IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MISSOURI ETHICS COMMISSION, Appellant	)	
	)	Case No. WD80176
vs.	)	
	)	Appeal from the Nineteenth
RON CALZONE , Respondent.	)	Judicial Circuit Court,
	)	Hon. Jon Beetem, Circuit Judge

RESPONDENT'S APPLICATION FOR REHEARING AND/OR TRANSFER AND SUGGESTIONS IN SUPPORT THEREOF.

APPLICATION FOR REHEARING AND/OR TRANSFER

Comes now Respondent Ron Calzone, pursuant to Missouri Supreme Court Rule 84.17(a)(1), and respectfully moves this Court to rehear this matter, or in the alternative, transfer it to the Missouri Supreme Court, in the light of the following material matters of law overlooked in the opinion issued on June 19, 2017:

(1) The Court of Appeals held that, where an agency clearly lacks subject matter jurisdiction but chooses not to rule on multiple motions raising the point, circuit courts lack discretion to issue writs of prohibition. That decision conflicts with opinions of this Court and permits agencies to act in excess of their statutory authority without providing recourse for Respondent and others similarly situated.

(2) The Court of Appeals failed to address Respondent's claim that the Administrative Hearing Commission may not order discovery as to the merits without satisfying itself as to subject-matter jurisdiction. While stating that there is no statutory basis

for that assertion, the Court of Appeals failed to address on-point decisions of both the U.S. Supreme Court and this Court upon which Respondent had relied.

Wherefore, the Respondent asks this Court to grant a rehearing on one or both of these grounds and correct these errors of law.

SUGGESTIONS IN SUPPORT OF THE APPLICATION

Introduction

"It is axiomatic that prohibition is an appropriate remedy for…improper exercise of jurisdiction," and "it is also true that 'issuance of the writ is in the sound discretion of [the circuit] court.'" *State ex rel. Regional Justice Information Serv. Comm'n. v. Saitz*, 798 S.W.2d 705, 706 (Mo. banc 1990) (quoting *State ex rel. St. Louis Housing Auth. v. Gaertner*, 695 S.W.2d 460, 461 (Mo. banc 1985)).

The relevant facts, briefly recounted below, are not in dispute. As the circuit court specifically found, despite only having statutory authority over complaints filed by natural persons, the Administrative Hearing Commission ("AHC" or "Hearing Commission") and the Missouri Ethics Commission ("MEC" or "Ethics Commission") acted on a complaint filed not "by a natural person, but by an entity by its agent."[1] And the AHC itself has stated that it lacks subject-matter jurisdiction. Nevertheless, it has declined to rule on numerous motions raising that argument, and even delayed its own briefing schedule to allow the MEC to initiate discovery.

[1] Judgment, LF 1157.

In such circumstances – where the lack of jurisdiction is obvious, the cost to the parties concrete, and the administrative body has ignored numerous attempts to obtain a jurisdictional ruling – circuit courts must be permitted their traditional discretion to intervene via the writ of prohibition. Nevertheless, this Court ruled categorically that prohibition is unavailable if there may, at some indeterminate point in the future, be an appeal from the AHC's eventual merits determination.

That decision strips the circuit courts of their ability to intervene in cases where administrative agencies act *ultra vires*, permits agencies to draw out unlawful proceedings by simply declining to rule on jurisdiction, and exposes Mr. Calzone to the continued burdens and costs of defending himself before a body with no authority over him.

In the past, this Court has made prohibition available to the circuit courts in order to protect parties similarly situated to Mr. Calzone. *E.g. State ex rel. Southers v. Stuckey*, 867 S.W.2d 579, 581 (Mo. App. W.D. 1993). It ought to do so again.

Statement of Facts

It is undisputed that the General Assembly granted both the Missouri Ethics Commission ("Ethics Commission" or "MEC") and the Administrative Hearing Commission ("Hearing Commission" or "AHC") limited jurisdiction to review and adjudicate ethics complaints. *Bauer v. Mo. Ethics Comm'n*, 2008 Mo. Admin. Hearings LEXIS 287 at *3 (Mo. Admin. Hearings 2008) ("The conditions for Ethics' jurisdiction, and therefore [the Administrative Hearing Commission's] jurisdiction, include 'a complaint as described by section 105.957'") (quoting § 105.961(1), RSMo.). In both

cases, the Commissions are only vested with subject-matter jurisdiction upon receipt of a complaint "filed *only* by a natural person." § 105.957(2), RSMo (emphasis supplied).

It is also undisputed that the complaint against Mr. Calzone was filed by an attorney for the Missouri Society of Governmental Consultants, a nonprofit corporation that is not a natural person. The Society's attorney, who works at the Carver & Michael firm in Jefferson City, made this plain by attaching a cover letter to the Society's complaint against Mr. Calzone that stated:

> Enclosed herewith for filing and action by MEC is the complaint, along with supporting Exhibits A-E, against Ron Calzone for violating the requirements imposed on lobbyists by Missouri law[,] that I am submitting on behalf of our [the firm's] client, Missouri Society of Governmental Consultants. LF 36.

The Society's secretary, Mr. Randy Scherr, testified under oath before the MEC that this complaint was "filed…by the association," LF 794-795, meaning the Society. Mr. Scherr also testified that there was official action by the Society "to bring about the filing of the [c]omplaint," *id*., namely a vote of the Society's board of directors, LF 807, and the selection of counsel, LF 806. Moreover, the Society's board dictated the date on which the complaint would be filed. LF 804-805. Presented with all of this evidence, the circuit court specifically found that the complaint "was not filed by a natural person, but by an entity by its agent." LF 1157.

At the MEC's hearing, the Ethics Commission's counsel lodged an unsuccessful relevance objection to questions concerning the complaint. In response, Mr. Calzone's counsel stated that "[t]he relevance is it's an unlawful complaint. It's not filed by a natural person." LF 795. Later, when the Ethics Commission's counsel introduced the complaint

into evidence as Exhibit 6, LF 875, Mr. Calzone's counsel stated that while he did "not object to the existence of the Complaint…[he did] object to any legal conclusions, such as the Commission being legally permitted to act upon that Complaint." LF 876. The MEC admitted the exhibit "with that understanding." *Id*. Additionally, in closing arguments, Mr. Calzone's counsel argued that "[t]his is a case where on the face of the Complaint a nonnatural person filed a Complaint in clear violation of the statute." LF 892.

Nevertheless, the Ethics Commission found probable cause that Mr. Calzone had violated Missouri law, and Mr. Calzone timely appealed, as he must, to the AHC. *Impey v. Mo. Ethics Comm'n*, 442 S.W.3d 42 (Mo. banc 2014). There, Mr. Calzone continued his argument, in a motion for judgment on the pleadings, that both Commissions lacked subject-matter jurisdiction. At oral argument on Mr. Calzone's motion, the AHC stated:

> On that jurisdiction requirement, Mr. Stokes [MEC counsel], unless there's some case law that I did not see, I'm going to side with Petitioner. A corporate officer or an attorney acts on behalf of his or her client or the entity in which they're an officer. Here the client is clearly an organization. So I am going to side with the Petitioner on that. LF 958.

The commissioner also rejected the MEC's effort to seek additional briefing on the natural person question, LF 964, stating: "I'd rather let you do what you do on appeal, and I'm going to side with the Petitioner in this case." LF 966.[2] Nevertheless, the MEC filed an amended answer that night, as well as additional briefing. While Mr. Calzone moved to strike—so as to preserve the pleadings for judgment—the AHC instead accepted the Ethics

[2] At the end of the argument, as the MEC continued to press its case on the natural person requirement, the AHC interjected to "stop [counsel] there", and stated that "I have everything I need. I am going to wait for the transcript to be prepared before I rule on this motion." LF 967.

Commission's filings and set a briefing schedule for summary decision. The AHC did not rule as to its jurisdiction.

At that point, the Ethics Commission moved to compel discovery from Mr. Calzone and a third-party as to the merits, over objections from Mr. Calzone, who argued, *inter alia*, that an adjudicative body may not order discovery while its subject-matter jurisdiction is in question. The MEC also sought, and obtained, delay of the summary decision briefing schedule "at the MEC's request, so that it may conduct…discovery." LF 17.

At every juncture, including through a motion for a protective order, Mr. Calzone argued that discovery could not commence until the AHC had satisfied itself as to its subject-matter jurisdiction. In the end, however—and despite its on-the-record belief that it lacked jurisdiction—the AHC sidestepped that question and ordered substantial discovery on the merits while refusing to render a decision on subject-matter jurisdiction. LF 14 ("On April 8, 2016, the Hearing Commission denied Relator's motion and granted the MEC's motion to compel discovery…Its decision does not discuss, let alone rule upon, the jurisdictional argument raised by Relator").[3] Only then did Mr. Calzone seek, and obtain, prohibition in the circuit court.

[3] The Court of Appeals was mistaken in opining that "The AHC was poised to address [Calzone's jurisdictional claim] when its review was cut short by the circuit court's writ…" Op. at 10. The AHC had permitted the MEC to amend its complaint so as to defeat a jurisdictional ruling on the pleadings, and after ordering a summary decision briefing schedule, had delayed that schedule to allow the MEC to seek far-reaching discovery. Thus, the AHC chose to extend the proceedings rather than ruling upon its clear, and acknowledged, lack of jurisdiction.

I. Prohibition is available when subject-matter jurisdiction is lacking, and a party need not wait for the conclusion of proceedings below before forestalling *ultra vires* agency action.

Administrative agencies are creatures of statute, and as the Court of Appeals properly observed, "have only such authority as is granted by the legislature." Op. at 7 (citation omitted); *City of O'Fallon v. Union Elec. Co.*, 462 S.W.3d 438, 445 (Mo. App. W.D. 2015) ("The legislature, not the Commission, sets the extent of the Commission's authority"). And "[i]f the agency lacks statutory authority to consider a matter, it is without subject matter jurisdiction." *Tetzner v. State*, 446 S.W.3d 689, 692 (Mo. App. W.D. 2014) (quotation marks and citation omitted). Given that circuit court specifically found that the ethics complaint against Mr. Calzone was filed by a corporation and not a natural person,[4] § 105.957(2), RSMo., the MEC "lacks statutory authority" and "is without subject matter jurisdiction." *Tetzner*, 446 S.W.3d at 692 (quotation marks and citation omitted).

Nevertheless, the Court of Appeals here ruled that the circuit court's grant of prohibition was improper and "disrupt[ive]" because Mr. "Calzone had not exhausted his administrative remedies prior to seeking the writ of prohibition and, because an appeal was available to Calzone after exhaustion of those remedies". Op. at 6, 10-11. This was error.

"Exhaustion is generally required as a matter of preventing premature interference with the agency processes…so that it may have an opportunity to correct its own errors." *Boot Heel Nursing Ctr., Inc. v. Mo. Dep't of Soc. Servs.*, 826 S.W.2d 14, 16 (Mo. App.

[4] The circuit court's determination of the agency relationship between the Society and its attorney was a finding of fact and remains undisputed. *See W. v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7, 11 (Mo. App. W.D. 2010) (agency relationships are questions of fact).

W.D. 1992). But when an agency acts extra-jurisdictionally, the toothpaste is out of the tube, and cannot be corrected by the agency or ameliorated on appeal. In such circumstances, "[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,'" and prohibition must issue. S*tate ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915, 919 (Mo. App. W.D. 2003) (quoting *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 79 (Mo. banc 1974)) (emphasis supplied); *J.C. Nichols Co. v. Director of Revenue*, 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).

By contrast, the Court of Appeals determined that, so long as there remains an outstanding motion as to jurisdiction that the AHC may rule on at a future time, an obvious lack of subject-matter jurisdiction can never be cured by prohibition. Under the Court of Appeals's ruling, then, all future actions that the AHC may order below—including discovery, briefing, depositions, and a new hearing[5] with witness testimony and cross-examination—must be undertaken, even when it is obvious every such order is *ultra vires* and would be overturned on appeal after the AHC's proceedings finally concluded.

[5] While the Court of Appeals indicated that the AHC was likely to resolve this matter on summary decision, the Ethics Commission's decision to seek discovery against Mr. Calzone and a third-party plainly indicates that the MEC does not consider the record as it stands below to be complete. The AHC acquiesced in this view by delaying its own summary decision scheduling order to permit the MEC to supplement the record with matters having nothing to do with its jurisdiction.

In the past, as the circuit court's decision recognized, such circumstances have demanded prohibition and a cessation of all proceedings *immediately*, not after more damage has been done. *State ex rel. Southers v. Stuckey*, 867 S.W.2d 579, 581 (Mo. App. W.D. 1993) (issuing prohibition and ordering the lower body to "cease from exercising any further jurisdiction over the case") (emphasis supplied); S*tate ex rel. Sch. Dist. v. Williamson*, 141 S.W.3d 418, 423, 428 (Mo. App. W.D. 2004) (issuing writ of prohibition for want of jurisdiction and ordering both the dissolution of a granted preliminary injunction and dismissal of petition for judicial review).

This Court's decision in *State ex rel. Southers v. Stuckey* is instructive. In *Stuckey*, as here, the parties presented arguments "on [a] motion to dismiss and [on] discovery motions." *Id*. at 581. As the AHC did below, "[t]he court deferred ruling on relator's motion to dismiss and ordered the parties to proceed with discovery." *Id*. The *Stuckey* relator then petitioned for a writ, arguing that the lower body "lacked jurisdiction in ordering the parties to proceed with discovery without deciding" a jurisdictional question of law—there, whether the relator enjoyed official immunity. *Id*. And here, as there, the precondition for continued jurisdiction is absent "[b]ased upon . . . clear" law. *Id*. at 581-82. Accordingly, a permanent writ of prohibition "to cease from exercising any further jurisdiction over the case" issued, just as it ought to have here. *Id*. at 581.

The Court of Appeals ruled that prohibition is unavailable so long as an administrative agency chooses to defer a jurisdictional question. That decision conflicts with prior precedent and should be revisited.

II. The Court of Appeals's holding that an agency may order discovery without satisfying itself as to subject-matter jurisdiction contradicts precedents of the U.S. Supreme Court and this Court.

It is undisputed that the Hearing Commission ordered discovery as to the merits without first satisfying itself as to subject-matter jurisdiction. The Court of Appeals forgave this lapse, finding in a footnote that:

> The AHC requested in its scheduling order that the parties address in their motions for summary judgment Calzone's claim that the MEC had no 'jurisdiction.' While Calzone contends that the AHC should have first addressed this claim before allowing discovery, we find no statutory support for this assertion. Op. at 10, n.5.

This is a significant error. Both the U.S. Supreme Court and this Court have made plain that adjudicative bodies *must* have jurisdiction over the subject-matter before ordering discovery. *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) ("*Catholic Conference*"); *Mo. Comm'n on Human Rights v. Cooper*, 639 S.W.2d 902 (Mo. App. W.D. (1982). Both cases were briefed before this Court, and the opinion's failure to address those cases, and to instead limit its review to statutory authority, must be revisited. U.S. Const. art. VI, cl. 2.

Both cases involve the same facts: an adjudicative body (a federal court in *Catholic Conference* and a Missouri administrative agency in *Cooper*) with doubtful or nonexistent subject-matter jurisdiction ordered discovery, via subpoenas *duces tecum*, as to the merits. In both cases, the result was the same—discovery as to the merits was "unauthorized." *Cooper*, 639 S.W.2d at 902; *Catholic Conference*, 487 U.S. at 76 ("…the subpoena power of a[n adjudicative body] cannot be more extensive than its jurisdiction").

In *Cooper*, this Court pointedly noted that "the subpoena was unauthorized because (1) the Commission has no power to issue a…complaint *sua sponte*; and (2) the Commission cannot issue a subpoena until after a valid…complaint is filed." 639 S.W.2d at 902. Those same facts exist here, and the circuit court properly found that they necessitated prohibition. After all, as the federal Supreme Court held in *Catholic Conference*, if a body "does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void." 487 U.S. at 76.

In *Cooper*, the entire process was halted because the lack of jurisdiction was so obvious. 639 S.W.2d at 902. In *Catholic Conference*, where at least some colorable question as to jurisdiction existed, the lower court was ordered to first ascertain subject-matter jurisdiction before it could order compliance with the subpoenas *duces tecum*.[6]

Here, this Court ignored these precedents and instead postulated that agencies need not satisfy themselves as to jurisdiction—or, as is the case here, finalize their own on-the-record concerns about lacking jurisdiction—because the General Assembly has not specifically told them to do so. Op. at 10, n.5. That is not the law. "[S]ubject-matter

[6] Indeed, were the AHC truly "poised," Op. at 10, to have ruled on subject-matter jurisdiction, the proper remedy would have been for this Court to merely modify the circuit court's prohibition order so as to direct the AHC to issue a ruling on its jurisdiction before moving forward. *Catholic Conference*, 487 U.S. at 80 ("Accordingly, on remand, the Court of Appeals must determine whether the District Court had subject-matter jurisdiction in the underlying action"). The circuit court took briefing from the Parties as to this very question, *e.g.* LF 1148-1155, and nevertheless halted all proceedings, as the AHC was plainly not so "poised." Op. at 10.

jurisdiction…is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that [adjudicative bodies] have finite bounds of authority, some of constitutional origin, which is exist to protect citizens from the very wrong asserted here, the excessive use of judicial power." *Catholic Conference*, 487 U.S. at 77.

To say that a person may be hauled before an administrative agency and be forced to undergo discovery into his "papers, homes, effects, and electronic communications and data," Mo. Const. art. I, § 15, while there is doubt as to that body's ability to compel that person to even appear before it,[7] is to permit agencies to go beyond the General Assembly's limited grant of authority. That is, it is an invitation to and a blessing for extra-jurisdictional acts. *Cf.* Op. at 7 ("The MEC and AHC are creatures of statute and have only such authority as granted by the legislature"). Prohibition exists precisely to counter extra-jurisdictional acts.

This Court's decision conflicts with binding federal and Missouri precedent. Adjudicative bodies are no more permitted to traipse around subject-matter jurisdiction and order discovery then they are permitted to order discovery when a plaintiff has questionable standing. Accordingly, rehearing is appropriate.

Respectfully submitted,

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[7] Here, by the *AHC itself*, on the record. LF 963.

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