



www.maricopa.edu

**VIA E-MAIL AND REGULAR MAIL**

March 20, 2017

James E. Barton II  
Torres Law Group  
2239 West Baseline Road  
Tempe, Arizona 85283

Re: Letter to Maricopa County Community College District Governing Board dated March 7, 2017

OFFICE OF GENERAL COUNSEL

Dear Mr. Barton:

On behalf of the Governing Board of the Maricopa County Community College District ("MCCCD"), I respond to your March 7, 2017 letter. In your letter, you appear to raise two points: 1) MCCCD's Administrative Regulation ("AR") 6.20, Whistleblower Protection, improperly excludes whistleblower protection "under OSHA" and under the Affordable Care Act; and 2) the review process for whistleblower complaints under AR 6.20 lacks fairness and independence when the complaint is about the Chancellor.

As to your first point, the whistleblower protections under Arizona's Occupation Safety and Health Act ("OSHA"), Ariz. Rev. Stat. § 23-425(A), and under the federal Affordable Care Act §1558 of the Affordable Care Act (ACA), P.L. 111-148, protect a person who reports a violation of those laws. Since AR 6.20-1 protects an MCCCD employee who reports an "alleged violation of law," I do not see any basis for your assertion that violations of those laws are excluded from coverage under AR 6.20. In any event, those laws provide whistleblower protection for employees and persons – as well as procedures for the adjudication of those claims - regardless of whether AR 6.20 identifies them or not.

In fact, there are many other whistleblower laws just in Arizona that AR 6.20 does not specifically call out. Examples are: Ariz. Rev. Stat. § 41-1464 (an employee may not be discharged or discriminated against for opposing a discriminatory employment practice); Ariz. Rev. Stat. § 23-329(A) (an employee may not be discharged or discriminated against in retaliation for serving on, or testifying before, a wage board in a proceeding concerning minimum wage paid to minors); Ariz. Rev. Stat. § 3-376 (an employee may not be discharged or discriminated against for filing a complaint, instituting a proceeding, testified in a proceeding, or exercising a right under Arizona's pesticide control laws). There are also many federal whistleblower protection laws beyond the ACA that you did not mention in your letter.

As an example of a claim under Arizona's OSHA's law, MCCCD received a whistleblower complaint filed last year under that law and handled it according to a

*A COMMUNITY OF COLLEGES...A WORLD OF OPPORTUNITY*

Chandler-Gilbert • Estrella Mountain • GateWay • Glendale • Mesa

Paradise Valley • Phoenix College • Rio Salado • Scottsdale • South Mountain • Skill Centers

The Maricopa County Community College District is an EEO/AA institution

2411 W. 14TH STREET  
TEMPE, AZ  
85281-6942

Telephone  
480.731.8877

Fax  
480.731.8890

statutory process that had nothing to do with the procedures outlined in AR 6.20. Given that, why is there any need to amend AR 6.20 to add every whistleblower law that exists in state and federal law?

As to your concerns about independence and fairness relating to claims for retaliation relating to the Chancellor under AR 6.20-7, the law and AR 6.20 require that the whistleblower make his or her written disclosure of an "alleged violation of law, mismanagement, gross waste of monies or abuse of authority" to a public body, and not to the Chancellor. A "public body" is the Arizona Attorney General, the Arizona Legislature, the Governor of Arizona, the Maricopa County Attorney, a federal, state or local law enforcement agency, or the Maricopa County Community College District Governing Board. The law protects the written record of a whistleblower's claim by specifying that it be filed at a high, executive level.

Without addressing the merits of your presumption that two out of three employees selected for the hearing committee will be biased in favor of the Chancellor, the ultimate safeguard is set forth in Ariz. Rev. Stat. §38-534(B). It states that, despite the process that AR 6.20 outlines, the MCCCDC Governing Board retains the authority itself to hold a hearing and decide personnel matters arising under Arizona's whistleblower law.<sup>1</sup> The Governing Board can, if it believes the process in AR 6.20 is flawed concerning an allegation relating to the Chancellor, direct the appointment of an independent hearing officer to hear the matter, and make findings of fact and conclusions of law to present to the Governing Board for a final decision.

Practically speaking, the Legal Services Department is not aware of any instance in at least the past 20 years in which an employee claim has required the impaneling of the committee specified in AR 6.20. While assertions of retaliation are not particularly unusual in employee claims, the underlying federal or state laws that are the basis of retaliation assertions are those identifying a specific set of circumstances, and not the generic type of claim enunciated in Ariz. Rev. Stat. §38-534, that is an "alleged violation of law, mismanagement, gross waste of monies or abuse of authority." Examples at the federal level are claims under Section 1983 of Title 42 of the U.S. Code, Title VII of the

---

<sup>1</sup> §38-534. Appropriate independent personnel boards

A. A community college district, school district, county and city or town may either:

1. Establish an appropriate independent personnel board to hear and decide personnel matters brought pursuant to section 38-532.
2. Authorize an existing independent board to hear and decide personnel matters brought pursuant to section 38-532.

B. Notwithstanding subsection A of this section, a school district governing board or a community college district governing board may hear and decide personnel matters brought pursuant to section 38-532. [Emphasis supplied.]

Mr. Barton - DRAFT/ATTORNEY-CLIENT PRIVILEGE March 15, 2017

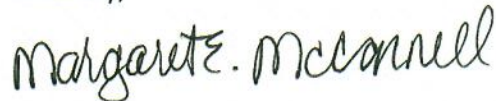
March 20, 2017

Page 3

Civil Rights Act of 1964 or the False Claims Act, or the False Claims Act, Section 3729 of Title 31 of the U.S. Code. Because those more specific laws accord employees more specific rights, the claims do not invoke AR 6.20.

In short, I do not find any reason in your letter, particularly in light of the historical lack of employee usage of the actual procedure, on which to recommend changes to the language of AR 6.20, especially on an immediate and emergency basis. Should the Governing Board wish to reconsider the language of AR 6.20, the Governing Board's Policy Committee may determine, based on your letter and my response, to do so. However, were there theoretically to be a claim made tomorrow involving the Chancellor where the sole assertion was a violation of AR 6.20 and the underlying Arizona law that is the basis of the regulation, the law clearly provides a means of resolving your speculative concerns.

Sincerely,

A handwritten signature in black ink that reads "Margaret E. McConnell". The signature is written in a cursive, flowing style.

Margaret E. McConnell  
Interim General Counsel

Cc: Members of the Governing Board  
Dr. Maria Harper-Marinick