



**PIMA COUNTY  
MERIT SYSTEM COMMISSION  
OPEN MEETING MINUTES OF JUNE 24, 2021**

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Commission Members Present

Mike Hellon, Chair  
David Freund  
Rhonda Pina

All persons in attendance were asked to state their names for the record.

Barry Corey	Counsel for the Commission
Dan Jurkowitz	Deputy Attorney for the Respondent
Bryson Buckley	Deputy Attorney for the Respondent
Laureen Pew	Paralegal, Pima County Attorney's Office
Jaclyn Foltz-Bralj	Paralegal, Pima County Attorney's Office
Bryan Smith	Appellant
Sofia Blue	Human Resources
Trina Bergen	Recording Secretary

The Open Meeting of the Pima County Merit System Commission was called to order by Mr. Hellon, Chair, at 9:00 AM. Roll call taken, the selected Commissioners were present.

The Pledge of Allegiance was led by Ms. Pina.

**Item C. Approval of Minutes**

1. Open Meeting Minutes of November 14, 2019

**ACTION:** Mr. Freund made a Motion to approve the Minutes of November 14, 2019. Second by Mr. Hellon. Ms. Pina was not a member of the Commission at the time of this hearing and did not vote. Motion passed.

2. Open Meeting Minutes of February 24, 2021

**ACTION:** Mr. Freund made a Motion to approve the Minutes of February 24, 2021. Second by Ms. Pina. Motion passed unanimously.

**Item D. Appeal Hearing**

1. Jesus Silva v. Pima County Sheriff's Department – Dismissal Appeal – Withdrawal

**ACTION:** Mr. Freund made a Motion to accept the Withdrawal of Jesus Silva. Second by Ms. Pina. Motion passed unanimously.

2. Joseph Gonsalves v. Pima County Sheriff's Department – Dismissal Appeal – Withdrawal

**ACTION:** Mr. Freund made a Motion to accept the Withdrawal of Joseph Gonsalves. Second by Ms. Pina. Motion passed unanimously.

3. Bryan Smith v. Public Defender's Office – Dismissal Appeal – Jurisdictional Hearing

Mr. Hellon read the Opening Statement for the Jurisdictional Hearing and asked if there were any preliminary matters.

**FOR THE RECORD:** Mr. Buckley said the Appellant's response for the Motion to Dismiss was outside the 10 calendar day period described under Merit System Rule 14.4. A.2. Mr. Hellon noted the objection.

Mr. Hellon explained the decision for a jurisdictional hearing:

- He determined there was sufficient information to conduct a Jurisdictional hearing.
- The County believes this is an error and filed a Motion to Dismiss and later a Motion to Reconsider.
- He did not accept the Motions and Mr. Smith is here to provide additional information for the Commissioners to consider.

Mr. Buckley asserted the issue is when the actual appeal was submitted and not necessarily the date and time of the date stamp. Mr. Hellon agreed and stated everyone is here to determine if the date stamp was accurate. Mr. Corey added is one of the questions which leads to the possibility as to whether or not there was good cause for failing to file within the 10 calendar day period.

Mr. Hellon asked Mr. Corey, if they determine the date stamp is correct, is it his council to the Commission they can accept jurisdiction if they find good cause for filing late? Mr. Corey indicated he needed to look up the appropriate Merit System Rule (MSR).

Before proceeding with the hearing Mr. Corey swore in the witness/appellant, Mr. Smith. The Respondent had no witnesses.

**ACTION:** Mr. Hellon admitted the email from Bryan Smith dated March 21, 2021 at 12:17 a.m. There were no objections.

Mr. Smith explained his process. He tried to digitally sign the Appeal form online and it couldn't be done and noticed it was approaching midnight. He submitted the other two documents that didn't require his signature. His first email was sent on March 21, 2021 at 12:01 a.m. When he was able to get the Appeal form signed, he emailed it, it was his third email.

Mr. Hellon stated if the County's website had accepted the digital signature would that have been within the 10 calendar days? Mr. Smith stated it wouldn't make the 10-day but the total 17-day time line.

Mr. Hellon asked what he believed the amount of time he had to file the appeal. Mr. Smith believed he had 17-days to file the appeal and at the time he was uncertain. The mandatory language of the 10-day Rule was diluted by the next sentence, allowing for 7 more days for good cause.

Mr. Hellon asked if he was asking for an extension based on good cause. Mr. Smith thought he was here to dispute the County's Motion to Dismiss.

Mr. Corey read Merit System Rule 14.2, sub-paragraph A.

"Appeals to the Commission must be filed with the Human Resources Department in writing within ten (10) calendar days of receipt of notice of an appealable action. If all attempts to deliver the notice fail, the right to appeal expires seventeen (17) calendar days from the date of the appealable action. In the absence of good cause, failure to file a timely appeal results in denial of the appeal due to lack of jurisdiction."

He and added the 17-day time period Mr. Smith is referring to is not applicable here, that deals with attempts to deliver the Notice of Discipline. The Notice of Discipline date is not contested.

His advice to the Commission is the 10-day period applies unless there is good cause. If there is good cause it could extend the 10-day period in which to file an appeal.

Mr. Freund asked Mr. Smith the following questions:

- Did he know the appeal had to be filed before midnight of March 29, 2021? Mr. Smith replied that he wasn't clear about the dates until Mr. Corey explained rule 14.2.A. He had no one to ask and he was going for the 10-day window. He had difficulty digitally signing the appeal.
- Was he filling in the form prior to midnight? Mr. Smith confirmed he was working on the documents prior to midnight. He offered to provide access to his computer to look at the time documented on his system.
- Did he think to consult someone in Human Resources for assistance? Mr. Smith stated he did not. He followed the prompts on the website.

Ms. Pina asked Mr. Smith additional questions.

- What was he basing his time on as far as good cause that allows him to add the extra time, 10-days or an extra 7-days? Mr. Smith acknowledged that he did not clearly understand the time line.
- When did he receive notification? Mr. Smith stated he signed the document on March 10, 2021.
- What was happening within the 10-days? Mr. Smith indicated he was searching for an attorney and had to file the documents himself which bought it to the 20th and 21st dates. The 20th was Saturday and that morning he discussed the issue with his wife and children. That afternoon he started to process the documents.

Ms. Pina asked Mr. Corey if the procedure for notification was followed. Mr. Corey stated the signature on the last page of the notification is March 10, 2021 and it was his understanding the procedures were followed.

**ACTION:** Exhibits 1-5 were admitted without objection.

Mr. Buckley clarified the dates:

- March 9, 2021 the dismissal meeting was held. Ms. Kroska sent Mr. Smith an email informing him of the dismissal and she later followed up with a telephone call.
- Attached to the email was a PDF document of the Notice of Dismissal, Exhibit 5.
- Mr. Smith was to be present in the office but for whatever reason he wasn't in that day and attended from another location. The meeting took place utilizing Microsoft Teams.
- They couldn't get his signature that day and asked him to sign it the next day. As soon as possible.

Mr. Smith objected stating there was no evidence to show that he was to appear in the office. He was on suspension and not allowed in the office.

Mr. Hellon reiterated Mr. Smith's response. He was trying to file his appeal electronically on Saturday. He knew the 10 calendar day limit was on Saturday. Mr. Smith thought he was within the 10 calendar days when attempting to electronically sign it which failed. He thought because of the issues, he had additional 7-days for good cause. Does that accurately state your position?

Mr. Smith replied, the line about the 10-day limit is incorrect, he did not know. He felt good that he submitted it. He objected to the idea that he was notified to attend the meeting in the office. That is false.

Mr. Buckley stated Mr. Smith was notified in writing multiple times informing him that he has a 10-day window and he had the right to file an appeal within 10 calendar days of the receipt of the appealable action. See Exhibit 5. It was included in the text of the email that was sent by Ms. Kroska, it shows the 10-days. He was also instructed to call Human Resources if he has questions.

Mr. Freund stated Mr. Smith is basically saying the requirement of the Notice that he received doesn't necessary require that he be there in person or that he sign. Is there is some proof he actually had the Notice? A signature in and of itself is just a manner of proving the Notice?

Mr. Buckley confirmed Mr. Freund's statement is correct. Because of COVID and with everything transitioning to remote meetings, it made sense to give somebody notice without physically requiring a signature from them. That was done in the meeting. It was done in the email after the meeting and it was done by the phone call.

Mr. Hellon explained Mr. Buckley's position is the Notice was delivered on March 9, 2021. Mr. Buckley agreed and stated, the evidence of the Notice is in the email. Mr. Smith's actions, making himself unavailable to sign off should not change the effective date of the Notice.

Mr. Smith stated that is not what he did. The Rule says 10 calendar days of receipt of Notice, not notice. He knew he was being fired and the actual receipt of the Notice was signed on March 10, 2021. He didn't have the foreknowledge of playing some kind of game to avoid giving a signature to get an extra day added.

Mr. Buckley stated the County is not arguing this is on purpose or intentional. He noted that under Merit System Rule 14.2.A, signature is not required. Mr. Smith added a Notice of Dismissal is different than a receipt of Dismissal.

Mr. Corey read Merit System Rule 12.2.B.4 under the caption Dismissal and said It was pertinent to their consideration.

Section a: "Dismissal for a disciplinary reason is the most significant disciplinary action and may be used for the most serious incidents or repetitions of improper performance or conduct. An Appointing Authority may dismiss a permanent employee for a disciplinary reason."

Section b: "The Notice of Dismissal shall contain the specific reason(s) for the dismissal in sufficient detail to inform the employee of the reason(s) for the action and shall advise the employee of the right to appeal the dismissal to the Merit System Commission within ten (10) calendar days of receipt of notice."

Section c: "The Notice of Dismissal must be delivered to the employee prior to or no later than the effective date of the dismissal." The date of the dismissal can be different from the Notice. I think the Notice is referred to as a written document.

Mr. Freund asked Mr. Corey:

- If the signature on the Notice of Dismissal where the employee is asked to sign. Isn't that a way of proving the employee received it? Does it mean there could be alternated means of showing they received it? Mr. Corey responded, it would and does constitute Notice of receipt by the employee by the date shown. In this case it is March 10, 2021.

- Is there another method of proof the employee actually received the Notice? Mr. Corey stated a signature on the date shown is evidence.

Mr. Buckley stated it's the County's position it was given on March 9, 2021 and under Rule 12.2.B.4.c it references the receipt must be documented and it is here. That acknowledges the receipt. It doesn't determine when the receipt occurred. If it is determined this happened on March 10, 2021, the filing still came outside the window.

Ms. Pina asked Mr. Corey how does the Rule he read apply to the 10-day rule of March 10, 2021? Mr. Corey responded, he believed March 10th is the beginning of the countdown. The 10-days after that would be March 20th and that's a Saturday. The Rules are silent on a person walking in the door and hand a piece of paper to somebody and say here is my appeal. Mr. Smith could not do that on Saturday or Sunday. He stated the 10th calendar day would be March 20th and it would be up to the Commission to make the determination. Ms. Pina replied either way the appeal would be late.

Mr. Corey also added if it was Mr. Smith's position there was good cause for bringing it to the Commission and filing it when he did. The question is whether or not the fact the office wasn't open to file it constitutes good cause.

Mr. Freund asked Mr. Buckley, is it the County's position that an employee who has been disciplined or dismissed has a vehicle or method or a way of filing their appeal electronically, would that be sufficient if Mr. Smith had done so before 12:00 a.m. would that have properly involved the jurisdiction within the 10-day Rule?

Mr. Buckley responded yes and added the appeal form was submitted online, he filled it out digitally and submitted digitally. That's the means which an appeal could be submitted. Because there were technical difficulties at the last minute doesn't constitute good cause. Mr. Smith had 10-days to fill out the 1-page form and attach his Notice of Dismissal. That's what is required to submit and it states on the form there are 10 calendar days to submit. By waiting for the 10th day, until about around midnight and submitting it late is not good cause. Mr. Smith said it took him about 15 minutes to do this whole thing. That's 15 minutes he could have done at any point in that 10-day window. If he had any questions he could have called Human Resources. He didn't and that can't constitute good cause. Mr. Smith agreed it took 15 minutes.

Mr. Hellon asked if he had additional items to present to the Commission.

Mr. Buckley had a couple of items that may have been discussed briefly and stated there were multiple times Mr. Smith was informed of the 10-day window and to contact Human Resources if he needed information about the process. His office contacted Human Resources, Employment Rights to inquire if Mr. Smith contacted them within the 10-day period and he did not. Mr. Smith waited until the last possible date to start filing the appeal.

Mr. Smith said he believed he had 10-days until he read the sentence after the 10-day rule and he tried to get it submitted. Additionally, the decision to appeal was not made until the 10th day, it wasn't an easy decision as the allegations included falsification of government documents. If they asked him to sign it on the 9th, he would have done it. They informed him that he didn't offer any information to change their mind about the dismissal.

Mr. Freund questioned Mr. Smith about the Teams meeting. He did not dispute the Teams meeting took place on March 9th. During their conversation someone reviewed the Notice of Dismissal. He couldn't be certain but guessed that would be the last thing. He couldn't be 100% certain of what was discussed during the Teams meeting.

Mr. Freund re-stated Mr. Smith doesn't dispute that on March 9th he was being dismissed and he knew some of the reasons why.

Mr. Corey again read Rule 12.3.B.4 and he wasn't sure if the date of March 9th was particularly relevant to the Commission's decision.

Mr. Freund stated that is why he was trying to establish the County's position.

- They had the discussion on phone and video on March 9th.
- Mr. Smith was sent an email and attached to the email was the actual Notice of Dismissal.
- Whether the Commission want to consider that was delivered to him on the effective date or not, he didn't know and documented is the question.
  - Mr. Corey stated in this case it was documented to be the 10th.
  - Mr. Buckley stated the Dismissal was dated March 9th.
  - Mr. Hellon restated Mr. Smith was dismissed on March 9, 2021 and confirmed by Mr. Buckley.

Mr. Hellon asked Mr. Corey about the Rule. The Notice of Dismissal has to be delivered to Mr. Smith prior to the dismissal. He can't be dismissed and then give him the Notice of Dismissal later. Mr. Corey agreed and read a portion of the Rule. "The Notice of Dismissal must be delivered to the employee prior to or no later than the effective date of the dismissal." It goes on to say, "The date of receipt must be documented." Mr. Smith stated that was not done.

Mr. Hellon asked if Mr. Smith was dismissed on March 9th and he didn't get the Notice until March 10th, does that void the dismissal? Mr. Buckley stated no and explained the Notice of Dismissal was delivered to Mr. Smith on the effective date of his dismissal and referenced Exhibit 5. He added, because Mr. Smith wasn't in the office they couldn't get his signature and they got it the next day. The date of the receipt is documented.

Mr. Hellon stated his perception. Whoever came up with the Rule that an Appellant has 10 calendar days to file an appeal had to anticipate that weekends would be involved and had to anticipate it was possible that a Saturday and Sunday would occasionally be the 10th day. The evidence seems to indicate he was clearly late.

Yes, he missed the deadline but did he do so in making a good faith effort to meet the deadline and therefore should we find there is good cause to hear the appeal. That's the matter before Commission and asked if anyone had a different view.

Ms. Pina didn't have a different view and asked if an actual conversation took place between Mr. Smith, Ms. Kroska and Mr. Feinman. Mr. Buckley stated yes, it took place using the Teams program. The Notice of Dismissal was reviewed during the video conference and later that day Ms. Kroska called him to inform him that he was dismissed.

Mr. Hellon stated, If the Commission accepts March 10, 2021, which is a Wednesday and there are 7 working days between the date of dismissal and the conclusion of the 10-day window that were available to the Appellant to file, the appeal. He considered that could be good cause for missing the midnight deadline on Saturday.

Mr. Freund said they heard Mr. Smith was trying to get an attorney and he had a conversation with his family on Saturday. He testified the information of the 10-day notice was his belief until he read this procedure then came to the conclusion that was the day he had to get it in.

Mr. Buckley stated good faith attempt was mentioned and good faith is not part of the rules and it is important to differentiate that from good cause. Good cause is being physically unable to complete then submit the appeal paperwork and that is not the cause in this case. Mr. Smith was searching for an attorney it doesn't preclude him from filing his appeal.

The appeal form is one page. Write the bases of the appeal, write the remedy requested, sign and date the form then submit it. Mr. Smith determined on Friday that he was not going to get an attorney and that gives him Friday night and all of Saturday to complete the appeal process. He waited until the last minute to complete a 15-minute process. It is not good cause.

Mr. Smith explained his understanding of the process:

1. Explain the reason for the appeal.
2. Present your appeal on the document.
3. It's not a form that requires "only" a signature.

Mr. Corey read Merit System Rule 14.2.A; "The appeal shall state the basis of the appeal and the remedy requested."

Mr. Hellon explained the process could simply be the County's actions were wrong. The remedy requested is you want your job back and the details could be flushed out at a later time.

Mr. Buckley agreed with this statement.

Mr. Hellon commented for information purposes Mr. Buckley, this Commissioner would equate good faith with good cause. In this case it seems if Mr. Smith had been hit by a truck on the 10th or 11th and didn't get out of the hospital until Saturday that would clearly be good cause in my judgment. Not utilized 7 working days to file simply because he was looking for a lawyer, in my mind that doesn't quite gets us there.

Ms. Pina concurred with Mr. Hellon's comments. There were multiple times this was made available to know there were 10 calendar days and it was established it was 10th. 10-days from that still would have been past the 10 calendar days.

- On March 9th there was a conversation between the interest party the dismissal was going to take place. Mr. Smith may have anticipated receiving documents that would have listed the 10 calendar days within the email.
- The other one was on March 10th and signing the document and once again it is a 10 calendar day notification. In this particular situation they could file that or have the ability to file, that's an option based on the 14.2.A policy, which is the bases of the appeal which you mentioned.

Mr. Freund stated many rules and procedures have a provision written into them that if a due date falls on a weekend or holiday when the government office is closed, then its extended. He asked Mr. Corey if Pima County rules have such a provision and he responded Pima County does not have such a provision.

Mr. Hellon agreed and commented what if the County provides a system whereby these things can be filed electronically, at any time, any day whether the office is open or not.

Mr. Corey commented a good faith excuse could have been I don't have a computer. I don't have access to a computer because the libraries are closed due to the pandemic. Those aren't addressed in the Rule and they are left to the Commissions sound discretion in determining if that would constitute good cause. But that evidence hasn't been introduced. Mr. Smith had access

