

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

STATE OF MISSOURI, EX REL.)	
RON CALZONE,)	
)	
Relator,)	
)	Case. No. 16AC-CC00155
v.)	
)	Div. 1
ADMINISTRATIVE HEARING)	
COMMISSION,)	
)	
and)	
)	
SREENIVASA DANDAMUDI,)	
Administrative Hearing)	
Commissioner,)	
)	
Respondents.)	

**Brief of Missouri Ethics Commission
in opposition to writ of prohibition**

The Missouri Ethics Commission, a real party in interest, requests this Court to deny Relator Calzone’s request for a permanent writ of prohibition and to quash the preliminary writ.

Summary and Background

Relator Calzone waived his argument regarding the Ethics Commission’s statutory authority to conduct an investigation. At his first opportunity to raise the issue, in front of the Ethics Commission, Relator Calzone argued that the complaint was filed by a natural person:

The initiating complaint was brought by Mr. Dallmeyer individually, as required by state law, and not by the Society [of Governmental Consultants].

Exhibit 1 at 2 & n.1 (Relator Calzone's Motion to Dismiss filed with Ethics Commission Aug. 31, 2015). Now, and for the first time in front of the Administrative Hearing Commission, Relator Calzone argues that the complaint was filed by the Society, and not by Mr. Dallmeyer individually. Relator's Brief at 13.

In addition, Relator Calzone filed this action prematurely while a motion for summary decision was still pending with the Administrative Hearing Commission, he has used the writ process to increase litigation expenses, and he is incorrect on the merits of his argument.

Facts

On November 4, 2014, Michael Dallmeyer filed a complaint with the Missouri Ethics Commission. Exhibit 2. Mr. Dallmeyer is a natural person. He signed the complaint under oath and penalty of perjury, and his signature was notarized. *Id.*

The Ethics Commission mailed the complaint to Relator Calzone on November 7, 2014. Exhibit 3. Relator Calzone spoke with the Ethics

Commission's investigator on January 20, 2015.¹ *Tr.* at 122:24–25. The Ethics Commission investigator learned of a cover letter to the complaint, and mailed that to Relator Calzone on January 21, 2015. *Transcript* at 122:18–20.

Relator Calzone did nothing until August 31, 2015, more than seven (7) months after he received the letter and only three (3) days before the hearing before the Ethics Commission, when he filed a motion to dismiss. Exhibit 1. In that motion, Relator Calzone stated that the complaint was filed by a natural person:

The initiating complaint was brought by Mr. Dallmeyer individually, as required by state law, and not by the Society [of Governmental Consultants].

Exhibit 1 at 2 & n.1.

¹ Relator Calzone states that he was interviewed by the Commission's investigator "without counsel." (Relator's Brief at 4, 27). Relator Calzone was not represented by counsel at the time he spoke with the investigator. Exhibit 4 (entry of appearance dated August 31, 2015). The Court should not infer from Relator Calzone's statement of facts that the Ethics Commission's investigator spoke to a represented party without his attorney present.

At the hearing before the Ethics Commission, the Ethics Commission called four (4) witnesses and introduced eight (8) exhibits, including the complaint filed against Relator Calzone. *Transcript* at 83:8–13. The following exchange occurred when the Ethics Commission offered the complaint (Exhibit 6) into evidence:

MR. STOKES: The purpose of admitting Exhibit 6 is to establish that a Complaint was filed with the Commission, that it was signed under oath and verified by the complainant.

MR. DICKERSON: I certainly do not object to that proffer.

Transcript at 83:8–13. Relator Calzone exercised his Fifth Amendment right against self-incrimination, *Tr.* at 134:4–145:13, called no witnesses, *Tr.* at 154:21–22, and introduced only one (1) exhibit, the cover letter to Mr. Dallmeyer’s complaint. *Tr.* at 124:5–9. In closing arguments, Relator Calzone incorporated his motion to dismiss, which included the argument that the complaint was filed by a natural person, Mr. Dallmeyer, acting individually in as required by state law, and not by the Society of Governmental Consultants. *Tr.* at 159:24–160:4.

Relator Calzone never argued before the Ethics Commission, as he does now, that the Ethics Commission was without authority to investigate

because the complaint was filed by Mr. Dallmeyer on behalf of the Society of Governmental Consultants. Exhibit 1 at 2 & n.1; *Tr.* at 83:8–13.

Argument

Prohibition is a discretionary writ. *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. banc 2009). It is also an “extraordinary legal remedy” that risks circumventing normal appellate processes. *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985). For this reason, courts should employ it “judiciously and with great restraint,” only when facts and circumstances “demonstrate unequivocally that there exists an extreme necessity for preventive action.” *Id.* A court should decline to act in the absence of such extreme conditions. *Id.* Here, Relator Calzone waived his arguments regarding the Ethics Commission’s authority to conduct an investigation, and he has a direct appeal right from a decision of the Administrative Hearing Commission. § 536.100 *et seq.*, RSMo.

I. The Court should deny the request for a permanent writ and quash the preliminary writ because (a) Relator Calzone waived this argument before the Ethics Commission by taking the exact opposite stance, (b) Relator Calzone filed this writ appeal prematurely, (c) Relator Calzone has used the writ process to increase litigation costs, and (d) Relator Calzone’s argument fails regardless.

The Court should deny Relator Calzone’s motion for a preliminary writ and quash the preliminary writ. First, Relator Calzone waived his argument before the Ethics Commission. Relator Calzone’s waiver alone justifies denial

of his request for a permanent writ and a quashing of the preliminary writ. In addition, Relator Calzone filed this writ prematurely, has used the writ to increase litigation costs, and his arguments fail as a matter of law regardless.

A. Relator Calzone waived his argument before the Missouri Ethics Commission, and therefore failed to preserve the issue for appeal.

Relator Calzone waived his argument in this writ action by failing to raise the argument at the first opportunity, and by specifically conceding that the complaint against Relator Calzone was filed by a natural person. Relator Calzone now argues—and for the first time before the Administrative Hearing Commission argued—that the Ethics Commission lacked statutory authority to investigate Relator Calzone because the complaint filed with the Ethics Commission was not filed by a natural person, Michael Dallmeyer. Instead, Relator Calzone argues, the complaint was filed by a non-natural person, the Society of Governmental Consultants, when Mr. Dallmeyer filed the complaint on behalf of the Society.

But at Relator Calzone’s first opportunity to raise this argument, before the Ethics Commission, Relator Calzone specifically conceded that the complaint against Relator Calzone was filed by a natural person:

The initiating complaint was brought by Mr. Dallmeyer individually, as required by state law, and not by the Society [of Governmental Consultants]. Mo.

Rev. Stat. § 105.957(2) (“Complaint filed with the commission shall be in writing and filed only by a natural person.”).

Exhibit 1 at 2 n.1. Relator Calzone incorporated this motion into his arguments at the hearing. *Tr.* at 159:24–160:4. Relator Calzone never argued before the Ethics Commission, as he does now, that the Ethics Commission was without authority to investigate because the complaint was filed by Mr. Dallmeyer on behalf of the Society of Governmental Consultants. Exhibit 1 at 2 & n.1; *Tr.* at 83:8–13.

“A court should not set aside administrative actions unless the agency has been given a prior opportunity, on timely request by the complainant, to consider the point at issue.” *Morfin v. Werdehausen*, 448 S.W.3d 343, 349 (Mo. App. W.D. 2014). Parties cannot raise an issue for the first time on appeal. *Mills v. Federal Soldiers Home*, 549 S.W.2d 862, 869 (Mo. banc 1977).

Unlike a federal court’s subject matter jurisdiction, a circuit court’s and an administrative tribunal’s statutory authority to proceed can be waived. *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 475 (Mo. banc 2009); *J.C.W. v. Wyciskalla*, 275 S.W.3d 249, 253-54 (Mo. banc 2009). Cases cited by Relator are inapposite. But the relator in *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915, 920 (Mo. App. W.D. 2003), was appealing from a motion to disqualify a hearing officer, an issue the relator had

preserved. Here, Relator Calzone waived the authority of the Ethics Commission to conduct an investigation during the entire course the investigation and during the hearing before the Ethics Commission. In *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), the U.S. Supreme Court ruled on a U.S. District Court's jurisdiction under Article III of the U.S. Constitution to conduct third-party discovery in a declaratory judgment action. That case shares nothing in coming with this case, which involves the authority of an administrative state agency under Missouri statutes to conduct an investigation.

Relator Calzone waived his argument on appeal by conceding that argument during the investigation and hearing before the Ethics Commission. He cannot raise the issue for the time on appeal. *Morfin*, 448 S.W.3d at 349; *Mills*, 549 S.W.2d at 869.

B. Relator Calzone filed this writ action prematurely.

Section 536.140.2(2), RSMo, expressly governs challenges to an agency's statutory authority, and such an action may be brought only by a person who has exhausted all administrative remedies. § 536.100, RSMo. Relator Calzone has not exhausted his administrative remedies.

In addition, the Administrative Hearing Commission properly denied Relator Calzone's motion for decision on the pleadings, and granted leave to re-file it as a motion for summary decision. Relator Calzone cites to Missouri

Rule of Civil Procedure 55.27 for the proposition that the Administrative Hearing Commission must dismiss an action when “it appears” that it lacks subject matter jurisdiction. But Rule 55.27 governs actions in Missouri’s courts, not the Administrative Hearing Commission. Rule 41.01.

In contrast, procedures for resolving a case without a hearing before Administrative Hearing Commission are set forth at 1 CSR 15-3.446. Those procedures include: (i) decision on stipulated facts, (ii) decision on the pleadings, (iii) consent order, and (iv) summary decision. The parties did not stipulate to facts or consent to an order, and because Relator Calzone referred to matters outside of the pleadings in his motion to dismiss, decision on the pleadings was inappropriate. 1 CSR 15-3.446(4).

The remaining procedure, a motion for summary decision, is the appropriate vehicle to resolve Relator Calzone’s motion, and that motion for summary decision is still pending before the Administrative Hearing Commission. 1 CSR 15-3.446(6).

If the Administrative Hearing Commission rules against Relator Calzone, Relator Calzone has a right to challenge the Ethics Commission’s and Administrative Hearing Commission’s decision on grounds that the decision “Is in excess of the statutory authority or jurisdiction of the agency.” § 536.140.2(2), RSMo. The Court should deny Relator Calzone’s request for a permanent writ, quash the original writ, and permit the Administrative

Hearing Commission to proceed on Relator Calzone's motion for summary decision.

C. Relator Calzone has used the writ process to increase litigation costs.

Courts should be particularly skeptical that a writ process would spare the parties and the state's taxpayers litigation expenses compared to simply letting the case be resolved by a summary judgment motion. *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 334 (Mo. banc 2009) (Fischer, J., dissenting). This is particularly the case here, where Relator Calzone has waived the argument by failing to raise it at the first opportunity, and has used the writ process to increase litigation costs.

Immediately after this Court, on Relator's motion, ordered the Administrative Hearing Commission to "refrain from all action in the premises until further order," Relator Calzone opposed a motion to stay the Administrative Hearing Commission's proceedings. Relator Calzone suggested that the briefing on Relator Calzone's motion for summary decision, then and now pending before the Administrative Hearing Commission, continue. Exhibit 5.

Relator Calzone's motion in opposition to the stay was ultimately denied. Otherwise, the parties would have continued filing briefs on a motion that the Administrative Hearing Commission was prohibited from ruling on.

Moreover, the parties were and are unable to conduct or enforce discovery relating to that motion. Consequently, the Ethics Commission’s response brief would have required amendment in light of discovery regardless.

D. The Administrative Hearing Commission has statutory authority because the complaint was filed by Michael Dallmeyer, a natural person.

Relator Calzone’s argument fails as a matter of law. Michael Dallmeyer is a natural person. Mr. Dallmeyer identified himself as the complainant on the Ethics Commission’s form:

PART 1 - PERSON BRINGING COMPLAINT			
NAME: Michael A. Dallmeyer, Attorney		DATE OF COMPLAINT: November 4, 2014	
ADDRESS: Carver & Michael LLC, 712 East Capitol Ave.			
CITY: Jefferson City	STATE: MO	COUNTY: Cole	ZIP: 65101
CONTACT PHONE NUMBER/S: (HOME)	(WORK) 573-636-4215	(CELL)	
TITLE OF OFFICE HELD OR SOUGHT (IF APPLICABLE): N/A			

Exhibit 2.

Mr. Dallmeyer signed the complaint under penalty of perjury. *Id.* The conclusion here is simple: Mr. Dallmeyer, a natural person, filed a complaint with the Ethics Commission.

Relator Calzone now argues that because Mr. Dallmeyer stated that his motivation for filing the complaint was to do so on “behalf of” a client means that the client, and not Mr. Dallmeyer, filed the complaint. Relator Calzone waived this argument before the Ethics Commission. It also fails for four reasons.

First, Relator Calzone assumes that two events (one, a natural person filing a complaint, and two, a natural person filing a complaint on behalf of another person) are mutually exclusive. But they are not, because a complaint cannot be filed by a natural person on behalf of another person unless the complaint is first filed by a natural person.

Second, the fact that Mr. Dallmeyer stated he was filing “on behalf of” the Society of Governmental Consultants is merely an acknowledgment that the Society of Governmental Consultants wanted to file the complaint, but could not, so it asked a natural person to do so, just as Relator Calzone suggests would be permissible at page 25 of his brief: if “multiple members who wanted to file a complaint, if such members existed, could encourage just one member with personal knowledge to file the complaint.” *Relator’s Brief* at 25.

Third, Relator Calzone can point to no prejudice as a result of the complaint. Had the Ethics Commission rejected the complaint, Mr. Dallmeyer, or perhaps multiple members of the Society, would have re-filed the complaint, and the Ethics Commission would have conducted the same investigation. Relator Calzone received Mr. Dallmeyer’s cover letter in January 2015, and filed nothing in response until August 2015, and even that filing acknowledged that Mr. Dallmeyer filed the complaint ‘in his personal capacity.’ Exhibit 1 at 2 & n.1. Not until September 2015, almost a full year

after the complaint was filed against him, and after the Ethics Commission's hearing was complete, did Relator Calzone first raise his argument on appeal with the Administrative Hearing Commission.

Fourth, the purpose of requiring complaints to be filed in writing by a natural person with knowledge of the relevant facts are to: 1) provide transparency as to the identity of the actual complaining party, 2) provide the Ethics Commission with primary contact information for an individual with knowledge of the facts to begin an investigation, and 3) to require an individual to assume the liability imposed under Section 105.957.4, RSMo ("Any person who submits a frivolous complaint shall be liable for actual and compensatory damages.").

Here, those purposes have been achieved: Relator Calzone knows not only the identity of the person filing the complaint, but the identities of the people and organizations that motivated the person to file the complaint. The Ethics Commission contacted Mr. Dallmeyer as part of its investigation, confirmed the facts in the complaint, and obtained names of additional witnesses. *Transcript* at 83:17–84:7. And Mr. Dallmeyer assumed responsibility for the complaint for purposes of Section 105.957.4, RSMo.

In conclusion, Mr. Dallmeyer is a natural person, and he filed a complaint in writing with the Ethics Commission. There is no prejudice to

Relator Calzone that Mr. Dallmeyer did so at the behest of the Society of Governmental Consultants.

Conclusion

The Missouri Ethics Commission, a real party in interest, requests this Court to deny Relator Calzone's request for a permanent writ of prohibition and to quash the preliminary writ.

Respectfully submitted,

/s/ Curt Stokes

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CERTIFICATE OF SERVICE

I certify that on the 14th day of July, 2016, a true and accurate copy of the foregoing was submitted to be served via the court's electronic filing system upon the following:

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