Officer, and all  
11 other officers of the Court and participants to voluntarily disqualify themselves from participation in  
12 a decision on grounds such as prejudice or personal involvement.

13 As previously stated, the Complainant asserted months ago that since the Commission  
14 members are appointed by the Board of Supervisors, whose members are individually named as  
15 dependents/respondents in this matter, it would clearly be unlawful and a conflict of interest for  
16 them to effectively “judge themselves”.

17 Moreover, the issue of the impartiality and authority of the Hearing Officer in this matter has  
18 been raised, but ignored. He has compounded these issues by refusing to respond to such, and  
19 has even withheld any proof that he is authorized to act in this matter at all.

20 Recognizing that a clear conflict of interest exists in this matter by at least one if not many  
21 of the participants, any attempt by the Commission (or its’ agents) to “dismiss” the complaint,  
22 would undoubtedly be an act of retaliation against the Complainant and his Constitutional Rights.

23 ...

24 ...

1 8) APPROPRIATE VENUE

2 ARS 38-534 requires that an “independent” board hear a Whistleblower complaint.

3 Subsection (C) of that statute, states that if an “independent” board does not exist, or one has not  
4 been authorized, then the State of Arizona Personnel Board must hear the Complaint.

5 But, the issue of “discrimination” further compounds the question of venue. The complaint  
6 contains allegations of “discrimination” which are clearly covered by Rule 2.10 of the Maricopa  
7 County Employee Merit System. As such the Commission must hear those issues.

8 Unfortunately, the issue of “conflict of interests” by the Commission, the Respondents, and  
9 the Hearing Officer has been asserted. Since it would be inappropriate for the Commission to  
10 “judge itself” (or those that appointed it), then law binds the Commission to have the matter heard  
11 by someone whose “independence” and “impartiality” is above reproach.

12 With conflicts as to what board or panel should hear the complaints, the question is  
13 therefore not whether to dismiss the complaint, but rather, *“What is the appropriate venue for the*  
14 *complaint to be heard in?”*

15 Given that this unique situation has never been addressed before, one must look to the  
16 intent of the law for guidance. In doing so, one will find that administrative decisions by both the  
17 Maricopa County Merit Commission and the State of Arizona Personnel Board are subject to the  
18 Arizona Administrative Review Act (A.R.S. section 12-901 et seq.).

19 Under the ARA, the most obvious venue for this complaint would be the Superior Court.

20 ...  
21 ...  
22 ...  
23 ...  
24 ...

1 **IV. SUMMARY**

2 By and through resolution of the County Board of Supervisors, the Commission is statutorily  
3 bound to enforce all of the merit system rules for all employees. It is not allowed to piecemeal  
4 enforcement upon selective groups of personnel for selected rules.

5 The Complainant has filed a legitimate complaint in a timely manner and therefore he must be  
6 heard. Heard by a panel that is both impartial and independent.

7 The Respondents have not raised grounds for dismissal, but instead have forced the issues of  
8 impartiality and appropriate venue.

9 If the Commission cannot or will not address the Whistleblower portion of the complaint, then  
10 by law it falls to the jurisdiction of the State of Arizona Personnel Board. The discrimination portion  
11 of the complaint clearly falls to the jurisdiction of the Commission. But, due to Commission's  
12 relationship with the Respondents, there exists a clear conflict of interest. As such, any decision  
13 by the Commission or its agents in this matter would be suspect.

14 This unique situation has created the question as to whether the complaint is the jurisdiction of  
15 the Maricopa County Merit Commission, the State of Arizona Personnel Board, or both, or part for  
16 one and part for the other.

17 Since the impartiality of the Commission is clearly compromised, and since the State  
18 Personnel Board is not authorized to hear all of the issues, and since the Complainant has the  
19 right to have the entirety of his complaint adjudicated, then the question becomes one of deciding  
20 the appropriate venue to hear all of the issues.

21 Since decisions by both the Maricopa County Merit Commission and the State of Arizona  
22 Personnel Board are subject to the Arizona Administrative Review Act (A.R.S. section 12-901 et  
23 seq.), then the most obvious venue for this complaint would be the Superior Court.

24 ...

1  
2 **V. CONCLUSION**

3 The complaint must be heard in its entirety by one body and cannot be dismissed.

4 The Commission lacks the impartiality required to adjudicate **any** portion of the complaint,  
5 including a decision for or against dismissal.

6 Therefore, the Commission must recuse itself from the matter completely, vacate any  
7 proceedings it has already undertaken, and transfer the complaint to the Superior Court to be  
8 heard in full.

9  
10  
11 **RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of NOVEMBER 2004.**

12  
13 By: \_\_\_\_\_

14 Scott M. McNair, Complainant (Pro Se)

15  
16 ORIGINAL of the foregoing FILED this day with:

17 Maricopa County Employee Merit System Commission  
18 301 West Jefferson, Suite 219  
19 Phoenix, Arizona 85007

20 COPY of the foregoing HAND-DELIVERED this day to Counsel for Respondents:

21 Maricopa County, et. al.  
22 Division of County Counsel  
23 Attn: Mr. Daniel Brenden  
24 222 North Central Avenue, Suite 1100  
Phoenix, Arizona 85004