

PIMA COUNTY MERIT SYSTEM COMMISSION/
LAW ENFORCEMENT MERIT SYSTEM COUNCIL

An Open Meeting of the Pima County Merit System Commission/Law Enforcement Merit System Council will be held on **Monday, September 12, 2011, Tuesday, September 13, 2011 and Wednesday, September 14, 2011, convening at 9:00 a.m., (or at other such time to which the hearing may be continued)**, in the Merit System Conference Room, located on the 4th floor, 150 West Congress, Tucson, Arizona to discuss the business of the Pima County Merit System Commission and the Pima County Law Enforcement Merit System Council.

AMENDED AGENDA

- A. Pledge of Allegiance
- B. Roll Call
- C. Approval of Minutes
 - 1. Open Meeting Minutes of August 2, 2011
 - 2. Open Meeting Minutes of August 3, 2011
 - 3. Open Meeting Minutes of August 4, 2011
 - 4. Executive Session Minutes of August 2, 2011
 - 5. Executive Session Minutes of August 4, 2011 (1)
 - 6. Executive Session Minutes of August 4, 2011 (2)
- D. Other Business
 - Discussion and Action:*
- E. Hearing and Decision on Appeal
 - Hearing Officer Report:*
- F. Appeal Hearing
 - Discussion and Action:* 1. Ernest Irby v. Natural Resources, Parks and Recreation (Motion to Dismiss/Appeal Hearing)
- G. Legal Consultation
- H. Executive Session

The Pima County Merit System Commission/Law Enforcement Merit System Council may conduct one or more Executive Sessions concerning any matter on the Open Meeting Agenda for any or all of the following purposes:

- (a) discussion or consideration of employment, assignment, appointment, promotion, dismissal, salaries, disciplining or resignation of a public officer, appointee, or employee of the County of Pima, pursuant to ARS §38-431.03(A)(1); and/or
- (b) discussion or consideration of records exempt from public inspection, including the receipt and discussion of information or testimony that is specifically required to be maintained as confidential by state or federal law, pursuant to ARS §38-431.03(A)(2); and/or
- (c) discussion or consultation for legal advice with the attorney or attorneys for the Commission/Council, pursuant to ARS §38-431.03(A)(3); and/or
- (d) discussion or consultation with the attorneys for the public body in order to consider its position and instruct its attorneys regarding the Commission's/Council's position in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation, pursuant to ARS §38-431.03(A)(4).

I. Adjournment

Pursuant to ARS §38-431.02, notice is hereby given that a meeting will be conducted at the time and date set forth above, and on any subsequent date or dates to which this meeting or any hearing which is a party thereof may be continued. Questions regarding this meeting can be directed to Gwyn Hatcher, Pima County Human Resources Department, by calling 740-2732. Copies of the agenda may be obtained by contacting Veronica Lopez at 740-2728.

1 BARBARA LAWALL
2 PIMA COUNTY ATTORNEY
3 CIVIL DIVISION
4 By: Leslie K. Lynch
5 Deputy County Attorney
6 32 North Stone Avenue, Suite 2100
7 Tucson, AZ 85701
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10 Pima County Computer No. 35780
11 Arizona Bar No. 009757
12 *Attorney for Respondent*

13 **PIMA COUNTY MERIT SYSTEM COMMISSION**

14 ERNEST IRBY,

15 Appellant,

16 vs.

17 PIMA COUNTY NATURAL RESOURCES,
18 PAKS AND RECREATION DEPARTMENT,

19 Respondent.

20 **RESPONDENT'S
21 MOTION TO DISMISS**

PCHR 08/10/11 AM 10:45

22 NOW COMES the Respondent, Pima County Natural Resources, Parks and Recreation
23 Department ("Parks and Rec"), by and through its undersigned attorney, and moves this
24 Commission dismiss Appellant's Appeal, pursuant to Merit System Rule ("MSR") 2.3 and
25 14.1(B) and (D).

26 On May 17, 2011, Appellant, Ernest Irby ("Irby") received a Notice of Suspension,
suspending him for two (2) days, the suspension to be served on May 24 and 25, 2011. On May
27, 2011, Irby filed his appeal of his suspension. As the basis for his appeal he states:

My FMLA rights have been violated dated back to 2007. In 2009 I was injured and I was not properly informed of the dates for FLMA to begin as a result I was put on Special Observation. The following months again my FLMA rights were violated then followed a Reprimand. In March of 2011 again my FLMA rights were violated leading to suspension. Unlawful Retaliation outlined in A.R.S. 23-1501&38-532.

1 The Appellant's reasons for appeal are not covered as "actions" which may be appealed
2 under the applicable Merit Rules. First, with reference to Irby's claim of unlawful retaliation,
3 MSR 2.3 provides that:

4 An employee who reasonably believes he/she is the subject of reprisal for
5 disclosure, pursuant to ARS § 38-531 et seq., to a public body alleging a violation
6 of law, mismanagement, gross waste of monies or an abuse of authority by the
7 employer may file with the Arizona State Personnel Board for purposes of appeal
8 of any such reprisal action. Any such appeal to the Arizona State Personnel Board
9 must be filed, pursuant to ARS § 38-532, within ten (10) days of the effective date
10 of the alleged reprisal action.

11 Accordingly, MSR 2.3 requires that reprisals actions must be filed with the State
12 Personnel Board, and not this Commission. Irby has, in fact, filed a reprisals action with the
13 State Personnel Board in "Ernest Irby v. Pima County Natural Resources Parks and Recreation
14 Department," and a Hearing on Irby's Complaint before the Personnel Board is set for
15 September 15, 2011. The Commission, by its own Rule, does not have authority to entertain a
16 retaliation appeal.

17 Nor does this Commission, pursuant to MSR 14.1(B) and (D), have authority to entertain
18 an appeal based on a violation of the Family Medical Leave Act, 29 USC § 2601 et seq.
19 ("FMLA"). MSR 14.1(B) provides that "any claim of unlawful discrimination must be filed
20 with, investigated and determined by authorities as stated under 14.1D." The referenced MSR
21 provision, MSR 14.1(D), provides, in pertinent part, that:

22 Claims of discrimination based upon Federal and/or State civil rights laws,
23 including . . . the Family and Medical Leave Act (FMLA) must be filed with
24 Human Resources, or with the appropriate State and/or Federal agency charged by
25 Federal and/or State law with enforcement of those laws.

26 Under the applicable regulations, 29 CFR § 825.400:

- (a) The employee has the choice of:
 - 1) Filing, or having another person file on his or her behalf, a
 complaint with the Secretary of Labor, or

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2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

Under the applicable Merit Rules, Irby's remedy for a violation of his FMLA rights is with the Department of Labor, or through a separate lawsuit, in which he could receive relief (including attorney's fees) this Commission could not give him. His remedy, by the Commission's own Rules, lies elsewhere and it not available in an appeal to this Commission.

For the reasons given above, the Commission should dismiss Irby's appeal on the grounds that the relief he seeks is with the State Personnel Board, the Department of Labor, or through the courts. By this Commission's own Rules, this Commission does not have authority to hear this appeal or to grant Irby relief for the claims he alleges.

RESPECTFULLY SUBMITTED this 9th day of August, 2011.

BARBARA LAWALL, PIMA COUNTY ATTORNEY

By: Leslie K. Lynch
Leslie K. Lynch
Deputy County Attorney

1 Original delivered this 10th day
2 of August, 2011, to:

3 Commission Members
4 Pima County Merit System Commission
5 150 West Congress
6 Tucson, AZ 85701

7 Mr. Ernest Irby
8 4029 East Fort Lowell
9 Tucson, AZ 857
10 Appellant

11 Michael Coiro
12 110 South Church
13 Tucson, AZ 85701
14 Representative for Appellant

15 By Katherine Hyversom

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