

**IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL CIRCUIT
STATE OF MISSOURI**

RON CALZONE,)	
Relator,)	
vs.)	Case No. _____
)	
ADMINISTRATIVE HEARING COMMISSION)	Division _____
and COMMISSIONER SREENIVASA)	
DANDAMUDI,)	
_____ Respondents.)	

**SUGGESTIONS IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION**

Pursuant to Missouri Rule of Civil Procedure 97.03, Relator Ron Calzone submits these suggestions in support of his Petition for Writ of Prohibition.

Introduction

Where a court or state agency lacks subject-matter jurisdiction, any subpoenas issued pursuant to its authority “are void.” *U.S. Catholic Conf. v. Abortion Rights Mobilization*, 487 U.S. 72, 80 (1988). This is no “nicety of legal metaphysics”; the U.S. Supreme Court has declared that this rule stems from the “finite bounds” of judicial power, a “central principle of a free society.” *Id.* at 77.

The Administrative Hearing Commission (“AHC”) is presently reviewing a probable cause determination of the Missouri Ethics Commission (“MEC”). Those proceedings stem from a fatally-flawed complaint filed, in violation of state law, by a corporation. Because the Ethics Commission has jurisdiction only over matters stemming from complaints filed by *natural* persons, and because the AHC’s jurisdiction is coterminous with that of the Ethics Commission, there is no question that the AHC lacks

subject-matter jurisdiction in this matter. In fact, Relator has raised this jurisdictional point in two motions before the Hearing Commission, and the AHC Commissioner noted his agreement at oral argument.

Nevertheless, the AHC has not issued a formal ruling noting its lack of jurisdiction. Instead, it has permitted the Ethics Commission to pursue far-reaching discovery concerning the merits of the dispute, and to do so while a motion concerning the AHC's jurisdiction remains pending.

There is no question that this Court is empowered to issue writs of prohibition to the Administrative Hearing Commission. Nor is there any doubt that the subpoenas approved by that Commission are issued in excess of its lawful authority. In such circumstances, this Court should issue the writ and halt the Ethics Commission's unlawful fishing expedition. At a minimum, until there has been a formal determination of the AHC's jurisdiction, any discovery should be limited to that question.

Summary of Relevant Proceedings

On November 4, 2014, the Missouri Society of Governmental Consultants, a nonprofit corporation, filed a complaint with the Missouri Ethics Commission against Ron Calzone, alleging that Mr. Calzone was operating as an unregistered lobbyist. The complaint was signed by the Society's attorney, Mr. Michael A. Dallmeyer, who attached a cover letter making plain that he was filing "on behalf of our [*sic*] client, Missouri Society of Governmental Consultants." Ex. A at 2.

However, Missouri has only vested the Ethics Commission with jurisdiction over complaints filed by *natural* persons, and consequently lacks jurisdiction to pursue

complaints filed by corporations. § 105.957(2), RSMo (“Complaints filed with the commission shall be in writing and filed only by a natural person”); *see also Naylor Senior Citizens Hous., LP v. Sides Contr. Co.*, 423 S.W. 3d 238, 243 (Mo. banc 2014) (“In legal matters,” corporations “must act, *if at all*, through licensed attorneys”) (citation and quotation marks omitted) (emphasis partially removed).

The Ethics Commission investigated the Society’s complaint, even though it “shall dismiss the case” if the “complaint [is] clearly lacking any basis in fact or law.” § 105.957(4), RSMo; *Bauer v. Missouri Ethics Comm’n*, 2008 Mo. Admin. Hearings LEXIS 287 at 6 (Mo. Admin. Hearings 2008) (“‘Shall’ signifies a mandate and means ‘must’ in the present tense”).

The MEC was aware that it did not have jurisdiction at the time that it chose to proceed against Mr. Calzone. The cover letter accompanied the Society’s Complaint is stamped as “hand delivered” to the MEC on the day the Complaint was filed, November 4, 2014. Ex. A at 2. In fact, it is the *only* stamped page, strongly implying that it was the first page of the Complaint.¹ In addition to this unambiguous cover letter, Mr. Dallmeyer appended his name to the MEC’s Official Complaint Form as “Mr. Michael A. Dallmeyer, *Attorney.*” Ex. B at 4 (emphasis supplied).

¹ Although required by law, the MEC did not initially provide this portion of the Complaint to Mr. Calzone. § 105.957(2), RSMo. (“Within five days after receipt of a complaint by the commission, a copy of the complaint, including the name of the complainant, shall be delivered to the alleged violator”). Special Investigator Della Luaders testified before the Ethics Commission that she did not deliver the cover letter to Mr. Calzone until January 21, 2015. Ex. C at 15, l 18-20.

Moreover, at the probable cause hearing held on September 3, 2015, the Ethics Commission did not call Mr. Dallmeyer as a witness, but rather called Randy Scherr, the secretary of the Missouri Society of Governmental Consultants (“Society”). He testified that the Society’s Complaint was generated by a unanimous vote of the corporation’s board of directors, and the Society’s board directed the timing of that filing. Ex. C at 12, *l* 13-22, 10, *l* 2-13, 12, *l* 5-13. To file the Complaint against Mr. Calzone, the Society contracted for *pro bono* legal counsel from Michael A. Dallmeyer of the Carver & Michael law firm. *Id.* at 9, *l* 13-16 (Testimony of Randy Scherr) (“Q. You understood the [S]ociety to be the complainant in this case? A. The [S]ociety motivated the complaint and had it filed by Mr. Dallmeyer”); *id.* at 11, *l* 23-24. Thus, in calling a corporate officer with intimate knowledge of the Society’s complaint, the Ethics Commission demonstrated its understanding that the Society was the true complainant. *Id.* at 9, *l* 13-22 (“Q. Was the official action taken by the [S]ociety to bring about the filing of the Complaint? A. Yes, sir. Q. Were you involved in those deliberations? A. I was the secretary, sir, and took the record”).

Nonetheless, the Ethics Commission assumed jurisdiction and, on September 11, 2015, ordered Mr. Calzone to pay a \$1,000 fine and register as a legislative lobbyist. On September 28, 2015, Mr. Calzone timely filed a Petition for Administrative Review with the Administrative Hearing Commission pursuant to § 105.961, RSMo., and the Missouri Supreme Court’s *en banc* decision in *Impey v. Missouri Ethics Commission*, 442 S.W.3d 42 (Mo. banc 2014), which together require that the AHC review findings of probable cause by the Ethics Commission. Mr. Calzone’s Petition expressly questioned the MEC’s jurisdiction.

On September 28, 2015, the Hearing Commission “scheduled a hearing [for] 9:00 AM, Wednesday, February 3, 2016,” and expressly stated that “[t]his notice should give the parties ample time to conduct discovery and prepare for hearing.” On December 28, 2015—two months later—the Ethics Commission issued discovery requests directed only at Mr. Calzone. Ex. F. On January 15, 2016, Mr. Calzone filed objections to those discovery requests, and in accordance with Administrative Hearing Commission’s regulations, notified the MEC of those objections. The Ethics Commission never responded.

On January 4, 2016, in light of Mr. Calzone’s filing of a motion for judgment on the pleadings, the Ethics Commission sought a continuance of the February 3, 2016 hearing date. The February 3, 2016 hearing was limited to oral argument on the merits of Mr. Calzone’s motion for judgment on the pleadings. Consequently, on January 28, 2016, the parties met and conferred and agreed to stay discovery pending the outcome of the hearing for judgment on the pleadings. That discussion specifically addressed the fact that discovery would be irrelevant if the Commission ruled that the MEC (and consequently the Hearing Commission) lacked jurisdiction to pursue this matter.

The February 3 hearing was held before Commissioner Sreenivasa Rao Dandamudi in St. Louis. Counsel for Mr. Calzone appeared in person, and the Ethics Commission appeared via telepresence from Jefferson City. Commissioner Dandamudi indicated that he believed that Mr. Calzone’s jurisdictional argument was correct, and that unless the Ethics Commission could provide case law permitting a corporation to be considered a “natural person,” that he would rule in favor of Mr. Calzone on jurisdictional grounds. The parties and Commission agreed to hold the record open, per the MEC’s request, to submit

“the complaint filed with MEC by Michael A. Dallmeyer in the underlying case.” Order of the Administrative Hearing Commission of February 5, 2016 (“Ex. D”) at 21, n.2. However, after the hearing, the MEC filed an “amended answer [which] contained exhibits beyond the exhibit for which [the Commission] kept the record open for a decision on the pleadings.” Ex. D at 21. Mr. Calzone moved to strike, and in the alternative, provided a proper copy of the Society’s complaint. The AHC denied Mr. Calzone’s motions, and instead set a briefing schedule for summary decision. *Id.* at 21-22. Of note, none of the MEC’s additional documents provided a coherent argument for why a corporation could be considered a natural person within the meaning of § 105.957(2), RSMo.

On February 24, 2016, the MEC filed a subpoena *duces tecum* against a non-party, Missouri First, Inc. The MEC’s requests as to Missouri First, Inc. are attached. Ex. G at 73. On March 1, 2016, Mr. Calzone sought a protective order barring all discovery under Missouri Supreme Court Rule 56.01(c). Missouri First, Inc. also filed an objection with the Hearing Commission, incorporating Mr. Calzone’s arguments. On March 14, 2016, the MEC moved to compel, and Mr. Calzone filed his opposition to that motion. The Ethics Commission also sought to extend the briefing schedule the AHC had ordered on summary decision, which the AHC granted.

On April 8, 2016, the Hearing Commission denied Mr. Calzone’s motion for a protective order.²

² The AHC’s April 8 order does not rule as to the discovery requests toward the non-party, Missouri First, Inc., simply stating that “Calzone may renew those arguments in circuit court, in the event MEC attempts to obtain an order of enforcement of the subpoena *duces tecum*”, ignoring Missouri First’s own motion for a protective order—as well as the general

Standard of Review

A writ of prohibition is an extraordinary remedy, and the decision to issue a writ of prohibition is “left to the sound discretion of the court to which the application is made.” *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915, 919 (Mo. App. W.D. 2003).

Nevertheless, the Missouri Supreme Court has held that “prohibition lies where a judicial or quasi-judicial body... lacks jurisdiction over the subject matter the body is asked to adjudicate.” *State ex rel. Riverside Joint Venture v. Mo. Gaming Comm’n*, 969 S.W.2d 218, 221 (Mo. banc 1998). After all, “[w]here a presiding officer is wholly lacking in jurisdiction to hear a case, an appeal is not an adequate remedy because any action by the officer is without authority and causes unwarranted expense and delay to the parties involved.” *Thompson*, 100 S.W.3d at 920 (citing and quoting *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 79 (Mo. banc 1974)).

Consequently, prohibition “is appropriate...to prevent the usurpation of judicial power when” a lower body “lacks jurisdiction...” *State ex rel. Dep’t of Soc. Servs. v.*

right of parties to move for a protective order barring discovery directed at a non-party. Ex. E at 27; Rule 56.01(e) (“The party serving a subpoena on a non-party shall provide a copy of the subpoena to every party as if it were a pleading. A party objecting to the subpoena may seek a protective order under Rule 56.01(c)”); Rule 56.01(c) (“Upon motion *by a party or* by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...” (emphasis supplied)).

Additionally, the order sustained Mr. Calzone’s objection to the Ethics Commission’s third interrogatory, Ex. E at 28 (“...we will sustain his objection for interrogatory 3”), but on the next page grants “MEC’s motion to compel as to interrogatories 2 and 3...”).

Tucker, 413 S.W.3d 646, 647 (Mo. banc 2013); *see also State ex rel. Sch. Dist. v. Williamson*, 141 S.W.3d 418, 423 (Mo. App. W.D. 2004) (issuing writ of prohibition review for want of jurisdiction and ordering dismissal of petition for judicial review). In particular, “[p]rohibition is a proper remedy for an abuse of discretion or act in excess of jurisdiction in...denying...a protective order...” *State ex. rel Ford Motor Co. v. Manners*, 239 S.W.3d 583, 586 (Mo. banc 2007).

It is well established that “a circuit court has jurisdiction to issue a writ of prohibition directed to an administrative agency.” *State ex rel. Carter v. City of Independence*, 272 S.W.3d 371, 374 (Mo. App. W.D. 2008). This Court is specifically empowered to “to issue a writ of prohibition to the AHC.” *State ex rel. Mo. State Bd. of Pharm. v. Admin. Hearing Comm’n*, 220 S.W.3d 822, 825 (Mo. App. W.D. 2007); *see also State ex rel. Pulliam v. Reine*, 108 S.W.3d 148, 152 (Mo. App. W.D.2003) (“On July 20, 2000, Pulliam filed a petition for writ of prohibition in the Cole County Circuit Court. On November 9, 2000, the circuit court issued its writ of prohibition to the commissioner directing him to dismiss the Board's proceeding with prejudice”).

Argument

I. Neither Commission Has Subject-Matter Jurisdiction to Issue or Enforce a Subpoena.

The Ethics Commission never had jurisdiction in this matter. Nor, by extension, did the Hearing Commission. The complaint in this matter was filed by a nonprofit corporation. Since complaints can only be filed by natural persons, and since corporations are not natural persons, the complaint was legally defective. RSMo § 105.957(2) (“Complaints

filed with the commission shall be in writing and filed *only* by a natural person”) (emphasis supplied). “When a statute sets conditions for an agency’s jurisdiction, the agency’s jurisdiction does not exist until the fulfillment of all such conditions. The conditions for [the] Ethics [Commission’s] jurisdiction, and therefore [the Administrative Hearing Commission’s] jurisdiction, include ‘a complaint as described by section 105.957.’” *Bauer*, 2008 Mo. Admin. Hearings LEXIS 287 at 3 (quoting § 105.961(1), RSMo). Given these facts, unless the MEC can provide dispositive authority for the proposition that nonprofit corporations are natural persons, the Ethics Commission has not “shown that the complaint it received met the conditions of the statute,” and accordingly, neither the MEC nor the AHC ever “had...jurisdiction to sanction” Mr. Calzone. *Bauer*, 2008 Mo. Admin. Hearings LEXIS 287 at 3-4.

Moreover, this lack of subject-matter jurisdiction is fatal to the AHC’s order compelling discovery.³ In 1988, the Supreme Court emphatically reaffirmed the obvious notion that “the subpoena power of a court cannot be more extensive than its jurisdiction.” *U.S. Catholic Conf. v. Abortion Rights Mobilization*, 487 U.S. 72, 80 (1988). After all, adjudicative bodies “created by statute can have no jurisdiction but such as the statute confers.” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (quoting *Sheldon v. Sill*, 49 U.S. 441 (1850)). Moreover, the AHC has an “affirmative duty and obligation to prevent” discovery from becoming “overbroad, oppressive, burdensome and

³ This analysis applies equally to the AHC’s refusal to provide a protective order in this case.

intrusive.” *State ex rel. Kawasaki Motors Corp. v. Ryan*, 777 S.W.2d 247, 252 (Mo. App. E.D. 1989) (denying motion to compel discovery responses).

Thus, “[i]t follows that if [the commission] does not have subject-matter jurisdiction over the underlying action, and [if] the process [i]s not issued in aid of determining that jurisdiction, then the process is void...” *U.S. Catholic Conf.*, 487 U.S. at 76; *also Mo. Comm’n on Human Rights v. Cooper*, 639 S.W.2d 902 (Mo. App. W.D. 1982) (striking down subpoena where no valid complaint had vested an administrative agency with jurisdiction); *Tovey v. Prudential Ins. Co. of Am.*, 42 F. Supp. 2d 919, 923 (W.D. Mo. 1999) (“Federal courts should not make [merits] determinations prior to ascertaining whether they have jurisdiction”). None of the MEC’s discovery requests go toward whether or not subject-matter jurisdiction exists, and so those requests are unlawful until such time as the MEC’s, and therefore the AHC’s, jurisdiction has been positively established. *J.C. Nichols Co.*, 796 S.W.2d 16, 20 (Mo. banc 1990) (“the [Administrative Hearing] Commission is simply a hearing officer who exercises the same role as any administrative hearing officer authorized to hear contested cases within an agency”) (citation omitted).

Although Mr. Calzone contends that the Hearing Commission erred in determining that the discovery requests accorded with Rule 56.01(c), even if the AHC had correctly determined that the MEC’s requests were discoverable, relevant, “and not overly burdensome for Calzone to produce,” *it does not matter*. Ex. E at 28. “The age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases.” *Christianson*, 486 U.S. at 818. But “subject-matter jurisdiction . . . is not a mere nicety of legal metaphysics. It rests . . .

on the central principle of a free society that [adjudicative bodies] have finite bounds of authority . . . which exist to protect citizens from the very wrong asserted here, the excessive use of [adjudicative] power.” *U.S. Catholic Conf.*, 487 U.S. at 76. Accordingly, it is the duty and obligation of the Administrative Hearing Commission to first determine whether it has been vested with subject-matter jurisdiction before it orders discovery.

This is not the first time Mr. Calzone has raised these arguments. They were explicitly made to in his Motion for a Protective Order. Ex. G at 48-51. Nevertheless, the AHC’s April 8 order compelling discovery ignored them, and failed to so much as mention, much less ascertain, its subject-matter jurisdiction. Ex. E. In doing so, the Hearing Commission ignored Mr. Calzone’s citation to binding U.S. Supreme Court authority, as discussed above, and mischaracterized Mr. Calzone’s claim as being based entirely upon *State ex. rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602 (Mo. 2002). Ex. E at 25.

Relying on *Impey v. Missouri Ethics Commission*, 442 S.W.3d 42 (Mo. banc 2014), Commissioner Dandamudi appeared to argue that since the AHC must decide its case *de novo*, then it is under no obligation to first determine whether subject-matter jurisdiction exists. Ex. E at 26. This approach confuses jurisdiction with the standard of review. Jurisdiction cannot spring into being absent a proper complaint, and subpoenas cannot be enforced absent proper jurisdiction. *U.S. Catholic Conf.*, 487 U.S. at 80; *Mo. Comm’n. on Human Rights*, 639 S.W.2d 902 (Mo. App. W.D. 1982) (“[N]evertheless, the subpoena was unauthorized because: (1) the Commission has no power to issue a discrimination complaint *sua sponte*; and (2) the Commission cannot issue a subpoena until after a valid...complaint is filed and a notice of hearing is issued upon that complaint”).

The AHC’s decision to rule otherwise was clear error, and merits reversal for abuse of discretion. “Accordingly, on remand, the [AHC] must determine whether the [Ethics Commission] had subject-matter jurisdiction in the underlying action. If not, then the subpoenas...are void.” *U.S. Catholic Conf.* 487 U.S. at 80.

II. Failure to Issue the Writ Will Irreparably Harm Relator

As already explained, it is irrelevant that Mr. Calzone will be gravely injured by the Ethics Commission’s extraordinarily broad discovery requests, made late in these proceedings and compelled *after* Mr. Calzone has already moved for summary decision (on jurisdictional grounds, among others). Nevertheless, if this Court declines to act and permits the Hearing Commission to proceed unlawfully, Mr. Calzone will be subject to substantial expense complying, on a very short timetable, with voluminous and invasive discovery requests going to the heart of activity protected by the First Amendment. These costs are substantial and irreparable, and “an appeal is not an adequate remedy” where the AHC acts without authority and “causes unwarranted expense and delay to the parties involved.” *Thompson*, 100 S.W.3d at 920. These facts also counsel in favor of issuing the writ.

Conclusion

Because the Administrative Hearing Commission lacks subject-matter jurisdiction in this case, a writ of prohibition ought to issue ordering the Administrative Hearing Commission to quash its order compelling discovery, and prohibiting any further discovery in this case until such time as its jurisdiction is established.

Respectfully submitted,



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