In the

Supreme Court of Ohio

STATE OF OHIO EX REL, AMERICAN LEGION POST 25,	:	Case No. 2006-06-2263
Relator-Appellee,	:	On Appeal from the Fayette County Court of Appeals, Twelfth Appellate District
v.	:	
OHIO CIVIL RIGHTS COMMISSION and OHIO ATTORNEY GENERAL JIM PETRO,	:	Court of Appeals Case No. 2006-01-005
Respondents-Appellants.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF RESPONDENTS-APPELLANTS, THE OHIO CIVIL RIGHTS COMMISSION AND OHIO ATTORNEY GENERAL JIM PETRO

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INTRODUCTION

This case threatens the Ohio Civil Rights Commission's ("Commission's") ability to enforce Ohio's Anti-Discrimination Laws and challenges its legislatively granted authority to determine how best to accomplish this goal. Well-established Commission rules and practice permit respondents to obtain full discovery and subpoenas only *after* the Commission issues a complaint against them. But the Twelfth District Court of Appeals in this case incorrectly determined that the Commission had a clear legal duty to issue a subpoena at the request of the American Legion Post 25 ("the Legion") during the Commission's preliminary investigation into the Legion's alleged discriminatory conduct. *State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm'n* (12th Dist., Oct. 23, 2006), 2006 Ohio App. Lexis 5492, 2006-Ohio-5509, ¶¶ 37-60 ("App. Op."). That decision will adversely affect the Commission's ability to expeditiously investigate, conciliate, and, if necessary, adjudicate discrimination charges. The decision below will create an opportunity for respondents (i.e., those charged with discrimination) to stall the preliminary investigation by demanding subpoenas for information, regardless of whether the requested information is directly pertinent to a matter under investigation.

The Twelfth District compounded its error by concluding that the Commission's refusal to issue a subpoena during the preliminary investigation divested the Commission of jurisdiction to issue an administrative complaint against the Legion pursuant to R.C. 4112.05(B). App. Op. ¶¶ 61-65. Until the appeals court's decision in this case, the Ohio Civil Rights Commission exercised its power to adjudicate charges of discrimination under two statutory limitations. First, before issuing an administrative complaint to begin the adjudication, the Commission had to seek voluntary resolution through "informal methods of conference, conciliation, and persuasion." R.C. 4112.05(B)(5). Second, the Commission had to issue the complaint within one year after the charge of discrimination was filed. R.C. 4112.05(B)(7). But now there is a third, judicially-

crafted limitation, under which a court may override the Commission's decision and find that conciliation, though attempted, was not completed because the Commission did not issue a subpoena the respondent demanded during the investigation phase.

The consequences of this decision are grave. Until now, R.C. 4112.05(B)(5) gave the Commission the right to decide if it was "satisfied" with the results of the conciliation. If not, so long as it first attempted to conciliate, the Commission could proceed to adjudicate the charge without any question that its jurisdiction was complete. Under the Twelfth District's decision, however, the "completion" of conciliation is open to judicial scrutiny, and the Commission's jurisdiction will remain uncertain until a later court order decides it. If that dispositive order does not issue until after the one-year limitations period for filing a complaint has elapsed, the Commission may lose all opportunity to correct the error through further proceedings.

If the Twelfth District's decision is allowed to stand, it will invite manipulation of the investigation and conciliation process by respondents and cast a shadow of doubt over all the Commission's proceedings. For these reasons, and others described below, the Court should review this case and reverse the appeals court's decision.

STATEMENT OF THE CASE AND FACTS

A. The Commission investigated Ms. Van Slyke's discrimination charge against the Legion.

Carol Van Slyke, a former employee of the Legion, filed a charge of discrimination with the Ohio Civil Rights Commission alleging that she was sexually harassed by the Legion's Executive Director, Dale Butler, and terminated in retaliation for complaining about the harassment. App. Op. ¶ 2.

The Commission notified the Legion of the charge. App. Op. ¶ 3; Stmt. of Evid. p. 2, Att. A, Att. C. In response, the Legion asserted that Ms. Van Slyke was fired because Director Butler

received an anonymous letter that indicated that Ms. Van Slyke had been convicted of a felony. He suspected that serving alcohol, an integral aspect of Ms. Van Slyke's employment, was a violation of her probationary terms. *Id.* ¶¶ 3-4.

In the course of the investigation, the Legion's attorney wrote letters to the Commission's investigator requesting a subpoena to be issued on its behalf to David Porter, Ms. Van Slyke's Adult Parole Authority officer. App. Op. ¶ 4; Stmt. of Evid. p. 3, Att. D, Att. E. The Legion's counsel also requested the Commission to compel Mr. Porter to meet with him to discuss any conversations he had with Director Butler. *Id.*

The Commission refused to issue the subpoena because its investigation was ongoing. Under the Commission's rules, subpoenas are issued on behalf of respondents only after a formal complaint has been filed and the case is proceeding to hearing. App. Op. ¶ 5; Stmt. of Evid. p. 3; O.A.C. 4112-3-13(B). The Commission did, however, issue a subpoena to Mr. Porter as part of its own investigation. App. Op. ¶ 5; Stmt. of Evid. Att. F.

While the investigation was pending, and before the Commission made its probable cause determination, the Legion's counsel also requested to view the information Mr. Porter provided. *Id.* The Commission refused this request because R.C. 4112.05(B)(2) requires it to keep confidential all information resulting from or pertaining to a preliminary investigation until it has notified the complainant and respondent of a no-probable-cause finding or has found probable cause and scheduled the matter for conciliation. *Id.*

At the conclusion of its investigation, the Commission determined that it was probable that the Legion retaliated against Ms. Van Slyke in violation of R.C. 4112.02. App. Op. ¶5; Stmt. of Evid. p. 3. The Commission attempted conciliation as required by R.C. 4112.05, but the Commission's efforts were unsuccessful. App. Op. ¶¶ 6-7, 27. Accordingly, the Commission

issued an administrative complaint naming the Legion as a respondent to the administrative hearing process. App. Op. ¶ 7; Stmt. of Evid. p. 4, Att. H.

B. The Legion filed a mandamus action against the Commission and the Attorney General.

The day before the Commission issued its probable cause determination, the Legion filed a complaint for a writ of mandamus against the Commission and its counsel, Attorney General Jim Petro. The mandamus complaint sought an order compelling those parties to issue a subpoena on behalf of the Legion to Van Slyke's parole officer. App. Op. ¶ 8; Stmt. of Evid. p. 4. The Commission filed a motion to dismiss the complaint. App. Op. ¶ 9; Stmt. of Evid. p. 4. The trial court dismissed the action, finding that the Commission "had no clear legal duty to issue the subpoena" and the Legion's clear remedy lies in the ongoing "formal complaint stage," including full discovery rights. Court of Common Pleas Entry, Jan. 4, 2006, p. 2; see also App. Op. ¶ 10.

The Legion appealed to the Twelfth District Court of Appeals, and that court reversed the trial court's dismissal of the mandamus action. Stmt. of Evid. p. 5; Notice of Appeal. First, the appellate court declined to find the controversy moot, even though the court concluded that the Legion already had the right to issuance of a subpoena upon request, as well as full discovery rights, as soon as the Commission issued an administrative complaint. App. Op. ¶¶ 18, 23. The court of appeals concluded that the issue of whether a respondent is entitled to a subpoena upon request during the Commission's investigation was capable of repetition but evading review. *Id.* ¶¶ 21-23.

Second, the Twelfth District held that the Commission had a clear legal duty to issue subpoenas during the investigation and that the Legion had no adequate remedy at law when the Commission refused to issue a pre-administrative-complaint subpoena. App. Op. ¶¶ 54-60. The court concluded that the language of R.C. 4112.04(B)(3)(b), which states that a respondent has

the right, upon a written application, to have the Commission issue a subpoena in its name "to the same extent and subject to the same limitations as subpoenas issued by the [C]ommission," required the Commission to issue subpoenas for respondents during an investigation as well as during an adjudication hearing. App. Op. ¶¶ 40-46. The appellate court concluded that "at least in the context of this case," the Commission's rules that authorize a respondent-requested subpoena only *after* the Commission issues an administrative complaint, see O.A.C. 4112-3-13(B) and 4112-3-12(A), were inconsistent with the statute, and thus do not have the force of law. App. Op. ¶¶ 47-53. The court also rejected the Commission's argument that the Legion had adequate remedies at law through requesting a subpoena, and full discovery, after a complaint was issued, pursuant to those administrative rules. App. Op. ¶¶ 54-60. The court concluded that all of those remedies failed to "place [the Legion] on an equal footing with [the Commission,]" as the court believed was required under R.C. 4112.04(B)(3)(b). *Id.* ¶¶ 57-58.

Third, the court also concluded that "by refusing to issue the subpoena requested by [the Legion], the commission failed to engage in a 'completed attempt' to eliminate unlawful discriminatory practices by conference, conciliation or persuasion before issuing a complaint against [the Legion], thereby divesting itself of jurisdiction to issue such a complaint." App. Op. ¶ 61. The appeals court decided that conciliation was not "completed" because the Commission did not give the respondent a subpoena to obtain information that might have been "useful" during the conciliation conference. App. Op. ¶ 63.

The Commission appeals the Twelfth District's judgment.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

A. The Court should grant review because the decision below will impede the Commission's efficient investigation and resolution of civil rights charges.

The Ohio Civil Rights Commission receives and disposes of some 5,000 discrimination charges each year. During the preliminary investigative stage, the Commission gathers information about the charge from the charging party and respondent, and makes an initial determination whether there is probable cause to believe that the respondent engaged in the charged discriminatory practices. R.C. 4112.05(B)(4). Of the roughly 5,000 charges the Commission receives per year, it dismisses the overwhelming majority for lack of probable cause after preliminary investigation. In the remaining cases, if conciliation fails, the Commission issues a formal complaint which initiates the administrative hearing process, at which full discovery, including issuance of subpoenas, is available to the respondent and the assistant attorney general who prosecutes the administrative complaint. See O.A.C. 4112-3-12(A); 4112-3-13(B).

The decision below could significantly impede the Commission's ability to expeditiously review, investigate and recommend a disposition of, the thousands of discrimination charges the Commission receives each year. The decision permits respondents to insist that the Commission issue subpoenas on their behalf so they can essentially conduct their own parallel investigation—gathering information and interviewing witnesses while the Commission's investigation proceeds. Under the decision below, respondents will be able to demand subpoenas to harass or intimidate the charging party by demanding access to personal records, even if they are immaterial, or tangential at best, to the allegations of the charge. Arming respondents with the ability to direct the focus of the Commission's investigation and simultaneously conduct their own investigations will make the charge review and resolution procedure more burdensome,

expensive, and potentially abusive to those who file claims of discrimination, and could well impede the Commission's goal of eradicating unlawful discrimination. Cf. R.C. 4112.08 (anti-discrimination laws are to be liberally construed to achieve their purpose).

Additionally, the Twelfth District's conclusion that "at least in the context of this case," the Commission's long-established rules governing issuance of subpoenas for respondents do not "have the force of law" has the potential to create confusion in the Commission's proceedings, and in other courts throughout the State, as to the permissible application of those rules. The appellate court's further holding that the rules' provision for post-complaint discovery does not constitute an "adequate remedy at law" for respondents such as the Legion will only increase that confusion. Cf. App. Op. ¶ 60.

B. This case warrants review because the Twelfth District's ruling tying the Commission's jurisdiction to whether it grants subpoenas during an investigation imperils the Commission's ability to timely adjudicate discrimination complaints.

Until the decision below, the Commission's ability to issue and adjudicate a complaint of discrimination was subject to two jurisdictional limitations. First, if after a preliminary investigation the Commission finds probable cause to believe the charge has merit, the Commission must seek the respondent's voluntary compliance through conciliation. R.C. 4112.05(B)(5). Second, if the Commission is not satisfied with the outcome of the conciliation, it has one year from the time the charge was filed to issue a complaint against the respondent. R.C. 4112.05(B)(7); *Ohio Civil Rights Comm'n v. Countrywide Home Loans*, 99 Ohio St. 3d 522, 522-23, 2003-Ohio-4358. The Commission is able to operate within these limitations because it has full control of the process. Because the Commission can decide how much investigation is sufficient in a given case and how much attempted conciliation is enough, the Commission can ensure that the one-year time limitation is met. But in this case, the appeals court fashioned a third jurisdictional limitation, ruling that a conciliation attempt is not "completed" unless the

respondent has a right to subpoena witnesses in its own parallel investigation before conciliation begins. By taking control of the investigation and conciliation process out of the Commission's hands, the appeals court's decision gives respondents the power to obstruct and even prevent the Commission's adjudication of civil rights charges already found to have probable merit. For that reason, this case is a matter of public and great general interest.

Until now, the Commission has determined when conciliation has been unsuccessful. If the Commission did not make a "completed and unsuccessful attempt" at conciliation, it lost jurisdiction to issue a complaint. *State ex rel. Republic Steel Corp. v. Ohio Civil Rights Comm'n* (1975), 44 Ohio St. 2d 178, syllabus. But as long as the Commission tried to conciliate until it determined that the effort had failed, it cleared that jurisdictional hurdle. While a claimed defect in the preceding investigation might be a matter for appeal, it did not defeat the Commission's jurisdiction to hear the charge. See *State ex rel. State Farm Mutual Auto. Ins. Co. v. Ohio Civil Rights Comm'n* (1983), 6 Ohio St. 3d 426, 428. This distinction is important, because if the Commission's hearing decision is reversed on appeal for some procedural or substantive error, the matter might be remanded for a new hearing. But if an appellate court rules that the Commission lacked jurisdiction to issue a complaint because its conciliation attempt was not complete or adequate, then the one-year time limit would bar any further proceedings.

In this case, the appeals court agreed that the Commission had tried to conciliate with the respondent and concluded it was fruitless. App. Op. ¶¶ 7, 27. Then the court of appeals took the unprecedented step of deciding that the Commission's refusal to give the respondent a subpoena to conduct its own investigation meant conciliation could not be "completed." This decision puts the Commission in an impossible position.

Predicating a "completed attempt" at conciliation by the Commission on the *respondent's* demands for information by subpoena invites manipulation of the conciliation process. A respondent might demand subpoenas for every conceivable witness and item of evidence in an effort to "run out the clock" or pressure the Commission to make unwarranted concessions to achieve a successful conciliation and avoid the uncertainty of judicial review. And if the Commission refused the respondent's demands, or granted a witness's petition to revoke or modify the subpoena, and an appellate court later ruled that the Commission's decision made the conciliation incomplete, the one-year time limit for issuing an administrative complaint might preclude further proceedings.

The appeals court's decision, if uncorrected, leaves the Commission with two equally distasteful options for avoiding potentially fatal challenges to the adequacy of its conciliation efforts. Since R.C. 4112.05(B)(2) prevents it from disclosing the results of its investigation before conciliation, the Commission might hurry to make a probable-cause finding to maximize the time available for the respondent's investigation before the one-year limitation is reached. As a result of the truncated investigation, some poorly-supported charges might go forward, while others that have merit might be dismissed.

The decision also opens the door to substantive scrutiny of the Commission's decision-making during the conciliation. If a court can decide that conciliation is not "completed" because the respondent could not subpoena information to present during the conciliation, it might also decide that the Commission did not properly consider information the respondent did present. Such scrutiny would be at odds with federal civil rights law, in which courts give substantial deference to the EEOC's decision to break off conciliation efforts and pursue adjudication. See *EEOC v. Optical Cable Corp.* (W.D. Va. 2001), 169 F. Supp. 2d 539, 543; *EEOC v. North*

Central Airlines (D. Minn. 1979), 475 F. Supp. 667, 669 ("[I]f some conciliation efforts have occurred, substantial deference should be given to the EEOC's determination that [they] have failed.").

For these and other reasons, the Court should review, and reverse, the decision below.

ARGUMENT

Appellant Commission's Proposition of Law No. 1:

The Commission's subpoena statute, R.C. 4112.04(B), does not create a clear legal duty upon the Commission to issue a subpoena at a respondent's request during a preliminary investigation. Accordingly, the Commission rules that authorize issuance of a subpoena for a respondent only after a complaint is filed—OAC 4112-3-12(A) and4112-3-13(B)—are consistent with the subpoena statute's requirements.

By longstanding practice, the Commission does not issue subpoenas to a respondent until after an administrative complaint has been filed. This practice is authorized by OAC 4112-3-13(B), which requires a respondent to include the "case caption and complaint number" in its request for a subpoena. The appeals court acknowledged that such administrative rules normally have the force of law, but noted that R.C. 4112.04(B)(3)(b) says: "Upon written application by a respondent, the commission shall issue subpoenas in its name to the same extent and subject to the same limitations as subpoenas issued by the commission." Finding that a person charged with discrimination becomes a "respondent" when the discrimination charge is filed, the appeals court concluded that the rule conflicted with the statute and had to yield. But there are several problems with the court's reasoning.

First, some conceivable conflict with a statute is not enough to invalidate an administrative rule. Rather, there must be a "clear conflict" or the rule must be unreasonable. *Chi. Pac. Corp. v. Limbach* (1992), 65 Ohio St. 3d 432, 435. As the Court has cautioned, "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Weiss v. Pub. Utils.*

Comm'n of Ohio, 90 Ohio St. 3d 15, 17-18, 2000-Ohio-5. Here, R.C. 4112.04(B)(3)(b) is ambiguous, and therefore incapable of conflicting with the Commission's rule.

Second, contrary to the opinion below, during the Commission's preliminary investigation of a charge, the Ohio had no right to be "on equal footing" with the Commission, and thus had no right to issuance of a subpoena upon request. Cf. App. Op. ¶ 58. Neither the investigation of a charge nor conciliation is an adjudication hearing. Accordingly, those preliminary proceedings, at which the Commission acts as a neutral fact-gatherer or conciliator, do not contemplate issuance of subpoenas at the parties' request or other hallmarks of an adversary process. See *Salazar v. Ohio Civil Rights Comm'n* (6th Dist. 1987), 39 Ohio App. 3d 26, 29-31 & Syllabus ¶ 3 (lack of an adversarial hearing during the Commission's investigation did not violate due process). Indeed, the Court has held that the Commission has discretion to determine whether it will investigate a particular charge at all. See *Westbrook v. Ohio Civil Rights Comm'n* (1985), 17 Ohio St. 3d 215, 216. The decision below undercuts the Commission's discretion to determine the scope of its investigation.

Third, by statute the Commission must keep the results of its investigations confidential until after it has made a probable-cause determination and, if cause is found, has scheduled conciliation. R.C. 4112.05(B)(2). But under the appeals court's interpretation of R.C. 4112.04(B)(3)(b), a respondent could subpoena investigative data at any time, confidentiality notwithstanding. And even if the respondent could not subpoena the Commission's investigative files directly, it could still subpoena all the same witnesses, subjecting them to the unwarranted double burden of complying with the Commission's and the respondent's requests. Under the Commission's subpoena rule, by contrast, this information would be available through the normal civil discovery process after the complaint is filed. See O.A.C. 4112-3-12(A). And as the

Commission argued in the court below, that rule, and the rule authorizing a respondent to obtain a subpoena during the adjudication stage, after a complaint is filed, see O.A.C. 4112-3-13(B), provide adequate remedies at law, defeating a mandamus action for a pre-complaint subpoena.

Finally, if the EEOC were investigating the same discrimination charge, the respondent would have no right to an investigative subpoena. See, e.g., *Food Town Stores, Inc. v. EEOC* (4th Cir. 1983), 708 F.2d 920, 923-25. The Court has long held that federal case law interpreting Title VII is generally applicable to cases involving alleged violations of R.C. Chapter 4112. See, e.g., *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n* (1981), 66 Ohio St. 2d 192, 196. The Commission, like the EEOC, has investigatory power to prevent and remedy unlawful discrimination, and the Commission's governing statutes and agency rules should be interpreted liberally to achieve that purpose. Cf. R.C. 4112.08; *Smith v. Friendship Village of Dublin, Ohio, Inc.* (2001), 92 Ohio St. 3d 503, 505.

Appellant Commission's Proposition of Law No. 2:

> *The Commission does not fail to engage in conciliation under R.C. 4112.05(B), and consequently lose jurisdiction over a claim of unlawful discriminatory conduct, when in the course of its investigation it refuses to issue a subpoena at respondent's request.*

Under R.C. 4112.05(A), the Commission must "attempt, by informal methods of conference, conciliation, and persuasion, to induce compliance with this chapter" before issuing an administrative complaint to a respondent charged with unlawful discrimination. But the Commission until now has been able to decide when an attempt at conciliation has failed. The statute governing the Commission's procedures presumes that discrimination charges will be adjudicated if probable cause is found, but allows the Commission to "treat the charge involved as being conciliated" and enter that disposition on its docket if, after the conciliation attempt, it is "satisfied that any unlawful discriminatory practice will be eliminated." R.C. 4112.05(B)(5).

The Court has rebuffed previous attempts to attack the adequacy of a conciliation attempt or the investigation preceding it. In the 1983 *State Farm* decision, for example, the Commission proposed conciliation after reviewing the EEOC's investigation of a charge and adopting its finding of probable cause. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Ohio Civil Rights Comm'n* (1983), 6 Ohio St.3d 426, 427. The Commission's conciliator advised State Farm that the offer it made in the EEOC proceeding was unacceptable and that, if a counteroffer was not received, she would consider negotiations at an impasse. *Id.* When no new offer came the Commission issued an administrative complaint. State Farm sued in prohibition, alleging that the Commission had not attempted conciliation efforts. *Id.* The Court disagreed, noting that "the complaint alleged, and the record demonstrates, that conciliation efforts were completed and unsuccessful." *Id.* at 428. Critically for the present case, the Court in *State Farm* said: "These arguments do not present a challenge to [the Commission's] jurisdiction, but rather, allege error as to the manner in which appellee conducted its investigation." *Id.*

The same arguments that State Farm made are implicit in the appeals court's decision in this case. As the court acknowledged, the Commission did make conciliation efforts, and those efforts proved fruitless. App. Op. ¶¶ 26-27. But it inferred that conciliation failed because the Commission monopolized the investigation, refusing to allow respondent to subpoena "information that could have proven useful ... during the conciliation phase." *Id.* ¶ 63. As in *State Farm*, however, claimed problems with the Commission's investigation do not negate its conciliation attempt conciliation and destroy its jurisdiction; rather, they are issues that can be raised on appeal after the hearing.

The appeals court's misunderstanding of the Commission's conciliation process is apparent. As one court described the process, "the primary focus of the conciliation proceedings

is to eliminate the alleged discriminatory practice, not necessarily to settle the existing dispute between the complainant and the respondent." *Voiers Enterprises, Inc. v. Ohio Civil Rights Comm'n*, 156 Ohio App. 3d 195, 2004-Ohio-738, ¶ 30. The process is informal and confidential, akin to mediation, and nothing that is said or done during conciliation can be used as evidence. R.C. 4112.05(B)(5). It is not a forum to challenge the Commission's probable cause finding. Instead, as described by statute, it is a setting for "informal methods of conference, conciliation, and persuasion." R.C. 4112.05(B)(4). Accordingly, a respondent has no need to subpoena evidence to prepare for it.

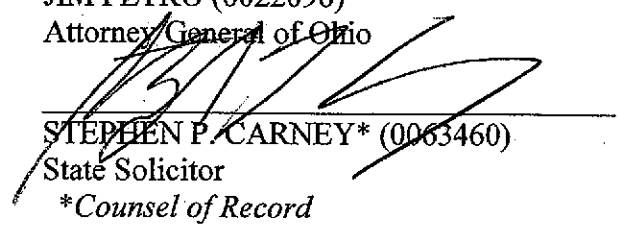
The appeals court's decision also hinges on due process concerns. As the court described it, the Commission's refusal to let respondent use a subpoena meant the two sides were not on an "equal footing" with respect to the investigation, giving the Commission (in the court's view) an "unfair advantage" during the conciliation. App. Op. ¶ 64. But investigative bodies traditionally do not inform the targets of their investigation of the charges against them or allow the confrontation and cross-examination of witnesses, and due process does not require it. See *Hannah v. Larche* (1960), 363 U.S. 420, 449-51. And as the evidentiary privilege of R.C. 4112.05(B)(5) and the confidentiality requirements of R.C. 4112.05(B)(2) and (3)(c) make clear, until conciliation is complete, the Commission's role is investigatory and strictly separated from its adjudication of charges. So while due process and fairness may require that a respondent have access to subpoenas and discovery during *adjudication*, such matters are foreign to the investigation process and conciliation.

CONCLUSION

For the above reasons, the Court should review this case and reverse the decision of the court below.

Respectfully submitted,

JIM PETRO (0022096)
Attorney General of Ohio



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by U.S. mail this 7th day of December, 2006, upon the following counsel:

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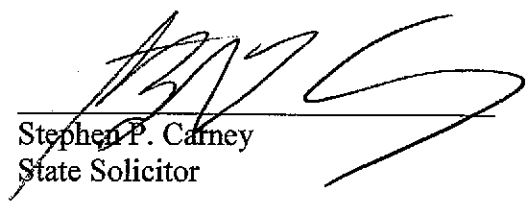

Stephen P. Carney
State Solicitor

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO ex rel. AMERICAN LEGION POST 25,	:	
Relator-Appellant,	:	CASE NO. CA2006-01-006
-vs-	:	OPINION 10/23/2006
OHIO CIVIL RIGHTS COMMISSION and JIM PETRO as Atty. General,	:	
Respondents-Appellees.	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 20050434CVC

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POWELL, P.J.

{¶1} Relator-appellant, American Legion Post 25, appeals an order of the Fayette County Court of Common Pleas dismissing its action for mandamus, in which appellant sought to compel respondents-appellees, the Ohio Civil Rights Commission and Ohio Attorney General Jim Petro, to issue a subpoena on behalf of appellant.[1]

1. We have sua sponte removed this case from the accelerated calendar.

{¶2} On August 18, 2005, Carol Van Slyke (hereinafter "complainant"), a former employee of appellant, filed a charge of discrimination with the Ohio Civil Rights Commission (hereinafter "the commission"). Complainant alleged that she had been sexually harassed by appellant's executive director, Dale Butler, and terminated in retaliation for complaining about the harassment.

{¶3} The commission notified appellant of the charge in a letter, dated August 18, 2005. Appellant responded by filing a position statement with the commission on September 19, 2005, alleging that it had terminated complainant shortly after learning she had been previously convicted of a felony, and that complainant had filed the discrimination charges as her own act of retaliation for being terminated.

{¶4} On September 19 and 23, 2005, appellant sent letters to the commission, requesting that it issue a subpoena in its name to Adult Parole Authority Officer David Porter. Appellant requested that Officer Porter provide it with all documents pertaining to complainant's sentence in Arizona, the transfer of her case to Ohio, and all documents pertaining to her parole or probation, including those related to any restrictions placed on her during her parole or probation and the dates and length of her supervision. Appellant also requested a subpoena requiring Officer Porter to meet with it to discuss his conversations with Dale Butler.

{¶5} The commission denied appellant's request to issue a subpoena to Officer Porter, advising appellant that the commission would not issue a subpoena on behalf of a party during the "investigative phase" of a discrimination charge, but only during the "hearing process." Thereafter, the commission did issue a subpoena to Officer Porter, but only as part of its investigation of complainant's charges—not on appellant's behalf. In response, Officer Porter provided the commission with information and statements that factored into the agency's decision-making process. When appellant learned of the existence of this

information, appellant sought to obtain it from the commission, but the commission refused to share the information with appellant, relying on certain provisions in R.C. 4112.05(B).

{¶6} On October 27, 2005, the commission issued a decision, finding that it was "probable" that appellant engaged in an unlawful discriminatory practice under R.C. 4112.02 when it terminated complainant's employment. The commission scheduled the matter for conciliation.

{¶7} On December 15, 2005, the commission issued a complaint and notice of hearing to appellant, after failing to resolve the matter through the informal methods of conference, conciliation, and persuasion. The complaint stated, in pertinent part, that "the Commission determined at its meeting on October 27, 2005, that it is probable that unlawful discriminatory practices have been or are being perpetrated by [appellant] in violation of [R.C.] 4112.02(A) and (I)."

{¶8} While these administrative proceedings were pending, appellant, on October 26, 2005, filed a complaint in the Fayette County Court of Common Pleas, seeking a peremptory writ of mandamus compelling the commission and Ohio Attorney General Jim Petro to prepare and issue a subpoena to Officer Porter as requested in the letters appellant sent to the commission on September 19 and 23, 2005.

{¶9} On November 23, 2005, the commission moved to dismiss appellant's complaint pursuant to Civ.R. 12(B)(6), arguing that appellant had no clear legal right to have the commission issue the requested subpoena; the commission had no clear legal duty to issue the subpoena; and appellant had an adequate remedy at law.

{¶10} On January 4, 2006, the trial court held a phone conference, permitting the parties to make any additional arguments they had regarding the case. Later that day, the trial court issued an entry ordering that appellant's complaint for a writ of mandamus be dismissed on the grounds that appellant had no clear legal right to the issuance of a

subpoena during the commission's "investigatory phase," the commission had no clear legal duty to issue the subpoena, and appellant's "clear remedy lies in the ongoing administrative process, including full discovery rights in the current 'formal complaint' stage."

{¶11} Appellant now appeals the trial court's order dismissing its complaint for a writ of mandamus, raising the following assignment of error:

{¶12} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AS A MATTER OF LAW WHEN IT FAILED TO ISSUE A PREEMPTORY [sic] WRIT OF MANDAMUS TO THE OHIO CIVIL RIGHTS COMMISSION WHEN THE APPELLANT ALLEGED THAT IT HAD NO ADEQUATE REMEDY AT LAW."

{¶13} Before addressing the issues raised in appellant's assignment of error, we need to discuss briefly the nature of the two proceedings involved in this case: (1) a discrimination claim brought pursuant to R.C. Chapter 4112, and (2) an application for a writ of mandamus brought pursuant to R.C. Chapter 2731.

{¶14} R.C. 4112.05(B)(1) provides that "[a]ny person may file a charge with the commission alleging that another person has engaged or is engaging in an unlawful discriminatory practice[,]" including sexual harassment, see R.C. 4112.02(A), or retaliation for complaining about an unlawful discriminatory practice, see R.C. 4112.02(I). The person who files the charge is known as "the complainant," and the party against whom the charge is filed is known as "the respondent." See, generally, R.C. 4112.05(B).

{¶15} R.C. 2731.01 states that "[m]andamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.04 allows a person to petition for an application for the writ of mandamus "in the name of the state on the relation of the person applying." The party that applies for a writ of mandamus is known as "the relator," while the party against whom the writ is sought is known

as "the respondent." See, generally, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123.

{¶16} We are concerned that the use of the term "respondent" may cause confusion in this case since appellant is "the respondent" for purposes of the discrimination claim, while the commission is "the respondent" for purposes of the mandamus action. Therefore, when we use the term "respondent," we will be careful to specify which party to whom we are referring. When we use the term "respondent" without specifically referring to either party, we will be using it simply as the term is used in Chapter 4112 of the Ohio Revised Code or Chapters 4112-1 and 4112-3 of the Ohio Administrative Code, or as the term is used in mandamus actions brought pursuant to R.C. Chapter 2731. With that said, we now turn to the merits of appellant's assignment of error.

{¶17} Appellant argues that the trial court erred in failing to issue a peremptory writ of mandamus to the commission, compelling it to issue the requested subpoena. Appellant's assignment of error and the commission's response to it raise a number of issues that we shall address in an order that facilitates our analysis.

{¶18} The first issue we must decide is whether the issues raised in this appeal are moot. The commission argues appellant's request for a writ of mandamus is now moot because appellant has been entitled to have the commission issue a subpoena on appellant's behalf since December 15, 2005, which was the day the commission issued a complaint against appellant. Consequently, the commission argues that this matter was moot even before the trial court dismissed appellant's complaint. We disagree with this argument.

{¶19} "In a mandamus action, a writ will be denied when a question presented by the relator becomes moot." *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 518, 1997-Ohio-75. A question becomes moot "[w]here, prior to the rendition of a final decision, an event occurs, without the fault of either party, which renders it impossible for the

court to grant effectual relief in a case[.]" *Ohio Civ. Serv. Emp. Assn., AFSCME, Local 11, AFL-CIO, v. Ohio Dept. of Transp.* (1995), 104 Ohio App.3d 340,343. When the issues in a case become moot, the case should be dismissed. Id.

{¶20} There is, however, a recognized exception to the mootness doctrine for cases that present issues that are capable of repetition but will continually evade review. Id., citing *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App.3d 788, 791. This case falls within that exception to the mootness doctrine.

{¶21} The commission asserts that it has no obligation under R.C. 4112.04(B)(3)(b) to issue a subpoena on respondent's behalf until the commission issues a complaint against a respondent, even though that section does not expressly impose such a limitation. Therefore, this issue is clearly "capable of repetition." *Flaherty*, 74 Ohio App.3d at 791.

{¶22} Furthermore, this case, itself, demonstrates that the issue "will continually evade review," id., if we accept the commission's argument that the matter has been rendered moot by its issuance of a complaint. By the time a hearing is held in the trial court on a R.C. Chapter 4112 respondent's application for a writ of mandamus, made pursuant to R.C. 2731, or by the time the respondent appeals a trial court's denial of such a writ, the commission will usually have decided whether or not to bring a complaint against the R.C. Chapter 4112 respondent. If the commission chooses *not* to bring a complaint against the respondent, the respondent will have no reason to challenge the commission's position on the issue, and there will be no opportunity for either a trial court or court of appeals to consider whether the commission has a right to deny a respondent's request for a subpoena until the commission issues a complaint against the respondent.

{¶23} However, if the commission *does* choose to bring a complaint against a respondent, as it has against appellant in this case, the commission will then be able to argue, as it has in this case, that the issue has been rendered moot since the respondent will then

have full discovery rights, including the right to issue subpoenas, pursuant to Ohio Adm.Code 4112-3-12(A).[2] Once again, there will be no opportunity for either a trial court or court of appeals to consider whether the commission has a right to deny a respondent's request for a subpoena until the commission issues a complaint against the respondent.

{¶24} The potential unfairness of this situation stems from the fact that the commission is insisting that it has the right to issue subpoenas in furtherance of its preliminary investigation of a complainant's charge of discrimination, but is denying that same right to a respondent who has a charge brought against it, at least until the commission decides to bring a complaint against the respondent. However, this position appears to run counter to the plain language in R.C. 4112.04(B)(3)(b), which states that a respondent has the right, upon written application, to have the commission issue a subpoena in its name "to the same extent and subject to the same limitations as subpoenas issued by the commission."

{¶25} By not allowing a respondent to request that the commission issue a subpoena on the respondent's behalf until the commission brings a complaint against the respondent, the commission is placing respondents like appellant at a distinct disadvantage, particularly during the conference, conciliation, and persuasion phase of the proceedings. As appellant noted in its brief:

{¶26} "[The commission] and [a]ppellant repeatedly communicated about reaching a conciliation[;] however, [a]ppellant's counsel informed [the commission] of the unethical nature of advising his client to settle when [the commission] had the upper hand because of its knowledge of the contents of [Officer] Porter's file. Appellant informed [the commission] that conciliation was meaningless because of the unequal playing field. [The commission] replied

2. Ohio Adm.Code 4112-3-12 states, in pertinent part: "(A) Rights of discovery. After issuance of a complaint and receipt of the commission's file by the commission's attorney, the commission and respondent shall both enjoy the same rights of discovery as are provided for in division (B)(3) of section 4112.04 of the Revised Code, and in rules 26 through 37, 'Ohio Rules of Civil Procedure.'"

by continuing to run the statutory period of conciliation."

{¶27} After concluding that the informal methods of conference, concillation, and persuasion were fruitless, the commission, on December 15, 2005, filed a complaint against appellant pursuant to R.C. 4112.05(B)(5). Having done so, the commission claims that the issue of whether the commission can deny a respondent's request for a subpoena, made pursuant to R.C. 4112.04(B)(3)(b), is now moot. However, for the aforementioned reasons, we conclude that this issue is not moot because it is an issue that is capable of repetition but will continually evade review. See *Flaherty*, 74 Ohio App.3d at 791.

{¶28} In light of the foregoing, we conclude that the issue of whether the commission is entitled to deny a respondent's written application for a subpoena, pursuant to R.C. 4112.04(B)(3)(b), until it brings a complaint against the respondent, pursuant to R.C. 4112.05(B)(5), did not become moot after the commission filed a complaint against appellant in the administrative proceedings involving the discrimination claim.

{¶29} The second issue that we must address concerns appellant's argument that the trial court was required, pursuant to R.C. 2731.10, to issue a writ of mandamus when the commission failed to file an answer to its complaint seeking a writ of mandamus. We disagree with this argument.

{¶30} When relief is applied for by a writ of mandamus petition, a trial court may respond in three ways: (1) allow the writ without notice, (2) grant an order requiring that the respondent either perform the requested act or show cause why the act should not be performed, or (3) require that notice of the petition be given to the respondent and schedule a hearing on the matter. *State ex rel. Mansfield v. Lowrey* (C.P. 1964), 3 Ohio Misc. 174, 177-178, citing R.C. 2731.04.

{¶31} "When the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, the court should allow a peremptory writ of

mandamus. In all other cases, an alternative writ must first be issued on the allowance of the court, or a judge thereof." R.C. 2731.06.

{¶32} A peremptory writ orders the respondent to do the act required, while the alternative writ requires the respondent to do the act required or to show cause why the act is not, or should not, be performed. See *Werden v. Milford* (C.P. 1998), 91 Ohio Misc.2d 215, 218.

{¶33} R.C. 2731.10, which is relied upon by appellant, provides:

{¶34} "If no answer is made to an alternative writ of mandamus, a peremptory mandamus must be allowed against the defendant."

{¶35} "R.C. 2731.10 establishes that the failure to answer an *alternative writ* is grounds for the court to issue the requested writ of mandamus." (Emphasis added.) *State ex rel. Papp v. Norton*, 66 Ohio St.3d 162, 1993-Ohio-104.

{¶36} In this case, the trial court did not issue either a peremptory writ of mandamus or an alternative writ of mandamus. Instead, the trial court followed the third option listed in R.C. 2731.04 and *Lowrey*, and required that notice of appellant's application for the writ of mandamus be given to the respondent in the action, who, in this instance, was the commission, and then scheduled the matter for hearing. See *Lowrey*, 3 Ohio Misc. at 177-178, citing R.C. 2731.04. Therefore, contrary to what appellant says, R.C. 2731.10 has no application to this case.

{¶37} The next issue we must address is whether or not the trial court was correct in dismissing appellant's mandamus action after finding that appellant failed to establish each of the elements necessary to prevail in its mandamus action.

{¶38} In order for a writ of mandamus to issue, the relator must demonstrate that "(1) he has a clear legal right to the relief prayed for, (2) the respondent has a clear legal duty to

perform the acts, and (3) the relator has no plain and adequate remedy in the ordinary course of the law." *State ex rel. Westbrook v. Ohio Civil Rights Comm.* (1985), 17 Ohio St.3d 215. "The burden of proving these elements is on the relator." Id. Furthermore, all three of these elements must be met in order for the relator to prevail in the mandamus action. *State ex rel. McGrath v. Ohio Adult Parole Auth.*, Cuyahoga App. No. 82287,2003-Ohio-1969, ¶5.[3]

{¶39} In support of its argument that it has a clear legal right to have the commission issue the subpoena it requested and that the commission has a clear legal duty to issue it, appellant relies on R.C. 4112.04(B)(3)(b), which states, in pertinent part:

{¶40} "Upon written application by a respondent, the commission shall issue subpoenas in its name to the same extent and subject to the same limitations as subpoenas issued by the commission."

{¶41} R.C. Chapter 4112 does not provide a formal definition of the term "respondent." However, R.C. 4112.04(A)(4) provides that "[t]he commission shall *** [a]dopt, promulgate, amend, and rescind rules to effectuate the provisions of this chapter and the policies and practice of the commission in connection with this chapter[.]" The Ohio Administrative Code defines the term "respondent," when used in Chapter 4112 of the Ohio Revised Code and Chapters 4112-1 to 4112-3 of the Ohio Administrative Code, as "a person against whom a charge has been filed, or with respect to whom an investigation has been initiated by the commission without a charge, or against whom a complaint has been issued." Ohio Adm.Code 4112-1-01(N).

{¶42} The definition of "respondent" in Ohio Adm.Code 4112-1-01(N) comports with

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3. The Ohio Supreme Court has stated that "Civ.R. 12(B)(6) dismissals [of mandamus actions] may be based on 'merits' issues such as the availability of an adequate remedy in the ordinary course of law. The applicable Civ.R. 12(B)(6) standard is whether, after presuming the truth of all material factual allegations in the complaint and all reasonable inferences therefrom in [relator's] favor, it appears beyond doubt that [relator] can prove no set of facts warranting relief." *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 87, ¶20, 2002-Ohio-3605, citing *Taylor v. London*, 88 Ohio St.3d 137, 139, 2000-Ohio-278, and *State ex rel. Edwards v. Toledo City School Bd. of Edn.*, 72 Ohio St.3d 106, 108, 1995-Ohio-251.

the usage of that term in R.C. Chapter 4112. See, e.g., R.C. 4112.05(B)(5) ("If the commission fails to effect the elimination of an unlawful discriminatory practice by informal methods of conference, conciliation, and persuasion *** the commission shall issue and cause to be served upon any person, including *the respondent against whom a complainant has filed a charge ***, a complaint* ***.") (Emphasis added.) Thus, appellant became a respondent for purposes of R.C. 4112.04(B)(3)(b) when complainant filed a charge of discrimination against it on August 18, 2005.

{¶43} Appellant asserts that the commission was obligated under R.C. 4112.04(B)(3)(b) to issue a subpoena in its name to Officer Porter when appellant filed a written application for one on September 19 and 23, 2005, even though the commission had not yet issued a complaint against appellant. We agree with this assertion.

{¶44} R.C. 4112.04(B)(3)(b) provides that "[u]pon written application by a respondent, the commission shall issue subpoenas in its name *to the same extent and subject to the same limitations as subpoenas issued by the commission.*" (Emphasis added.) R.C. 4112.04(B)(3)(a) provides, in relevant part, that "[t]he commission *** may issue subpoenas to compel access to or the production of premises, records, documents, and other evidence or possible sources of evidence or the appearance of individuals *** to the same extent and subject to the same limitations as would apply if the subpoenas *** were issued or served in aid of a civil action in a court of common pleas."

{¶45} In this case, the commission issued a subpoena to Officer Porter for purposes of its preliminary investigation of complainant's charge, shortly after it had rejected appellant's request, pursuant to R.C. 4112.04(B)(3)(b), to have the commission issue a subpoena to Officer Porter on appellant's behalf. The commission was within in its rights to issue a subpoena to Officer Porter for purposes of its preliminary investigation of complainant's charge. See R.C. 4112.04(B)(3)(a). However, appellant was within its rights to ask the

commission to issue a subpoena to Officer Porter on appellant's behalf, and the commission was obligated to issue that subpoena upon appellant's written application. See R.C. 4112.04(B)(3)(b). Consequently, we conclude that appellant had a clear legal right to have the commission issue a subpoena in its name to Officer Porter upon appellant's written application, and the commission had a clear legal duty to issue the subpoena.

{¶46} The commission argues that R.C. 4112.04(B)(3)(b) cannot be construed to provide parties like appellant with "a blank check entitling it to a subpoena at anytime during the administrative process and conferring a duty upon the commission to issue a subpoena anytime one is requested." The commission asserts that parties like appellant are entitled to have the commission issue a subpoena in its name *only after* it has issued a complaint against the party, pursuant to R.C. 4112.05(B)(5).

{¶47} In support of this assertion, the commission relies primarily on Ohio Adm. Code 4112-3-13(B), which, the commission asserts, was promulgated pursuant to the language in R.C. 4112.04(B)(3) authorizing the commission "to make rules as to the issuance of subpoenas by individual commissioners." Ohio Adm.Code 4112-3-13(B) states, in pertinent part, that "[s]ubpoenas shall be issued upon receipt of a written request from a respondent *** which identifies the case caption and complaint number[.]"

{¶48} The commission points out that at the time appellant requested a subpoena for Officer Porter, there was no complaint number in the case since it had not yet filed a complaint against appellant. Consequently, the commission argues that a party, like appellant, cannot seek a subpoena through Ohio Adm. Code 4112-3-13(B) "unless and until an administrative complaint is issued[,]" and, therefore, that "a party is not entitled to a subpoena and the commission has no duty to issue a subpoena until after a complaint has been issued." We disagree with this argument.

{¶49} Initially, it appears that the commission promulgated Ohio Adm.Code 4112-3-

13(B) pursuant to the authority granted to it by R.C. 4112.04(A)(4), rather than by the aforementioned language in R.C. 4112.04(B)(3).[4] Nevertheless, an administrative rule issued pursuant to statutory authority "has the force of law" *only if* it is not unreasonable and does not conflict with a statute covering the same subject matter. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382, 1994-Ohio-486.

{¶50} In this case, Ohio Adm.Code 4112-3-13(B), which requires that a respondent's written request for a subpoena identify the case caption and complaint number, conflicts with R.C. 4112.04(B)(3)(b), which grants respondents, like appellant, the right to have the commission issue subpoenas, upon written application, "to the same extent and subject to the same limitations as subpoenas issued by the commission." Since the commission is entitled to issue subpoenas prior to filing a complaint against a respondent, see R.C.4112.04(B)(3)(a), then respondents are entitled to have the commission issue such subpoenas on their behalf. See R.C. 4112.04(B)(3)(b).

{¶51} As a result, Ohio Adm.Code 4112-3-13(B), at least in the context of this case, does not have the "force of law," *Natl. Lime & Stone Co.*, 68 Ohio St.3d at 382, and that provision of the Ohio Administrative Code cannot be used as a justification for ignoring appellant's rights under R.C. 4112.04(B)(3)(b).

{¶52} This same analysis applies to Ohio Adm.Code 4112-3-12(A), which provides that "[a]fter issuance of a complaint and receipt of the commission's file by the commission's attorney, the commission and respondent shall both enjoy the same rights of discovery as are

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4. The language in R.C. 4112.04(B)(3), authorizing the commission "to make rules as to the issuance of subpoenas by individual commissioners[,]" appears to be the statutory authority upon which Ohio Adm.Code 4112-3-13(*A*) is based, not 4112-3-13(*B*). The key language in this part of R.C. 4112.04(B)(3) is "individual commissioners." Ohio Adm.Code 4112-3-13(A) contains rules regarding the issuance of subpoenas by *individual commissioners*, see id, ("A commissioner may issue a subpoena to ***"), whereas Ohio Adm.Code 4112-3-13 (B) contains rules regarding the issuance of subpoenas by the commission, as a whole, upon a respondent's request. Thus, it appears that Ohio Adm.Code 4112-3-13(B) was promulgated pursuant to R.C. 4112.04(A)(4), not R.C. 4112.04(B)(3), as the commission contends.

provided for in division (B)(3) of section 4112.04 of the Revised Code, and in rules 26 through 37, 'Ohio Rules of Civil Procedure.'" This provision of the administrative code "has the force of law" *only if* it is not unreasonable and does not conflict with a statute covering the same subject matter. *Natl. Lime & Stone Co.*, 68 Ohio St.3d at 382.

{¶53} In this case, Ohio Adm.Code 4112-3-12(A) conflicts with R.C. 4112.04(B)(3)(b) since R.C. 4112.04(B)(3)(b) grants respondents the right, upon written application, to have the commission issue subpoenas on the respondents' behalf, "to the same extent and subject to the same limitations as subpoenas issued by the commission[,]" whereas Ohio Adm.Code 4112-3-12(A) indicates that respondents like appellant will not "enjoy the same rights of discovery as are provided" in R.C. 4112.04(B)(3), and in Civ.R. 26 through 37, until *after* a complaint is issued and the commission's attorney receives the commission's file. Because these limitations are not contained in R.C. 4112.04(B)(3)(b), Ohio Adm.Code 4112-3-12(A), at least in the context of this case, does not have the force of law, see *Natl. Lime & Stone Co.*, 68 Ohio St.3d at 382, and that provision of the administrative code cannot be used as a justification for ignoring appellant's rights under R.C. 4112.04(B)(3)(b).

{¶54} The commission argues that appellant is still not entitled to a writ of mandamus because appellant has or had several adequate remedies at law that it has chosen not to pursue. We disagree with this argument.

{¶55} "Mandamus will not issue if there is a plain and adequate remedy in the ordinary course of law." *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. Of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶54, citing *State ex rel. Ross v. State*, 102 Ohio St.3d 73, 2004-Ohio-1827, ¶5, and R.C. 2731.05. "'The alternative must be complete, beneficial, and speedy in order to constitute an adequate remedy at law.'" *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, at ¶54, quoting *State ex rel. Ullmann v. Hayes*, 103 Ohio St.3d 405, 2004-

Ohio-5469, ¶8.

{¶56} The commission argues that "[t]he most obvious and complete remedy is [a]ppellant's current entitlement to a subpoena after the [c]ommission issued its [complaint on December 15, 2005,]" adding that "[a]ppellant can [now] avail itself of all the tools of discovery pursuant to [Ohio Adm.Code] 4112-3-12." The commission also argues that appellant could have requested the commission to reconsider its probable cause determination in the case, and that appellant "still has the opportunity to resolve the underlying claim through conciliation or settlement and will continue to have this opportunity until the administrative hearing commences."

{¶57} However, none of the alternative remedies proposed by the commission provide appellant with a complete or adequate remedy. As we have stated, when complainant filed a discrimination charge against appellant, appellant became a "respondent" for purposes of R.C. 4112.04(B)(3)(b), and thus became entitled to have the commission issue a subpoena on appellant's behalf to the same extent and subject to the same limitations as subpoenas issued by the commission. The purpose behind R.C. 4112.04(B)(3)(b) is to place respondents on a equal footing with the commission once a charge of discrimination has been filed against the respondent.

{¶58} All of the alternative remedies proposed by the commission fail to place appellant on an equal footing with it, as required by R.C. 4112.04(B)(3)(b). Instead, those proposed remedies merely ratify the commission's position that respondents like appellant are not entitled to have the commission issue a subpoena on the respondent's behalf until the commission chooses to file a complaint against the respondent. However, that position is contrary to the plain language in R.C. 41112.04(B)(3)(b).

{¶59} By giving respondents the right to have the commission issue subpoenas on their behalf to the same extent and subject to the same limitations as subpoenas issued by

the commission, R.C. 4112.04(B)(3)(b) allows a respondent to request a subpoena before a complaint has been brought against it. Additionally, it allows respondents to have the commission issue subpoenas on their behalf before the conciliation phase of the proceedings begins, thereby placing them on an equal footing with the commission during that phase of the proceedings. The commission's proposed alternative remedies do not offer respondents the same advantage, but, instead, forces them to accept the commission's unwillingness to comply with its duties under R.C. 4112.04(B)(3)(b).

{¶60} Under these circumstances, we conclude that appellant does not have an adequate remedy at law. Because (1) appellant had a clear legal right to have the commission issue a subpoena on appellant's behalf, (2) the commission had a clear legal duty to issue the subpoena, and (3) appellant does not have an adequate remedy in the ordinary course of the law, we conclude that the trial court erred in dismissing appellant's mandamus action pursuant to Civ.R. 12(B)(6).

{¶61} We also conclude that by refusing to issue the subpoena requested by appellant, the commission failed to engage in a "completed attempt" to eliminate unlawful discriminatory practices by conference, conciliation or persuasion before issuing a complaint against appellant, thereby divesting itself of jurisdiction to issue such a complaint against appellant.

{¶62} "Pursuant to R.C. 4112.05(B), a completed and unsuccessful attempt by the Ohio Civil Rights Commission to eliminate unlawful discriminatory practices by conference, conciliation or persuasion is a jurisdictional prerequisite to the issuance of a complaint by the commission[.]" *State ex rel. Republic Steel Corp., v. Ohio Civil Rights Comm.* (1975), 44 Ohio St.2d 178, syllabus.

{¶63} Appellant was entitled, pursuant to R.C. 4112.04(B)(3)(b), to have the commission issue a subpoena to Officer Porter on appellant's behalf, even before the

commission filed a complaint against appellant, just as the commission, itself, was entitled to issue a subpoena to Officer Porter. See R.C. 4112.04(B)(3)(a). By having the commission issue a subpoena to Officer Porter, appellant may have learned information that could have proven useful to appellant during the conciliation phase of these proceedings.

{¶64} However, by refusing to issue the requested subpoena, the commission and appellant were not placed on an equal footing for purposes of the conciliation phase of the proceedings. Because the commission was able to subpoena Officer Porter, but appellant was not, the commission had an unfair advantage against appellant, contrary to R.C. 4112.04(B)(3)(b)'s explicit mandate requiring the commission, "upon written application by a respondent, *** [to] issue subpoenas in its name to the same extent and subject to the same limitations as subpoenas issued by the commission." Id.

{¶65} Under these circumstances, we conclude that the commission failed to engage in "a completed *** attempt *** to eliminate unlawful discriminatory practices by conference, conciliation or persuasion[,]" and, therefore, the commission lacked jurisdiction to issue a complaint against appellant. *Republic Steel Corp.*, 44 Ohio St.2d at syllabus.

{¶66} The final issue we must address concerns the commission's request in its reply to appellant's brief that we dismiss Ohio Attorney General Jim Petro as a party to this action on the grounds that R.C. 4112.10 requires the attorney general of this state to act as counsel for the Ohio Civil Rights Commission, and that appellant, without citing any authority in support, "is essentially suing an attorney for an alleged violation by the client." While we are not unsympathetic to this argument, we conclude that it is not properly before us.

{¶67} App.R. 3(C)(1) states, in pertinent part:

{¶68} "A person who intends to defend a judgment or order against an appeal taken by an appellant and *who also seeks to change the judgment or order* *** shall file a notice of cross appeal within the time allowed by App.R. 4." (Emphasis added.)

{¶69} In its January 4, 2006 order dismissing appellant's mandamus action, the trial court expressly dismissed appellant's action against the commission, but failed to expressly dismiss appellant's action against the attorney general. While that may have been what the trial court intended, that is not what the trial court did. By requesting that this court dismiss the attorney general as a party to appellant's mandamus action, the commission is tacitly acknowledging that the trial court failed to dismiss the attorney general as a party to appellant's mandamus action.

{¶70} Furthermore, by requesting that this court dismiss the attorney general as a party to appellant's mandamus action, the commission is essentially seeking "to change the *** order" from which the appeal has been taken. App.R. 3(C)(1). Consequently, the commission needed to file a cross appeal in order to accomplish that objective. Id. Nevertheless, after this case is remanded, the commission and the attorney general will, again, be able to request that the attorney general be dismissed as a party to this action on the grounds set forth in their appellate brief.

{¶71} In light of the foregoing, appellant's assignment of error is sustained.

{¶72} The trial court's judgment is reversed, and this cause is remanded to the trial court for further proceedings consistent with this opinion.

WALSH and YOUNG, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/ROD/documents/. Final versions of decisions are also available on the Twelfth District's web site at: http://www.twelfth.courts.state.oh.us/search.asp