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PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

October 16, 2017

Mr. David Armijo
Executive Director
South Central Regional Transit District
Via e-mail: socenrtd@gmail.com

**Re: Comments on South Central Regional Transit District Human Resources Manual
Our No.: 4183**

Dear Mr. Armijo:

As requested through Ms. Katherine Gervasio of the South Central Council of Governments, we have reviewed the draft South Central Regional Transit District Human Resources Manual (hereinafter the "Manual") that was forwarded to us in early September 2017. A redline version of the Manual containing our suggestions was forwarded to Ms. Gervasio on September 19, 2017, and is attached with this letter.

On the whole, we found the Manual to be well written and legally appropriate, and we recommend its adoption with the few substantive suggestions we made in the redline document. Many of the suggestions we made are minor, correcting a few typographic errors that we noticed and attempting to clarify a few sentences where we thought it appropriate. There were a couple of sections where we recommended relatively significant changes in the wording of the document, or thought that existing wording was particularly important to preserve or clarify, and those will be addressed in this letter. We should bear in mind that, notwithstanding the statement that the Manual is not to be deemed an employment contract, courts are likely to regard its terms as contractual in nature, despite that disclaimer.

Section 7. Conflict of Interest. We recommend that disclosure of financial interests include both those of the employee and the employee's spouse. This is consistent with Section 10-16A-3, NMSA 1978.

Section 9. Discrimination, Harassment and Retaliation Prohibited. In addition to the language prohibiting sexual harassment, we recommend an additional statement that no sort of behavior constituting harassment of any sort will be tolerated within SCRTD. In the paragraph relating to possible harassment involving third parties, we added language to clarify that (a) no

such harassment by SCRTD employees would be tolerated, and (b) encouraging employees to report if they were subjected to harassment by an officer or employee of a third party.

Section 10. Drug and Alcohol Policy. It appears that SCRTD is *not* legally subject to the CDL post-accident drug testing policies of the Federal Department of Transportation, due to the size of vehicles, number of persons carried, and non-commercial nature of the transportation provided. However, we recommend that SCRTD be prepared to perform post-accident drug testing in the event of a serious accident, as a matter of protecting SCRTD from potential liability and not giving the appearance that SCRTD is hiding anything. We have added the possibility of post-accident drug testing to the sections where the Manual also addresses “reasonable suspicion” testing. (Mere involvement in an accident, of course, does not constitute “reasonable suspicion” of illegal drug use.) Testing will presumably be essentially similar in each case, even though the event triggering it is different.

Section 11. Use of SCRTD Vehicles. We recommend adding a section stating that a driver employee will be subject to termination if unable to meet insurance requirements.

Sections 15-18. [Employee Leave.] We suggested a few minor changes intended to clarify the differences between the old leave program and the new “general paid leave” program.

For tuition assistance under the professional development and educational leave program, we inserted a statement that tuition assistance could be available if the education was directly related to the employee’s job and would result in a direct, tangible benefit to SCRTD. This will avoid violation of the Anti-Donation Clause of the New Mexico constitution (for State money). Restrictions on use of federal funds for such tuition will depend on the specific program involved, but are likely to be generally similar.

Section 20. Personnel Records. Here and elsewhere, where there is discussion of limitations on distribution of personnel records (including medical records), we have added that such records *will* be made available in response to a valid subpoena from a court or agency of competent jurisdiction.

Section 21. Separation from Employment. We made no substantive changes to this section, but suggested some reorganization to clarify the provisions related to retirement generally and those additional (more limited) provisions related to “early” retirement.

Sections 22 and 23. Disciplinary Actions and Appeal. We suggested a few procedural changes in these sections:

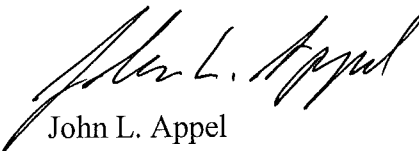
- Code of Judicial Conduct. We have kept the reference to the Code of Judicial Conduct as a sort of general “guide” to the Personnel Hearing Officer. However, the Code of Judicial Conduct cannot really be invoked in detail, particularly with the extensive changes that were made by 2012 amendments to that Code.

- Where short timelines are given (5 or 10 days), we recommend that it be made clear these are *business* days. (This is consistent with the rules of statutory interpretation.)
- The Personnel Hearing Officer does not have the power to administer oaths merely by appointment to the position, but will have that power if he or she is a notary public or a judge. If the Personnel Hearing Office is not a notary or a judge, it may be necessary to have a notary present to administer oaths. A court reporter (if one is retained to transcribe the proceedings) will have the power to administer oaths. Attorneys do not have the power to administer oaths merely in their capacity as attorneys, but many attorneys are also notaries and may administer oaths in that capacity.
- We are not aware of any legal authority for the Personnel Hearing Officer to subpoena witnesses or compel production of documents in this context, and therefore deleted the sentence asserting those powers.
- We have inserted fairly standard language giving the Personnel Hearing Officer authority to accept relevant testimony and evidence, but stating that the Officer is not bound by the Rules of Evidence applicable in the New Mexico courts. This is the usual approach for administrative hearings, in our experience.
- We also put in language requiring that the testimony and evidence submitted to the Personnel Hearing Office must be preserved, both for review by the Personnel Board and (if it should come to that), to “make the record” if there is an appeal to the district court.

As I remarked at the beginning of this letter, the draft Manual as presented to us was in very good form and legally correct, with a few minor exceptions as described above, so our comments on it are relatively limited. I hope the foregoing discussion will help clarify those areas where we did suggest changes before final adoption of the Manual.

Very truly yours,

COPPLER LAW FIRM, P.C.



John L. Appel

cc: K. Gervasio, SCCOG