

In the
Supreme Court of Ohio

STATE OF OHIO EX REL.
AMERICAN LEGION POST 25,

Relator-Appellee,

v.

OHIO CIVIL RIGHTS
COMMISSION and OHIO ATTORNEY
GENERAL MARC DANN,

Respondents-Appellants.

: Case No. 2006-2263
:
:
: On Appeal from the
: Fayette County
: Court of Appeals,
: Twelfth Appellate District
:
: Court of Appeals Case
: No. 2006-01-006
:

**MERIT BRIEF OF RESPONDENTS-APPELLANTS, THE OHIO CIVIL RIGHTS
COMMISSION AND OHIO ATTORNEY GENERAL MARC DANN**

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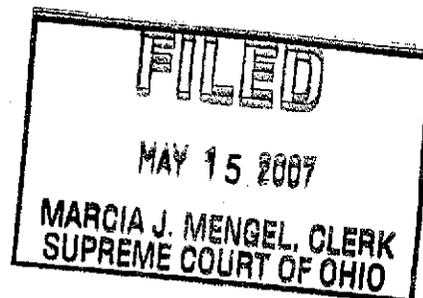


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS	3
A. The Commission investigated a charge of discrimination filed by Carol Van Slyke against the Legion and attempted conciliation before issuing a complaint.....	3
B. The Legion filed a mandamus action against the Commission and the Attorney General to compel the Commission to release confidential information.....	5
ARGUMENT.....	6
Appellant Commission’s Proposition of Law No. 1:	6
<p style="margin-left: 40px;"><i>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) and 4112-3-13(B)—are consistent with the subpoena statute’s requirements.....</i></p>	
A. Statutory language and history establish that the Commission’s subpoena rule does not conflict with the subpoena statute.....	8
B. Enforcement agencies typically do not allow the subjects of their scrutiny to compel testimony and evidence during the agency’s investigation.....	10
C. Allowing a respondent to compel evidence in a parallel private investigation would undermine the Commission’s duty to complete investigations within a year and to keep them confidential.....	14
Appellant Commission’s Proposition of Law No. 2:	16
<p style="margin-left: 40px;"><i>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.....</i></p>	
A. When the Commission has attempted conciliation, its jurisdiction to issue a complaint is complete.....	16
B. A failed conciliation does not preclude a successful settlement after discovery.....	18
C. Requiring the Commission to issue investigative subpoenas to respondents might extinguish a complainant’s due process rights.....	19

CONCLUSION20

CERTIFICATE OF SERVICEunnumbered

<i>Oklahoma Press Pub. Co. v. Walling</i> (1946), 327 U.S. 186.....	11
<i>Ohio Civ. Rights Comm'n v. Countrywide Home Loans, Inc.</i> (2003), 99 Ohio St. 3d 522.....	14
<i>Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n</i> (1981), 66 Ohio St. 2d 192.....	10
<i>Salazar v. Ohio Civil Rights Commission</i> (Sixth Dist. 1987) 39 Ohio App. 3d 26	14
<i>Securities and Exchange Comm'n v. Jerry T. O'Brien, Inc.</i> (1984), 467 U.S. 735.....	13
<i>State ex rel. American Legion Post 25 v. Ohio Civil Rights Commission (12th District)</i> , 2006 Ohio App. Lexis 5492, 2006-Ohio-5509.....	2
<i>State ex rel. Auglaize Mercer Comm. Action Comm'n, Inc. v. Ohio Civil Rights Comm'n</i> (1995) 73 Ohio St. 3d 723	10
<i>State ex rel. Civil Rights Comm'n v. Gunn</i> (9th Dist. 1975) 47 Ohio App. 2d 149.....	11
<i>State ex rel. Ohio Civ. Rights Commission v. Gunn</i> (1976), 45 Ohio St. 2d at 266.....	1, 12, 15
<i>State ex rel. Shriver v. Leech</i> (Tenn. 1981) 612 S.W.2d 454	13
<i>State ex rel. State Farm Mut. Auto. Ins. Co. v. Ohio Civil Rights Comm'n</i> (1983) 6 Ohio St. 3d 426.....	3, 17
<i>Town of Johnston v. Ryan</i> (R.I. 1984), 485 A.2d 1248	19, 20
<i>United States v. Calandra</i> (1974), 414 U.S. 338.....	11
<i>United States v. Morton Salt Co.</i> (1950), 338 U.S. 632.....	11
<i>Voiers Enterprises, Inc. v. Ohio Civ. Rights Comm'n</i> (4th Dist. 2004) 156 Ohio App. 3d 195, 2004-Ohio-738	16, 18
<i>Weiss v. Public Utilities Commission</i> , 90 Ohio St. 3d 15.....	7

<i>Oklahoma Press Pub. Co. v. Walling</i> (1946), 327 U.S. 186.....	11
<i>Ohio Civ. Rights Comm'n v. Countrywide Home Loans, Inc.</i> (2003), 99 Ohio St. 3d 522.....	14
<i>Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n</i> (1981), 66 Ohio St. 2d 192.....	10
<i>Salazar v. Ohio Civil Rights Commission</i> (Sixth Dist. 1987) 39 Ohio App. 3d 26	14
<i>Securities and Exchange Comm'n v. Jerry T. O'Brien, Inc.</i> (1984), 467 U.S. 735	13
<i>State ex rel. American Legion Post 25 v. Ohio Civil Rights Commission (12th District)</i> , 2006 Ohio App. Lexis 5492, 2006-Ohio-5509.....	2
<i>State ex rel. Auglaize Mercer Comm. Action Comm'n, Inc. v. Ohio Civil Rights Comm'n</i> (1995) 73 Ohio St. 3d 723	10
<i>State ex rel. Civil Rights Comm'n v. Gunn</i> (9th Dist. 1975) 47 Ohio App. 2d 149.....	11
<i>State ex rel. Ohio Civ. Rights Commission v. Gunn</i> (1976), 45 Ohio St. 2d at 266.....	1, 12, 15
<i>State ex rel. Shriver v. Leech</i> (Tenn. 1981) 612 S.W.2d 454	13
<i>State ex rel. State Farm Mut. Auto. Ins. Co. v. Ohio Civil Rights Comm'n</i> (1983) 6 Ohio St. 3d 426.....	3, 17
<i>Town of Johnston v. Ryan</i> (R.I. 1984), 485 A.2d 1248	19, 20
<i>United States v. Calandra</i> (1974), 414 U.S. 338	11
<i>United States v. Morton Salt Co.</i> (1950), 338 U.S. 632.....	11
<i>Voiers Enterprises, Inc. v. Ohio Civ. Rights Comm'n</i> (4th Dist. 2004) 156 Ohio App. 3d 195, 2004-Ohio-738	16, 18
<i>Weiss v. Public Utilities Commission</i> , 90 Ohio St. 3d 15.....	7

<i>West Virginia Human Rights Comm'n v. Garretson</i> (1996), 468 S.E.2d 733	19
<i>Westbrook v. Ohio Civil Rights Comm'n</i> (1985), 17 Ohio St. 3d 215.....	14
<i>Zimmerman Brush Co. v. Fair Emp. Practices Comm.</i> (1980), 411 N.E.2d 277.....	19

STATUTES

R.C. 119.....	10
R.C. 119.09.....	13
R. C. 3901.04(B)(2).....	13
R.C. 4112.....	<i>passim</i>
R.C. 4112.02.....	4
R.C. 4112.04.....	9
R.C. 4112.04(B).....	6
R.C. 4112.04(B)(3).....	9, 12
R.C. 4112.04(B)(3)(a).....	1, 9
R.C. 4112.04(B)(3)(b).....	<i>passim</i>
R.C. 4112.05.....	4
R.C. 4112.05(A).....	2, 17
R.C. 4112.05(B)(1).....	8
R.C. 4112.05(B)(2).....	<i>passim</i>
R.C. 4112.05(B)(3).....	8
R.C. 4112.05(B)(3)(a).....	8
R.C. 4112.05(B)(3)(b).....	8
R.C. 4112.04(B)(3)(d).....	8, 9, 10
R.C. 4112.05(B)(5).....	<i>passim</i>
R.C. 4112.05(B)(7).....	1, 14
R.C. 4112.06.....	17
R.C. 4112.06(B).....	8, 9
R.C. 4112.06(C).....	8, 9,
R.C. 4112.06(D).....	8, 9
R.C. 4371.....	13
R.C. 4731.22(F)(3).....	13

OTHER AUTHORITIES

Civ. R. 45(A) 7, 12
Crim. R. 17(A) 7, 11
Ohio Adm. Code 4112-3-12(A) 5, 6, 15
Ohio Adm. Code 4112-3-13(B) 1, 4, 5, 6
Ohio Adm. Code 4112-3-03(D) 1
Ohio Adm. Code 4112-3-07(E)(1)(j) 18
1959 Am. S.B. No. 10, 128 Ohio Laws 12 9
1969 Am. H.B. No. 432, 1969 Ohio Laws 2170 9
The New Fair Employment Law, 20 Ohio St. L.J. 570 (1959) 12

INTRODUCTION

The decision on appeal threatens the Ohio Civil Rights Commission's ability to enforce R.C. Chapter 4112—Ohio's anti-discrimination laws—and challenges its legislatively-granted authority to determine how best to accomplish this goal. The Ohio Civil Rights Commission ("Commission"), similar to many administrative enforcement agencies, carries out two distinct proceedings in performing its "statutory duty of eliminating unlawful discriminatory practices." *State ex rel. Ohio Civil Rights Comm'n v. Gunn* (1976), 45 Ohio St. 2d 262, 266. The proceedings—investigation and adjudication—serve different functions, and the parties involved have different roles and rights during each. *Genuine Parts Co. v. Federal Trade Comm'n* (5th Cir. 1971), 445 F.2d 1382, 1387. The court below misinterpreted these functions and rights.

Because of the need to make investigations quick and confidential, only the Commission is allowed by statute and rule to issue subpoenas during this stage of the proceedings. R.C. 4112.04(B)(3)(a); OAC 4112-3-13(B). The Commission's function during an investigation is to discover evidence to determine if there is sufficient cause to file an administrative complaint. A Commission investigation is similar to a grand jury investigation. The Commission has the power to subpoena witnesses and gather evidence, and the Commission is required to keep all results of the investigation confidential. R.C. 4112.05(B)(2). The Commission is also required by statute to complete its investigation quickly, as it must start an adjudication, if any, within a year. R.C. 4112.05(B)(7).

Once the investigation is complete, the Commission decides whether it is probable that there was or is unlawful discrimination by the respondent. If it is probable, the Commission can file an administrative charge against the respondent, including notice and an opportunity for a hearing. R.C. 4112.05(B)(5). The Commission then steps into the role of a litigant, and,

represented by the Attorney General, the Commission prosecutes the charge of discrimination against the respondent and on behalf of the complainant in an administrative action. R.C. 4112.05(B)(5), (6), (7). This starts the adjudicative process, and at this point, the respondent has all of the due process rights of a litigant, including the right to subpoena witnesses on his behalf. R.C. 4112.04 (B)(3)(b).

Thus, 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 incorrectly determined that the Commission had a clear legal duty to issue a subpoena at the request of Appellee American Legion Post 25 (“Legion”) during the Commission’s preliminary investigation into the Legion’s alleged discriminatory conduct. *State ex rel. American Legion Post 25 v. Ohio Civil Rights Comm’n* (12th Dist.), 2006 Ohio App. Lexis 5492, 2006-Ohio-5509, ¶¶ 37-60 (“App. Op.”). The lower court’s decision empowers a respondent to stall the preliminary investigation by requesting subpoenas for irrelevant information and potentially for the sole purpose of harassing witnesses.

The Twelfth District compounded its error by holding that conciliation, though attempted, was not completed because the Commission did not issue a subpoena the respondent demanded during the investigation. App. Op. ¶¶ 61-65. Before issuing an administrative complaint to begin the adjudication, the Commission must seek voluntary resolution through “informal methods of conference, conciliation, and persuasion.” R.C. 4112.05(B)(5). Conciliation is a process that occurs after the preliminary investigation and as a prerequisite to the Commission’s adjudicatory process of issuing a complaint and holding an administrative hearing. R.C.4112.05(A); (B)(4)(5); Ohio Adm. Code 4112-3-03(D). The courts have accorded great deference to the Commission regarding the conciliation process, and claimed problems with the Commission’s conciliation

efforts do not negate its conciliation attempt and destroy its jurisdiction; rather, they are issues that can be raised on appeal after the hearing. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Ohio Civil Rights Comm'n* (1983), 6 Ohio St. 3d 426, 427.

And not only does the dismissal disrupt the Commission's statutory duty to enforce the discrimination laws, but violates the due process rights of the complainant, Carol Van Slyke, who has the right to have her claim adjudicated. *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422.

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 reverse the appeals court's decision.

STATEMENT OF THE CASE AND FACTS

A. The Commission investigated a charge of discrimination filed by Carol Van Slyke against the Legion and attempted conciliation before issuing a complaint.

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

The Commission notified the Legion of the charge. App. Op. ¶ 3; Stmt. of Evid. at 2; Att. A; Att. C. In response, the Legion asserted that Van Slyke was fired because Director Butler received an anonymous letter that indicated that she had been convicted of a felony. Butler mistakenly concluded that serving alcohol, an integral aspect of Van Slyke's employment, was a violation of her probationary terms. App. Op. ¶¶ 3-4.

In the course of the investigation, the Legion's attorney asked the Commission's investigator to have the Commission issue a subpoena on the Legion's behalf to David Porter, Van Slyke's Adult Parole Authority officer. App. Op. ¶ 4; Stmt. of Evid. at 3; Att. D; Att. E. The attorney also asked the Commission to compel Porter to meet with him to discuss any conversations he had with Director Butler. *Id.*

The Commission refused to issue the subpoena on the Legion's behalf 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. at 3; Ohio Adm. Code 4112-3-13(B). Nevertheless, the Commission did subpoena Porter on its own behalf and gathered relevant evidence from him, which became part of the Commission's investigative file. 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 attorney asked to view the information Porter provided. *Id.* The Commission refused this request under R.C. 4112.05(B)(2). This statute requires the Commission to keep all information pertaining to a preliminary investigation confidential 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.*

When its investigation ended, the Commission determined that it was probable that the Legion retaliated against Van Slyke in violation of R.C. 4112.02. App. Op. ¶ 5; Stmt. of Evid. at 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. at 4; Att. H. The administrative case is currently pending before the Commission's Administrative Law Judge.

B. The Legion filed a mandamus action against the Commission and the Attorney General to compel the Commission to release confidential information.

The day before the Commission issued its probable cause determination, the Legion filed, in the Fayette County Court of Common Pleas, a complaint for a writ of mandamus against the Commission and its counsel, then-Attorney General Jim Petro. The mandamus complaint sought an order compelling those parties to issue an investigative subpoena on the Legion's behalf to Van Slyke's parole officer, Porter. App. Op. ¶ 8; Stmt. of Evid. at 4. The trial court dismissed, 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." That stage, the trial court noted, includes full discovery rights. Court of Common Pleas Entry, Jan. 4, 2006, at 2; see also App. Op. ¶ 10.

On appeal, the Twelfth District reversed the trial court's dismissal of the mandamus action. Stmt. of Evid. at 5; Notice of Appeal. The Twelfth District held that the Commission has a clear legal duty to issue investigative subpoenas to respondents and that the Legion had no adequate remedy at law when the Commission refused to do so. App. Op. ¶¶ 54-60. The court of appeals interpreted R.C. 4112.04(B)(3)(b), which allows a respondent to request subpoenas "to the same extent and subject to the same limitations as subpoenas issued by the [C]ommission," to mean the Commission has to issue subpoenas to respondents during both the investigatory and the formal adjudicatory hearing phase. App. Op. ¶¶ 40-46. The court below concluded that the Commission's rules authorizing a respondent to request subpoenas only *after* the Commission issues an administrative complaint—Ohio Adm.Code 4112-3-13(B) and 4112-3-12(A)—were inconsistent with the statute and did not have the force of law. App. Op. ¶¶ 47-53.

Finally, the lower court concluded: “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].” App. Op. ¶ 61-65. The lower court concluded that the Legion was entitled to a subpoena so it could be on “equal footing” with the Commission. The lower court found that the Commission did not “complete” conciliation and therefore did not have jurisdiction to issue a complaint, and therefore dismissed Van Slyke’s underlying action. App. Op. ¶ 61-65.

The Commission here appeals the Twelfth District’s judgment.

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) and 4112-3-13(B)—are consistent with the subpoena statute’s requirements.

By longstanding practice—as authorized by statute and rule—the Commission does not issue subpoenas to a respondent until after the investigation is over and an administrative complaint has been served. The Commission created rules to supplement and clarify the statute giving it subpoena power, R.C. 4112.04(B)(3)(b). The statute states: “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.” The rule at issue—Ohio Adm. Code 4112-3-13(B)—requires a respondent to include the “case caption and complaint number” in its request for a subpoena. Because there is no case caption or complaint number until after a complaint is filed, a respondent cannot ask for a subpoena until a complaint has been filed.

Similar requirements apply in the courts, where both civil and criminal subpoenas must include “the title of the action.” Civ. R. 45(A); Crim. R. 17(A).

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. The appeals court acknowledged that administrative rules normally have the force of law. Nonetheless, it held that the Commission had a clear legal duty to let the Legion subpoena evidence during the Commission’s investigation of it.

However, for a variety of reasons, the statute and rule do not conflict. A court must accord due deference to the Commission’s interpretation of its own statute. “Due 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. Public Utils. Comm’n.*, 90 Ohio St. 3d 15, 17-18, 2000-Ohio-5. See also, *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad* (2001), 92 Ohio St. 3d 282, 287, 2001-Ohio-190 (“A court must give due deference to the agency’s reasonable interpretation of the legislative scheme.”); *Chevron U.S.A., Inc. v. Echazabal* (2002), 536 U.S. 73; *Edelman v. Lynchburg College* (2002), 535 U.S. 106 (Upholding EEOC regulations).

Moreover, 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. Here, there is no “clear conflict” and the rule is not unreasonable.

A. Statutory language and history establish that the Commission’s subpoena rule does not conflict with the subpoena statute.

The statutory language and history establish that the Commission’s rule permitting respondent subpoenas only during the adjudicative phase of the process does not conflict with the statute.

Any person may file a charge with the Commission alleging discrimination. R.C. 4112.05(B)(1). The person filing the charge—typically the victim of the alleged practices—is the “charging party” or “complainant.” The person accused of the practice is deemed the “respondent.”

The Commission then conducts an investigation to determine whether it is probable that the accused has unlawfully discriminated. R.C. 4112.05(B)(2). The investigative stage is described in R.C. 4112.04(B)(3), which specifies that the Commission may “subpoena witnesses . . . relating to any matter under investigation.” When the Commission is “conducting a hearing or investigation, the commission shall have access at all reasonable times” to documents and individuals, may “take and record . . . testimony,” and may “issue subpoenas” to compel the production of documents or the “appearance of individuals.” R.C. 4112.04(B)(3)(a).

In contrast, Respondents can obtain subpoenas only if they relate to a matter “before the commission.” R.C. 4112.04(B)(3)(b), (d). A matter “before the commission” refers to the adjudicative stage of the Commission’s proceedings. R.C. 4112.05(B)(5); R.C. 4112.06(B), (C), (D). The statutory language pertaining to respondents says nothing about subpoenas for investigation. R.C. 4112.04(B)(3)(b) simply states that subpoenas shall be issued upon “written application by a respondent” without specifying when the application may be made, and R.C. 4112.04(B)(3)(d) allows respondent subpoenas only if they relate to a matter “before the commission”—that is, a matter that has reached the adjudicative stage of the Commission’s

proceedings. See also R.C. 4112.05(B)(5); R.C. 4112.06(B), (C), (D). When read *in pari materia*, these parts of Chapter 4112 show that the General Assembly did not intend respondents to issue subpoenas during the Commission's preliminary investigation.

The statutory language also indicates that respondents can issue subpoenas during an adjudication in front of the Commission as if it were an action in a trial court. R.C. 4112.04(B)(3)(b) states that upon the respondent's written application "the commission shall issue subpoenas in its name *to the same extent and subject to the same limitations* as subpoenas issued by the commission," which might imply that respondents are allowed to issue subpoenas whenever the Commission can, including during the investigation. But the phrase refers back to R.C. 4112.04(B)(3)(a), which lets the Commission issue subpoenas "*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 the court of common pleas." In other words, both the Commission and the respondent can issue subpoenas during a Commission adjudication as if it were a civil action in court.

The legislative history of R.C. 4112.04 further confirms that respondent subpoena requests are limited to the adjudicative stage. At the Commission's inception, R.C. 4112.04(B)(3) gave it the power to subpoena witnesses "relating to any matter under investigation or in question before the commission." 1959 Am. S.B. No. 10, 128 Ohio Laws 12. A 1969 amendment added R.C. 4112.04(B)(3)(a), which amplified the Commission's investigatory subpoena power. It also added R.C. 4112.04(B)(3)(b), giving respondents the ability to request subpoenas, and R.C. 4112.05(B)(3)(d), directing revocation of subpoenas that did not relate to a "matter before the commission." 1969 Am. H.B. No. 432, 1969 Ohio Laws 2170. Since the same act confirmed the Commission could *investigate* by means of subpoenas, allowed respondents to have subpoenas,

and directed the Commission to revoke subpoenas unrelated to matters being *adjudicated*, the limitation in R.C. 4112.05(B)(3)(d) must pertain to respondent subpoenas only.

All this shows that the subpoena statute was designed to ensure that respondents would be able to subpoena witnesses and evidence for the adjudicatory hearing. Without some provision in Chapter 4112 allowing it, respondents could not compel evidence and testimony for a Commission hearing, because the Administrative Procedure Act—which allows those parties served with notice of a hearing to request administrative subpoenas—generally does not apply to the Commission.¹ *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n* (1981), 66 Ohio St. 2d 192, 193-94. The 1969 amendment cured this defect, but provided for revocation of respondent subpoenas until a matter is before the Commission for hearing, all in a manner consistent with the Administrative Procedure Act.

B. Enforcement agencies typically do not allow the subjects of their scrutiny to compel testimony and evidence during the agency's investigation.

In its concern for placing the parties on an “equal footing,” the appeals court overlooked the fundamental and well-established difference between agency adjudication and agency investigation. The Commission and the respondent each have, and should have, the right to subpoena witnesses and evidence for the adjudicative hearing. But it is the Commission, not the respondent, that has the right and duty to enforce the state's anti-discrimination laws and investigate claimed violations. Like the subject of a grand jury's investigation, the respondent named in a charge of discrimination has no right to compel anyone's testimony until the Commission has concluded its investigation, served a complaint, and set the matter for hearing.

¹ The Commission's issuance and modification of final orders is subject to Chapter 119, but for all other purposes the Commission is not an “agency” subject to the Administrative Procedure Act. *State ex rel. Auglaize Mercer Comm. Action Comm'n, Inc. v. Ohio Civil Rights Comm'n* (1995), 73 Ohio St. 3d 723, 726-27.

Respondents are not entitled to subpoenas during the investigative stage of Commission action, because the function of an investigation—similar to the function of a grand jury—is to make a preliminary determination of probable cause, not to prove a charge against the respondent. Agency investigation and adjudication are “separate and distinct proceedings serving different functions and entitling parties to different rights under the due process clause.” *Genuine Parts Co. v. Federal Trade Comm’n* (5th Cir. 1971), 445 F. 2d 1382, 1387.

An agency investigation’s function “is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the [agency’s] judgment, the facts thus discovered should justify doing so.” *Oklahoma Press Pub. Co. v. Walling* (1946), 327 U.S. 186, 201. The Commission’s investigatory power is thus “analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.” *State ex rel. Civil Rights Comm’n v. Gunn* (9th Dist. 1975), 47 Ohio App. 2d 149, 152, quoting *United States v. Morton Salt Co.* (1950), 338 U.S. 632, 642-43; see also *In re Coastal States Petroleum, Inc.* (1972), 32 Ohio St. 2d 81, 84 (quoting *Morton Salt* to explain subpoena power of Division of Securities). And while a grand jury can subpoena testimony or other evidence at any time, *United States v. Calandra* (1974), 414 U.S. 338, 343-44, the subject of the investigation has no right to subpoenas unless and until a criminal action has been filed against him. Crim. R. 17(A).

Adjudication, by contrast, occurs only after the agency has decided the evidence uncovered in its investigation is enough to merit an enforcement action. It is designed to test the evidence supporting an administrative complaint in an adversary proceeding on the record, where “due process rights designed to insure the fairness of such a determination come to bear.” *Genuine*

Parts, 445 F.2d at 1388. The purpose of that adversary hearing, of course, is to determine whether unlawful conduct is not merely probable but proven by sufficient evidence to warrant administrative sanction. Cf. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.* (1986), 477 U.S. 619, 632 (Stevens, J., concurring) (listing charges for which probable cause had been found that were dismissed after hearing).

The Commission is the primary enforcer of Ohio's laws against discrimination, and the respondents it investigates do not and should not have identical powers during the investigation. Unlike respondents, the Commission has a "statutory duty of eliminating unlawful discriminatory practices." *State ex rel. Ohio Civil Rights Comm'n v. Gunn* (1976), 45 Ohio St. 2d 262, 266. Prompt investigations, unfettered by the delaying tactics of unwilling parties, are critical to the Commission's fulfillment of that duty. *Id.* Since its inception, the Commission has been empowered to investigate potential violations of the law it is charged with enforcing and, if it finds evidence of an unlawful practice, to take further actions that may culminate in an administrative hearing and a final, judicially-enforceable order. Joseph B. Robison, *The New Fair Employment Law*, 20 Ohio St. L.J. 570, 570-73 (1959). This model of administrative enforcement through investigation, prosecution, and adjudication is typical of many state and federal agencies. See *Miller Properties v. Ohio Civil Rights Comm.* (10th Dist. 1972), 34 Ohio App. 2d 113, 116-17.

Because the Commission is a law enforcement agency, it necessarily stands on footing different from the subjects of its investigations. If the Commission were an ordinary civil litigant, it would not have subpoena powers under Civil Rule 45(A) until after suit is filed. Unlike an ordinary litigant, however, the Commission is specifically empowered to compel evidence by subpoena in investigations before filing an administrative lawsuit. R.C. 4112.04(B)(3).

This investigatory power is typical among Ohio's enforcement agencies. As this Court has explained, "An administrative agency charged with regulating and enforcing compliance with certain laws must be able to discover evidence in order to determine whether a law is being violated. To achieve this purpose, the scope of the agency's investigative power should be construed broadly, within statutory constraints." *Harris v. Stutzman* (1989), 42 Ohio St. 3d 13, 14. The superintendent of insurance, for example, can subpoena witnesses "to testify in relation to any matter which, by the laws of this state relating to insurance, is the subject of inquiry and investigation." R.C. 3901.04(B)(2). Similarly, the state medical board can subpoena witnesses and documents when "investigating a possible violation of a possible violation" of Chapter 4731 or the board's rules. R.C. 4731.22(F)(3). In each instance, however, the subject of the investigation does not have subpoena power until adjudication has begun, when any party entitled to notice of the hearing may use agency subpoenas to compel witness testimony or obtain documents. R.C. 119.09.

Not surprisingly, a subject of agency scrutiny might want to forestall an enforcement action by making the investigation an adversary proceeding complete with discovery, cross-examination, and other protections common to trials. But courts have long perceived that "the investigative process could be completely disrupted" if it became adversarial, "plagued by the injection of collateral issues that would make the investigation interminable" and would "stifle the agency in its gathering of facts." *Hannah v. Larche* (1960), 363 U.S. 420, 443-44. Accordingly, they have rebuffed efforts by the subjects of investigation, *during the investigation itself*, to monitor the agency's activities or introduce evidence or contest the agency's findings. *Securities and Exchange Comm'n v. Jerry T. O'Brien, Inc.* (1984), 467 U.S. 735, 742; *Genuine Parts*, 445 F.2d at 1387-88; *State ex rel. Shriver v. Leech* (Tenn. 1981), 612 S.W.2d 454, 457-58.

They likewise have refused to allow complainants to intrude into the agency's investigative and fact-finding process. *Luckett v. Jett* (7th Cir. 1992), 966 F.2d 209, 214-15; *Jabbari v. The Human Rights Commission* (Ill. App. 1988), 527 N.E.2d 480, 482-84; *Salazar v. Ohio Civil Rights Commission* (Sixth Dist. 1987), 39 Ohio App.3d 26, 29-31.

This Court should similarly prevent the Commission's investigatory process from disruption.

C. Allowing a respondent to compel evidence in a parallel private investigation would undermine the Commission's duty to complete investigations within a year and to keep them confidential.

Commission investigations are subject to two important limitations, both of which are threatened by the lower court's holding. First, investigations must be completed within one year from the date a charge is filed. Second, they must be kept confidential until the time a finding of probable or no probable cause is made. R.C. 4112.05(B)(7); R.C. 4112.05(B)(2). By empowering respondents to compel investigative subpoenas from the Commission, the lower court has hampered—and perhaps in some cases precluded—the Commission's ability to comply with both statutory requirements.

First, prompt investigations, unfettered by the delaying tactics of unwilling parties, are critical to the Commission's ability to comply with the mandatory statute requiring the Commission to issue complaints within one year from the date a charge is filed. R.C. 4112.05(B)(7). *Ohio Civ. Rights Comm'n v. Countrywide Home Loans, Inc.* (2003), 99 Ohio St. 3d 522, 2003-Ohio-4358. The Commission therefore must complete both investigation and conciliation phases within this one-year time period. *Id.* The Commission is able to operate within this limitation because it has full control of the process. The Commission can decide how much investigation is sufficient in a given case, and has discretion to determine whether it will investigate at all. *Westbrook v. Ohio Civil Rights Comm'n* (1985), 17 Ohio St. 3d 215

Recognizing these statutory time constraints and the prospect of tactical delay by a respondent, this Court in *Gunn* decided that summary judicial enforcement of the Commission's investigatory subpoenas was necessary. *State ex rel. Ohio Civ. Rights Comm'n. v. Gunn*, 45 Ohio St. 2d at 266 n.3.

In contrast, the Twelfth District has directly invited respondents to impede civil rights investigations in Ohio by slowing and interfering with the fact-finding process. By holding that a respondent has a right to an investigative subpoena, the lower court may prevent the Commission from promptly investigating discrimination complaints.

Second, the Commission investigations must be confidential to protect both complainants and respondents. 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. Specifically, the Commission must "retain as confidential all information . . . obtained as a result of . . . a preliminary investigation." 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. The Commission's subpoena rule, by contrast, ensures this information remains confidential during the investigation, as R.C. 4112.05(B)(2) requires, but through Ohio Adm. Code 4112-3-12(A) becomes available for the respondent's defense through the normal civil discovery process after the complaint is filed.²

² As the Commission argued in the court below, these rules provide an adequate remedy at law, making mandamus inappropriate.

In short, the lower court's reading of R.C. 4112.04(B)(3)(b) erodes the General Assembly's intent that Commission investigations be quick, neutral and confidential. Moreover, the Commission's subpoena rule does not "clear[ly] conflict" with the subpoena statute, and the rule is reasonable. The Commission's interpretation of its own statute and rule should be respected, and the lower court reversed.

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.

A. When the Commission has attempted conciliation, its jurisdiction to issue a complaint is complete.

Failure to issue a subpoena on behalf of a respondent is irrelevant to conciliation, and does not amount to a failure to engage in conciliation. Nor is an allegedly inadequate conciliation effort a jurisdictional flaw. R.C. 4112.05(A) requires the Commission to "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. The statute governing Commission procedures presumes that all 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).

In short, conciliation is intended to induce compliance with the law, not to settle a case. *Voiers Enterprises, Inc. v. Ohio Civ. Rights Comm'n* (4th Dist. 2004), 156 Ohio App. 3d 195, 2004-Ohio-738, ¶ 30 ("[T]he primary focus of the conciliation proceedings is to eliminate the alleged discriminatory practice, not necessarily to settle the existing dispute between the complainant and respondent.").

This Court has rebuffed previous attempts to attack the adequacy of a conciliation effort or the investigation preceding it, holding that an allegedly inadequate conciliation effort was not a jurisdictional flaw. In *State Farm*, the Commission assumed work on a pending EEOC charge and advised State Farm that its offer during the EEOC's conciliation was unacceptable. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Ohio Civil Rights Comm'n* (1983), 6 Ohio St. 3d 426, 427. The respondent made no new offer, so the Commission issued an administrative complaint. State Farm then sued in prohibition, alleging the Commission had not attempted conciliation. *Id.* at 427. But 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 went on to explain that: "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 . . . [issues that] are properly raised on appeal . . . pursuant to R.C. 4112.06." *Id.*

The Legion and the court below implicitly revive the unsuccessful arguments in *State Farm*. As the court acknowledged, the Commission did make conciliation efforts, and those efforts proved fruitless. App. Op. ¶¶ 26-27. But the court held 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 conciliation efforts do not negate its conciliation attempt and destroy its jurisdiction; rather, they are issues that can be raised on appeal after the hearing.

The lower court's decision also potentially opens the door to substantive scrutiny of the Commission's conciliation process. 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 has already been rejected under 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 Cent. 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.”). The Court should likewise reject that type of scrutiny under Ohio law.

The Legion does not dispute that the Commission attempted to conciliate this matter. Its wish to issue subpoenas is irrelevant to the success or failure of that conciliation. The Commission retains jurisdiction and should be allowed to proceed with adjudication.

B. A failed conciliation does not preclude a successful settlement after discovery.

As explained above, conciliation is a setting for “informal methods of conference . . . and persuasion.” R.C. 4112.05(B)(4). The focus of conciliation “is to eliminate the alleged discriminatory practice, not necessarily to settle the existing dispute between the complainant and the respondent.” *Voiers Enterprises*, 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).

If the informal conference does not result in a conciliation agreement, a complaint is served and the respondent can begin discovery and subpoena witnesses and evidence. As in a civil suit, the administrative law judge normally will hold a pre-hearing conference to address procedural issues and the “possibility of settlement.” Ohio Adm. Code 4112-3-07(E)(1)(j). Accordingly, a respondent can fully discover the evidence against it, and decide whether or not to settle, before the charge proceeds to hearing, regardless of the success or failure of conciliation.

C. Requiring the Commission to issue investigative subpoenas to respondents might extinguish a complainant's due process rights.

Finally, even assuming, *arguendo*, that R.C. 4112.04(B)(3)(b) requires the Commission to issue a subpoena on behalf of a respondent, dismissal for failure to issue the subpoena—exactly what the Twelfth District did here—violates the due process rights of the complainant. Once a state legislature confers a property interest on a citizen, it may not constitutionally deprive them of this interest without appropriate procedural safeguards. *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422. Specifically, the *Logan* Court determined that the cause of action of an alleged victim of discrimination could not be terminated because the state agency, vested with authority to enforce anti-discrimination law, failed to comply with a statutorily-mandated time constraint. *Id.* at 434.

In *Logan*, the complainant filed a charge with the Illinois Commission, and a Commission employee inadvertently scheduled the fact-finding conference five days past the statutory deadline. The respondent employer filed in prohibition and the Illinois Supreme Court granted the writ, finding the statute's language mandatory and holding that the Commission's failure to comply with the statute deprived the Commission of jurisdiction. *Zimmerman Brush Co. v. Fair Emp. Practices Comm.* (1980), 411 N.E. 2d 277, 282-83. The U.S. Supreme Court reversed. The Court found Logan's right to use the State's adjudicatory procedure to be a property right protected by the Fourteenth Amendment which could not be destroyed without due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 429.

Other courts have followed the *Logan* reasoning. See *Town of Johnston v. Ryan* (R.I. 1984), 485 A.2d 1248 (lower court violated Ryan's due process rights by dismissing the case when the Commission failed to initiate proceedings within a year) and *West Virginia Human Rights Comm'n v. Garretson* (1996), 468 S.E. 2d 733 (state human rights commission's non-

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compliance with statute requiring complaints be filed within thirty days of election was not a basis to dismiss a valid discrimination complaint).

The analyses used by the *Logan*, *Johnston* and *Garretson* Courts are applicable in this case. The General Assembly created the Ohio Laws Against Discrimination and vested discrimination victims, such as the complainant here, Carol Van Slyke, a property interest in having their charges examined, and if necessary, adjudicated. If a case is dismissed because of the failure by the Commission, not the complainant, to meet a statutory requirement, the complainant's due process rights will be violated.

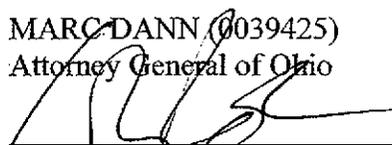
Therefore, even if the Commission is required to issue investigatory subpoenas on behalf of respondents, the Twelfth District's dismissal of Carol Van Slyke's case should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court below.

Respectfully submitted,

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Attorney General of Ohio



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Respondents-Appellants, The Ohio Civil Rights Commission and Ohio Attorney General Marc Dann, was served by U.S. mail this 15th day of May, 2007, upon the following counsel:

James A. Kiger, Esq.
Kiger & Kiger Lawyers
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Washington Court House, Ohio 43160

Counsel for Relator-Appellee
American Legion Post 25



Elise Porter
Acting Solicitor General

In the
Supreme Court of Ohio

STATE OF OHIO EX REL,
AMERICAN LEGION POST 25,

Relator-Appellee,

v.

OHIO CIVIL RIGHTS COMMISSION and
OHIO ATTORNEY GENERAL
JIM PETRO,

Respondents-Appellants.

Case No.

06-2263

On Appeal from the
Fayette County Court of Appeals,
Twelfth Appellate District

Court of Appeals Case
No. CA2006-01-006

**NOTICE OF APPEAL OF RESPONDENTS-APPELLANTS,
THE OHIO CIVIL RIGHTS COMMISSION AND
OHIO ATTORNEY GENERAL JIM PETRO**

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FILED

DEC 07 2006

**MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO**

**NOTICE OF APPEAL OF RESPONDENTS- APPELLANTS,
THE OHIO CIVIL RIGHTS COMMISSION AND
OHIO ATTORNEY GENERAL JIM PETRO**

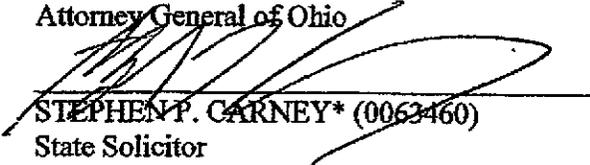
Respondents-Appellants, the Ohio Civil Rights Commission and Ohio Attorney General Jim Petro, give notice of their discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II(A)(3), from a Judgment Entry of the Fayette County Court of Appeals, Twelfth Appellate District, journalized in Case No. CA2006-01-006. That Judgment Entry was stamped "Filed" on October 23, 2006, and reads in whole:

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and remanded to the trial court for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment entry shall constitute the mandate pursuant to App.R. 27.

The Judgment Entry is attached to this Notice as Exhibit 1. Reasons for this discretionary appeal, including the great public and general interest involved in this case, are fully set forth in the accompanying Memorandum in Support of Jurisdiction.

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Attorney General of Ohio



STEPHEN P. CARNEY* (0063460)
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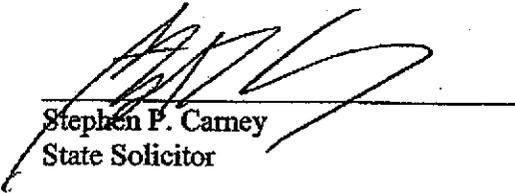
Counsel for Respondents-Appellants
Ohio Civil Rights Commission and
Ohio Attorney General Jim Petro

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Respondents-Appellants, the Ohio Civil Rights Commission and Ohio Attorney General Jim Petro, was served by U.S. mail this 7th day of December, 2006, upon the following counsel:

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Washington Court House, Ohio 43160

Counsel for Relator-Appellee
American Legion Post 25



Stephen F. Carney
State Solicitor

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

FILED
COURT OF APPEALS
FAYETTE CO., OHIO

OCT. 29 2008

Henry L. ...
CLERK OF COURTS

STATE OF OHIO ex rel. AMERICAN
LEGION POST 25,

Relator-Appellant,

CASE NO. CA2006-01-006

JUDGMENT ENTRY

-vs-

OHIO CIVIL RIGHTS COMMISSION and
JIM PETRO as Atty. General,

Respondents-Appellees.

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and remanded to the trial court for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

Stephen W. Powell

Stephen W. Powell, Presiding Judge

James E. Walsh

James E. Walsh, Judge

William W. Young

William W. Young, Judge



IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO ex rel. AMERICAN
LEGION POST 25,

Relator-Appellant,

-vs-

OHIO CIVIL RIGHTS COMMISSION and
JIM PETRO as Atty. General,

Respondents-Appellees.

CASE NO. CA2006-01-006

OPINION
10/23/2006

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

Kiger & Kiger Lawyers, James A. Kiger, 132 South Main Street, Washington C. H., OH 43160,
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Cincinnati, OH 45202, for respondents-appellees

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.



{12} 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.

{13} 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.

{14} 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.

{15} 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).

{16} 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.

{17} 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)."

{18} 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.

{19} 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.

{110} 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, conciliation, 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 *Warden 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

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.

{143} 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.

{144} 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."

{145} 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 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.

{¶150} 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).

{¶151} 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).

{¶152} 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

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 an 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. 4112.04(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>