

IN THE ADMINISTRATIVE HEARING COMMISSION

RON CALZONE,)	
Petitioner,)	
vs.)	Case No. 15-1450
)	
MISSOURI ETHICS COMMISSION,)	
Respondent.)	
_____)	

**PETITIONER’S OPPOSITION TO RESPONDENT’S
MOTION TO CONTINUE DEADLINE**

Petitioner Ron Calzone provides the following suggestions in opposition to the Missouri Ethics Commission’s (“MEC” or “Ethics Commission”) Motion to Continue Deadline for Respondent Missouri Ethics Commission’s Response to Petitioner Calzone’s Motion for Summary Decision (“Mot. to Continue”).

1. For the reasons stated in Petitioner’s Suggestions in Opposition to Respondent’s Motion to Compel (“Opp’n”), there are no grounds for further delaying resolution of this matter so that the Ethics Commission may attempt to retroactively buttress its probable cause determination. Petitioner incorporates the arguments advanced in that brief here.

2. Petitioner has today filed his opposition to the Ethics Commission’s Motion to Compel. Consequently, the MEC’s suggestion that its motion cannot be ruled upon until after it files its Response to Petitioner’s Motion for Summary Decision is incorrect. Mot. to Continue at ¶ 6. While the MEC was unaware of this fact at the time its request was filed, this change in circumstances counsels against permitting further delay.

3. The MEC suggests that *Sims v. Harmon*, 22 S.W.3d 253 (Mo. App. E.D. 2000),

stands for the proposition that any decision by this Commission “based on the current status of discovery would be premature” and that “the Ethics Commission has ‘had no opportunity to develop their [sic] theory of the case.’” Mot. to Continue at ¶¶ 7-8 (quoting and citing *Sims*, 22 S.W.3d at 256-57). This is incorrect. *Sims* merely states the obvious: that adequate discovery must be permitted, not generally, but “on the issues to be decided in the motion for summary judgment.” *Sims*, 22 S.W.3d at 255 (quoting Rule 74.04(c)(2)). Here, this Commission has narrowed the “issues to be decided” to purely legal ones, as explained at pages 2-4 of Petitioner’s opposition to the MEC’s Motion to Compel. Consequently, discovery is not relevant within the meaning of *Sims* which, in any event, explicitly states that denial of discovery is subject to an abuse of discretion standard which permits reversal only when that decision is “so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Id.* (quoting *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 804 (Mo. banc 1988)). No such abuse would be present here.

4. Moreover, the MEC has consistently suggested that the procedure before this Commission is tantamount to a do-over of its probable cause determination. Its effort to expand that theory to reopen discovery is unavailing. The question here is whether the MEC abused its discretion in finding probable cause *on the record it had at that time*. In reviewing a finding of probable cause this Commission conducts a *de novo* review, “establishing the facts and applying the law to those facts.” *White v. Dir. of Revenue*, 321 S.W.3d 298, 310 (Mo. 2010) (discussing and applying *Ornelas v. United States*, 517 U.S. 690 (1996)). But “[t]he first part of the analysis involves *only a determination of the*

historical facts.” *Id.* That is, the MEC’s ruling must be considered “in light of the *record...*” *Id.* This appeal is not an opportunity to create an entirely new record from scratch.¹

5. For the reasons already given, Mr. Calzone will be prejudiced by investing the resources to comply with this Commission’s briefing order, only to have the scope of that order retroactively changed for the MEC’s benefit. *E.g.*, Opp’n at 3-4. Furthermore, Mr. Calzone continues to labor under the MEC’s unlawful finding of probable cause, a stigma bearing the imprimatur of the State. Given that there is not and cannot be any genuine factual dispute concerning the record actually presented to the Ethics Commission, continued delay is inappropriate and summary decision should issue. Importantly, given the MEC’s aggressive litigation posture and the First Amendment interests at stake, this Commission should issue a broad ruling barring future cases of this sort from being brought against Mr. Calzone or others, who may not be able to obtain counsel to respond to the MEC’s demands.

6. There is no similar prejudice to the Ethics Commission, which has had *longer* to comply with this Commission’s scheduling order than did Mr. Calzone, and objects only now. Similarly, as previously explained, the MEC has had adequate opportunity to pursue the discovery it demands here, but chose not to because its theory of this case rendered such discovery irrelevant. *E.g.*, Opp’n at 4-6, 10. Finally, the MEC can adequately respond to Mr. Calzone’s Motion for Summary Decision, which relies almost entirely upon legal arguments, without the benefit of discovery. Even under its own, incorrect view of the

¹ Doing so would defeat the purpose of reviewing the MEC’s decision so as to give effect to its “ability to weigh the credibility of [a] witness,” for example.

procedure governing this appeal, discovery would only be appropriate *after* a hypothetical denial of Petitioner's Motion.

7. The Commission suggests that its late discovery requests “were issued in a manner such that timely responses would have permitted the Ethics Commission to refer to the discovery responses” in its summary decision briefing. Mot. to Continue at ¶ 3. This assertion ignores the enormous range of documents requested, and the time required to review documents, screen them for relevance and privilege, and prepare discovery responses. It also ignores the MEC's agreement to stay discovery pending this Commission's jurisdictional ruling.

For the reasons stated above, and in its Motion for a Protective Order and Opposition to Respondent's Motion to Compel, the MEC's Motion to Continue should be denied. Alternatively, this Commission should issue Petitioner's requested protective order and deny this Motion as moot. At minimum, Respondent's Motion should be granted only as to those portions of its Opposition to Summary Decision unrelated to this Commission's subject matter jurisdiction and authority to approve discovery. *See Opp'n* at 2.

Respectfully submitted,

/s/ Allen Dickerson

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th of March, I caused a copy of the forgoing to be delivered to the Administrative Hearing Commission and counsel for the Missouri Ethics Commission:

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