ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE *ex rel.* **OHIO CIVIL RIGHTS COMMISSION, *et al.*** **Relators,** **v.** **THE HON. RICHARD J. McMONAGLE,** **Respondent** **v.** **GMS MANAGEMENT CO., INC.** **Intervenor**	**CASE NO. 14-0295** **Original Action in Prohibition**

FILED
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SUPREME COURT OF OHIO

Motion Of Intervenor GMS Management Co., Inc. For Judgment on the Pleadings, Civ.R. 12(C)

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I. Issue presented.

This case is not about discrimination. It is about the system of checks and balances.

Distilled to its basics the simple issue presented is whether a common pleas judge has the jurisdiction to prohibit by injunction a state commission from conducting an investigation which the commission initiated upon its receipt of a written charge signed "under penalty of perjury," as purportedly permitted by an administrative rule promulgated by said commission, §4112-3-01(B)(2), but where: 1) the statute which enumerates the powers and duties of said commission explicitly limit its powers so that it is only empowered to "Receive, investigate, and pass upon written charges made under oath ...," R.C. 4112.04(A)(6); 2) the statute which allows for aggrieved parties to file such charges with the commission also requires that those charges "shall be in writing and under oath," R.C. 4112.05(B)(1); 3) the statute which authorizes the institution of a preliminary investigation is dependent upon the receipt of such a charge; and where 4) the General Assembly reinforced the requirement that such charges be "under oath" administered by another, by authorizing all relevant employees of said commission to administer such oaths. R.C. 4112.09.

Given this Court's repeated pronouncements that a writing signed "under penalty of perjury" is not the equivalent of a writing signed "under oath," *Toledo Bar Ass'n v. Neller*, 102 Ohio St. 3d 1234, 1236-1237 (2004), and *Lisboa v. Kleinman* (*In re Donnelly*), 134 Ohio St. 3d 1221 (2011), given further the fact that the state, which by definition includes said state commission, has successfully argued that same principle, see, *e.g.*, *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279 (Cuyahoga County 1973), and given further that an administrative rule cannot conflict with a statute, *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm'n*, 117 Ohio St. 3d 441 (2008), the answer to the issue presented is clear at the

outset. On the one hand, the common pleas judge clearly has such jurisdiction. On the other hand, the commission patently and unambiguously lacks jurisdiction to "receive, investigation, or pass upon" any charge not made in writing "under oath." Intervenor is thus entitled to Judgment on the Pleadings.

II. Introduction.

In determining this Motion for Judgment on the Pleadings this Court may consider the complaint, answer, and for all purposes the instruments attached thereto. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 569-570 (1996) and Civ.R. 10(C). From those pleadings the following appear.

Intervenor, plaintiff in the underlying litigation ("***Litigation***") over which Respondent presides, manages approximately 3,000 apartment dwellings in Ohio, including the 360 unit apartment complex at which one Mr. Fasanaro ("***Fasanaro***") applied for occupancy. Intervenor is thus subject to the lawful application of R.C. Chap. 4112.

Relator Ohio Civil Rights Commission (the "***OCRC***"), a defendant in the Litigation, was created by R.C. 4112.03, with the jurisdiction granted by R.C. 4112.04, among which is the limited jurisdiction to "**Receive, investigate, and pass upon <u>written charges made under oath</u> of <u>unlawful discriminatory practices</u>.**"[1] R.C. 4112.04(A)(6). [Emphasis supplied.] In further recognition that the OCRC's jurisdiction is dependent upon a charge "under oath" the General Assembly enacted R.C. 4112.09 by which "The executive director, compliance officer, each field investigator, and each regional director of the Ohio civil rights commission ... may administer oaths, take affidavits, [sic] and acknowledgements, and attest the execution of any instrument in writing." In fact, the names of those so empowered to administer oaths must be recorded in the

[1] "Unlawful discriminatory practices' means any act prohibited by section 4112.02, 4112.021, or 4112.022 of the Revised Code." R.C. 4112.01(A)(8).

secretary of state's office which recordation must be canceled and replaced "whenever the occupant of any such office changes." *Id.*

With the knowledge of the immediate availability of those so authorized to administer oaths, the General Assembly further provided that: "Any person may file a charge with the commission alleging that another person has engaged or is engaging in an unlawful discriminatory practice" provided that "the charge shall be in writing and under oath." R.C. 4112.05(B)(1). Thereafter, the OCRC may initiate a preliminary investigation to determine whether it is probable that an unlawful discriminatory practice has occurred. If it is found probable a complaint is initiated and scheduled for mandatory conciliation. If not successfully conciliated either party involved may elect to have the complaint adjudicated in common pleas court. R.C. §§ 4112.05(B)(1) & 4112.051(A)(2).

Either in the alternative to, or simultaneous with, the foregoing administrative investigation, an aggrieved party may commence an action in common pleas court alleging an unlawful discriminatory practice. R.C. §§4112.051 and 4112.99.

Relator Boggs, a defendant in the Litigation, is the investigator assigned by the OCRC to investigate Fasanaro's charge.

Fasanaro, upon denial of his occupancy application, submitted to Respondent the OCRC a written "charge" signed only under "penalty of perjury." In the process of said investigation Relators subjected Intervenor to any number of notices, procedures, and burdens. None of said notices, procedures, and burdens were lawful because the jurisdiction of the OCRC can only be invoked by charges made in writing under oath.

By its enactment and adoption of Ohio Adm. Code ("***OAC***") §4112-3-01(B)(2),[2] the OCRC purported to lessen the dignity of the signature required on a charge from "under oath," as required by R.C. §§4112.04(A)(6), 4112.05(B)(2) and 4112.05(B)(2), to a signature "under penalty of perjury." OAC §4112-3-01(B)(2) is ineffective as being in direct conflict with said statutes.

Time after time the state of Ohio has successfully argued that statements signed "under penalty of perjury" are not signed "under oath."[3] Time after time this Court and others have consistently ruled that statements signed "under penalty of perjury" are not signed "under oath."[4]

The "charge" filed by Fasanaro, having been signed "under penalty of perjury," albeit ostensibly permitted by OAC §4112-3-01(B)(2) was insufficient to invoke the preliminary investigation by Relators. As a matter of law, Relator the OCRC did not even have the jurisdiction to "receive" a charge not signed under oath. R.C. 4112.04(A)(6).

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[2] "For charges that allege a violation … of division (H) of section 4112.02 of the Revised Code, the charge shall be in writing, the original being signed and affirmed by the complainant. The affirmation shall state: '**I declare under penalty of perjury that the foregoing is true and correct.**'" OAC §4112-3-01(B)(2). [Emphasis supplied.]

[3] See, *e.g.*, *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279 (Cuyahoga County 1973) (letter to Department of Taxation signed "Under the penalties of perjury" held not to have been signed under oath and, therefore, ***insufficient to invoke the jurisdiction of the Department***); *Watley v. Ohio State Adult Parole Auth.*, 2006-Ohio-2745, NaN-P12 (Franklin County June 1, 2006) (citing *Toledo Bar Assn. v. Neller*, 102 Ohio St. 3d 1234, 2004 Ohio 2895, at P1, 809 N.E.2d 1152, court held that where affidavit, *i.e.*, declaration under oath, is required, but a statement is instead signed under penalty of perjury pursuant to 28 USC 1746, it is not a statement made "under oath" thereby depriving the court of jurisdiction); and *Ohio ex rel. Trawick v. Trumbull Corr. Inst.*, 2012-Ohio-5839, NaN-P16 (Trumbull County Dec. 10, 2012) (citing *Toledo Bar Assn. v. Neller*, "only a written declaration made under oath before a proper officer qualifies as an 'affidavit,'" *i.e.*, a statement under oath).

[4] *Toledo Bar Ass'n v. Neller*, 102 Ohio St. 3d 1234, 1236, 2004-Ohio-2895, ¶22. An affidavit is a "written declaration under oath," R.C. 2319.02, not a written declaration under signed under penalty of perjury.

Intervenor originally cooperated in the illegal and ultra vires investigation through its further initial mediation process which process itself further violates R.C. Chap. 4112 and the relevant provisions of the Ohio Administrative Code. Jurisdiction cannot be created by Intervenor's participation, and it is sometimes more economical to submit to an unwarranted governmental intrusion than it is to fight it. However, when Intervenor received a purported subpoena seeking, inter alia, "a list of all three hundred sixty (360) current residents including complete name, address, phone number and move in date," {¶34a},[5] which further imposed upon Intervenor the duty to allow a deposition to be conducted within its business premises, Intervenor filed the Litigation. {¶41 (i – vii)} Due to the fact that Intervenor had previously been subjected to similar illegal investigations by the OCRC, and Intervenor continues to manage approximately 3,000 suites in Ohio, {¶42}, Intervenor sought injunctive relief to enjoin the illegal and ultra vires investigation, and declaratory relief as to the lawfulness and propriety of other investigatory steps and procedures undertaken by Relators during either the Fasanaro or any future lawful investigations. Given that the civil penalties for the unlawful discriminatory practice of housing discrimination far exceed those for criminal violation of the same laws, which criminal violations involve more egregious conduct, Intervenor is entitled to such declaratory relief under all circumstances.

Respondent, a judge of the common pleas court, a tribunal of general jurisdiction capable of determining his own jurisdiction, overruled Relators' motion to dismiss. As here, Relators contended that Respondent patently and unambiguously lacked subject matter jurisdiction because the Litigation by-passed a "special statutory proceeding" then pending within the jurisdiction of the OCRC.

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[5] Denotes paragraph number in that which Relators refer to as Intervenor's "complaint." Complaint Exhibit 1 to Exhibit A.

Given that it is empowered only to **receive, investigate, or pass upon** charges made in writing under oath, it is the OCRC which patently and unambiguously lacks subject matter jurisdiction. Moreover, as the name of the "special statutory proceeding" deference rule ("***Deference Rule***") implies, a prerequisite to its invocation is the existence of some adjudicatory proceeding which is patently absent during the current illegal and ultra vires investigatory stage. R.C. 4112.05(B)(2). Ironically, even were this matter in the adjudicatory stage the OCRC's jurisdiction over such adjudications is not exclusive. Relators can thus prove no set of facts in support of their claim that would entitle them to relief. In fact, that which is presented is a matter of law. Accordingly, Intervenor is entitled to Judgment on the Pleadings. Relators' conduct is not above the scrutiny of the common pleas court.

III. Intervenor is entitled to Judgment on the Pleadings.

A. Relators' affidavit is facially incorrect and must be stricken as deficient.

Despite Relators' affidavit, complaint Exhibit A, required by S. Ct. Prac. R. 12.02, that which is attached to said affidavit as Exhibit 1, which Exhibit contains neither Respondent's name a judge nor the common pleas court case number assigned, is not that to which affiant has sworn it is, namely: Intervenor's "amended complaint" filed on January 20, 2014. It is instead an unfiled courtesy copy of Intervenor's original complaint, albeit without its incorporated and attached exhibits which are a part thereof for all purposes per Civ.R. 10(C).

Intervenor's First Amended Complaint, which supersedes and renders Intervenor's original complaint a nullity, is attached to Intervenor's proposed Answer herein. While the exhibits to the original complaint were incorporated by reference into said First Amended Complaint by reference, {¶4} and fn. 1, p. 2, they are attached to Intervenor's Answer.

In addition to being facially incorrect Relators' affidavit for the same reason fails to specify the details of the claim. Finally, said affidavit fails to affirmatively state that affiant is competent to testify to all matters stated in the affidavit. S. Ct. Prac. R. 12.02(B)(1) and (B)(2). See, also, *State ex rel. Sekermestrovich v. City of Akron*, 90 Ohio St. 3d 536, 538, 740 N.E.2d 252 (2001).

While a true copy of the First Amended Complaint with exhibits is attached to Intervenor's Answer, the affidavit must be stricken and Judgment on the Pleadings must be rendered in Intervenor's favor.

B. Even considering Relators' affidavit Intervenor is entitled to Judgment on the Pleadings.

Relators now bring suit against Respondent seeking a writ of prohibition. To be entitled to the writ, Relators must establish that (1) Respondent is about to exercise quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Eshleman v. Fornshell*, 125 Ohio St. 3d 1, 3 (2010). For want of allegations of elements (2) and (3) Relators' complaint fails to state a claim.

The first element must be conceded. Respondent is exercising his judicial power over the underlying litigation. That said, Intervenor is nonetheless entitled to Judgment on the Pleadings pursuant to Civ.R. 12(C) and/or a dismissal for failure to state a claim upon which relief may be granted. See, Civ.R. 12(B)(6) & 12(H)(2).

The four corners of Relators' pleading (complaint) includes "for all purposes" the attachments thereto including, without limitation, Intervenor's First Amended Complaint (hereinafter, simply Intervenor's complaint) in the Litigation, albeit inappropriately without the exhibits thereto. Civ.R. 10(C) and S. Ct. Prac. R. 12.02(B). See, Exhibit 1 of Relators'

complaint Exhibit A. Taking all allegations of Relators' complaint as true, Fasanaro filed a charge with Relator OCRC alleging that Intervenor, a real property management company, rejected his housing application due, in part, to his disability. Based upon said charge Relator OCRC began an investigation of Intervenor in the process of which Relator OCRC sought documentation from Intervenor. Said investigation is ongoing. (All of the foregoing alleged in Relators' complaint, ¶5).

As for Intervenor's complaint, Intervenor alleged as plaintiff in the Litigation that Fasanaro's charge was "***not under oath***" [sic], ¶4, "Fasanaro's charge was facially defective for want of the required oath," ¶5, a "'charge shall be in writing and under oath,' §4112.05(B)(1)," ¶10, upon receiving a charge the commission may initiate a preliminary investigation, ¶11, oaths can be administered by virtually every employee of the OCRC, ¶14, OAC §4112-3-01(B)(2) cannot conflict with R.C. §§4112.04(A)(6), 4112.05(B)(1), or 4112.05(B)(2), ¶¶12-13, 17, and Intervenor's complaint further asked Respondent to take judicial notice of the cited provisions of the Ohio Administrative Code, ¶16, including the aforesaid OAC §4112-3-01(B)(2), which substitutes for an oath a mere declaration that a charge be signed "... under penalty of perjury," a strictly federal equivalent to an oath pursuant to 28 USC §1746, ¶18.

With the foregoing allegations taken as true, Relators cannot prevail because they cannot muster any set of facts by which to overcome the conclusion that **for want of a charge signed "under oath" Relators patently and unambiguously lack jurisdiction over the Fasanaro matter**. "Thus, Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 569-570 (1996).

IV. Summary of Intervenor's argument.

As a creature of statute the OCRC only has the powers conferred by statute. Thus, it can only "**Receive, investigate, and pass upon <u>written charges made under oath</u>** of **<u>unlawful discriminatory practices</u>**." R.C. 4112.04(A)(6)(with emphasis added). Concomitantly, "[a]ny person may file a charge with the commission" but "the charge shall be in writing and under oath." R.C. 4112.05(B)(1).

Fasanaro's charge, albeit deficient in other subjective regards, is objectively deficient because a signature "under penalty of perjury" is not a signature under oath. In the absence of a written charge under oath no jurisdiction is conferred upon the OCRC.[6] *Powell v. Ohio Civil Rights Com.*, 51 Ohio App. 2d 197 (Franklin County 1976), syllabus. See, also, *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64-65 (1984) (a charge under oath is a jurisdictional prerequisite to the issuance of a subpoena; investigative authority is tied to charges filed with the Commission). That Intervenor did not immediately object immediately is of no consequence. Lack of jurisdiction cannot be conferred by stipulation or waived. See, *e.g.*, *State ex rel. Sugardale Foods, Inc. v. Industrial Comm'n*, 90 Ohio St. 3d 383, 385-386 (2000).

While the dignity of Fasanaro's signature, *i.e.*, "under penalty of perjury" appears to comply with OAC §4112-3-01(B)(2), it patently and unambiguously not "under oath." It is a given that the OCRC cannot by means of an administrative rule vary the jurisdictional requirement of an oath required by the General Assembly. See, *e.g.*, *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm'n*, 117 Ohio St. 3d 441 (2008). The substitution of a lesser

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[6] "The jurisdiction of such officials and tribunals must be invoked in the manner prescribed by statute, and their proceedings must be in accordance with valid statutory requirements. They * * * can not dispense with the essential forms of procedure which condition their statutory powers, or have been prescribed for the purpose of investing them with power to act." *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279-280 (Cuyahoga County 1973).

dignity for the signature on a charge alleging an unlawful discriminatory practice of housing discrimination impermissibly conflicts with said statutes. *Id.*

To be clear: "it is no small thing to be called upon to respond" to discrimination charges. *Edelman v. Lynchburg College*, 535 U.S. 106, 115 (2002). Unlike the OCRC which can only **receive** written charges made under oath, the EEOC nonetheless requires a "verified charge before the agency will require a response from the employer." *Id.*, fn. 9.

In light of the patent and unambiguous lack of jurisdiction, Intervenor filed suit for injunctive and declaratory relief. That case is pending before Respondent. Relators rely on the Deference Rule to support their claim that it is instead Respondent, who patently and unambiguously lacks jurisdiction to proceed with the Litigation. By that rule "it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve ***matters committed to special statutory proceedings*** ...." *State ex rel. Smith v. Frost*, 74 Ohio St. 3d 107, 112 (1995). [Emphasis supplied.] However, the rule only applies where the forum conducting the special statutory proceeding "has ***exclusive*** authority over" the matters so committed to it. *State ex rel. Taft v. Court of Common Pleas*, 63 Ohio St. 3d 190, 195 (1992). [Emphasis supplied.] Because there is no special statutory proceeding pending Relators' reliance on that rule is misplaced. Intervenor seeks no relief from Respondent over "matters committed to a special statutory proceeding." Moreover, whenever proceedings involving unlawful discriminatory practices involving housing discrimination do lawfully materialize the OCRC's jurisdiction over "matters committed" to it is not exclusive.

As the word "proceeding" implies, there must be a pending adjudicatory process. The Fasanaro matter is now in the preliminary investigative stage – albeit without jurisdiction. The adjudicatory stage will not reached, if reached at all, until a complaint is issued which alleges the

commission of an unlawful discriminatory practice. R.C. 4112.05(B)(5). The adjudicatory jurisdiction of the OCRC over a complaint alleging an unlawful discriminatory practice ***is not exclusive***. Any party – including Intervenor as a respondent – can elect to have the complaint adjudicated in the common pleas court. R.C. §§4112.05(B)(5) and 4112.051(A)(2). In fact, the charging party has the right to initiate its own litigation at any time within one year after the alleged unlawful discriminatory practice was committed," R.C. 4112.05(B)(1), and may do so even while a lawful administrative investigation is pending.

In every event, the matter committed to the administrative or judicial forum is whether or not "the respondent has engaged in, or is engaging, any ***unlawful discriminatory practice***." R.C. 4112.05(G). [Emphasis supplied.] **Intervenor's First Amended Complaint before Respondent seeks no declaration whatsoever as to any "matter committed to a special statutory proceeding."** There is thus no special statutory proceeding being by-passed.

Intervenor seeks to enjoin Relators' illegal and ultra vires investigation. The OCRC's conduct is not above the scrutiny implicit under Ohio's constitutional scheme of checks and balances. Intervenor further asks Respondent to declare the lawfulness of any number of other investigatory steps taken by Relators. The relief sought is well with the subject matter jurisdiction of Respondent.

On the other hand, the OCRC cannot issue declaratory judgments or injunctive relief. Nor is an appeal of any ultimate unlawful and ultra vires finding by the OCRC under R.C. 4112.06 of any value or detriment to Intervenor. The availability of such an appeal is not an adequate remedy at law which could deprive Intervenor of declaratory or injunctive relief. "[W]hether or not the availability of an appeal from the commission's findings constitutes an adequate remedy at law is immaterial in light of the commission's unambiguous lack of

jurisdiction and the principle announced in *State, ex rel. Adams v. Gusweiler (1972), 30 Ohio St.2d 326, 285 N.E.2d 22.*" *State ex rel. Republic Steel Corp. v. Ohio Civil Rights Com.*, 44 Ohio St. 2d 178, 815 (1975).

For a writ of prohibition to issue, the exercise of judicial power by Respondent must be unauthorized by law. Respondent has jurisdiction; the OCRC does not. Respondent, a judge of the common pleas court, a tribunal of general jurisdiction, can determine his court's own jurisdiction. Respondent has done so by overruling Relators' motion to dismiss. Relator OCRC has no jurisdiction.

Having failed to persuade Respondent that is has jurisdiction to investigate Intervenor, or that the Deference Rule applies, Relators now make a rather transparent attempt to expand the doctrine beyond "special statutory ***proceedings***" which must clearly be of an adjudicative nature, to now cover "an ***investigation*** governed by special statutory ***procedures***." Complaint {¶8}. One cannot rewrite the law to fit one's facts.

Based upon an unambiguous lack of jurisdiction to investigate, the absence of a "special statutory proceeding" being by-passed, and the fact that Intervenor seeks no declaration relating to whether Intervenor committed an unlawful discriminatory practice – the only determination to be made in any such special statutory proceeding, Intervenor is entitled to judgment on the pleadings. Relators can prove no set of facts in support of their claim that would entitle them to relief. No material factual issues exist and Intervenor is entitled to judgment as a matter of law.

V. Respondent's exercise of judicial power is authorized by law.

Relators' cannot adduce any set of facts to overcome the fact that Respondent is a judge in the Cuyahoga County Court of Common Pleas which is a tribunal having general subject-

matter jurisdiction in civil actions, R.C. 2305.01, including the jurisdiction to grant injunctions, R.C. 2727.03, Civ.R. 65, and to render declaratory judgments. R.C. 2721.02 and Civ. R. 57.

Absent a patent and unambiguous lack of jurisdiction it "can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy in the ordinary course of law by appeal. See *State ex rel. Estate of Hards v. Klammer*, 110 Ohio St. 3d 104, 2006 Ohio 3670, 850 N.E.2d 1197, P 10." *State ex rel. Scott v. City of Cleveland*, 112 Ohio St. 3d 324, 326 (2006). See, also, *State ex rel. Lipinski v. Cuyahoga County Common Pleas Court*, 74 Ohio St. 3d 19 (1995). Having admitted that Respondent already overruled Relators' Motion to Dismiss for want jurisdiction, Relators' complaint, ¶8, the instant complaint must be dismissed. Relators have the right to appeal.

VI. There is no special statutory proceeding to be by-passed in the first instance.

Relators claims are limited to, and wholly dependent upon, the existence of a "special statutory proceeding." See, Relators' complaint, ¶15 ("relator ... is an agency seeking to prevent a court from interfering with a ***special statutory proceeding***." (Emphasis added)) For numerous reasons there is no such special statutory proceeding to be by-passed in the first instance. Because Relators can prove no set of facts by which such a special statutory proceeding exists Intervenor is entitled to judgment on the pleadings as a matter of law.

The Deference Rule is simply stated. "Where, however, a specialized statutory remedy is available **in the form of an adjudicatory hearing**, a suit seeking declaration of rights which would bypass, rather than supplement, the legislative scheme ordinarily should not be allowed." [Citations omitted.] *State ex rel. Taft v. Court of Common Pleas*, 63 Ohio St. 3d 190, 193 (1992). *Taft*, at 195, relying on *State ex rel. Iris Sales Co. v. Voinovich*, 43 Ohio App. 2d 18 (Cuyahoga County 1975), further defines the Deference Rule (with emphasis added):

> A declaratory judgment action may not be brought or maintained if there is an ***exclusive*** statutory remedy or procedure, or if ***exclusive jurisdiction*** vests in some agency or some other court in the action presented. See *Dayton Transit Company v. Dayton Power and Light* (1937), 57 Ohio App. 299.

The application of the Deference Rule is thus dependent on the existence of an **adjudicatory** hearing pending before an administrative agency having exclusive jurisdiction over the matter committed to it in said hearing. All of the requisite elements are missing and Relators can prove no set of facts in support of their claim that would entitled them to relief.

C. The Fasanaro "charge" is not sufficient to invoke the OCRC's jurisdiction.

The jurisdiction of the OCRC can only be invoked in the manner prescribed by statute, namely: by a "written charge made under oath." R.C. §§4112.04(A)(6), 4112.05(B)(1) & 4112.05(B)(2). In the absence of a written charge under oath no jurisdiction is conferred upon the OCRC.[7] *Powell v. Ohio Civil Rights Com.*, 51 Ohio App. 2d 197 (Franklin County 1976), syllabus. See, also, *EEOC v. Shell Oil Co.*, 466 U.S. 54, 64-65 (1984) (a charge under oath is a jurisdictional prerequisite to the issuance of a subpoena; investigative authority is tied to charges filed with the Commission). There being no written charge under oath Relators' jurisdiction has not been invoked over the Fasanaro "charge."

1. Only written charges under oath can invoke the jurisdiction of Relators.

On the one hand, the OCRC only has jurisdiction to "**Receive, investigate, and pass upon <u>written charges made under oath</u>** of **<u>unlawful discriminatory practices</u>**."[8] R.C. 4112.04(A)(6) [Emphasis supplied.] On the other hand, any person may file a charge with the

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[7] "The jurisdiction of such officials and tribunals must be invoked in the manner prescribed by statute, and their proceedings must be in accordance with valid statutory requirements. They * * * can not dispense with the essential forms of procedure which condition their statutory powers, or have been prescribed for the purpose of investing them with power to act." *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279-280 (Cuyahoga County 1973).

[8] "Unlawful discriminatory practices' means any act prohibited by section 4112.02, 4112.021, or 4112.022 of the Revised Code." R.C. 4112.01(A)(8).

OCRC alleging an ***unlawful discriminatory practice*** provided that "***the charge shall be in writing and under oath***." §4112.05(B)(1).[9] That a charge must be under oath is consistently stated in §§4112.04(A)(6), 4112.05(B)(1), & (B)(2).

The Fasanaro "charge" of housing discrimination is not under oath. Intervenor's complaint, ¶¶5, 18. Instead it was made "under penalty of perjury" pursuant to OAC §4112-3-01(B)(2), which purports to permit a charge of housing discrimination to be instead signed "under penalty of perjury." Such a charge is insufficient to invoke the jurisdiction of the OCRC. See, also, *State ex rel. General Motors Corp. v. OCRC*, 50 Ohio St.2d 111, in which this Court found a clear and unambiguous lack of jurisdiction for the OCRC's failure to comply with yet another statutorily required prerequisite.

2. A statement signed "under penalty of perjury" is not signed "under oath."

This Court has repeatedly held that a statement signed "under penalty of perjury" is not signed "under oath." A statement signed under **penalty of perjury** may be sufficient for federal purposes, 28 USC §1746, but does not qualify as a statement signed "under oath" in Ohio. See, *e.g.*, *Toledo Bar Ass'n v. Neller*, 102 Ohio St. 3d 1234, 1236-1237 (2004), *Lisboa v. Kleinman (In re Donnelly)*, 134 Ohio St. 3d 1221 (2011), *State ex rel. Brown v. Ohio Dep't of Rehab. & Corr.*, 2011 Ohio 5401 (Franklin County Oct. 20, 2011), and *State v. Clark*, 2007 Ohio 2707, P18 (Mahoning County June 1, 2007).

"In general usage the phrase 'under oath' connotes something of the notion that the declarant is first sworn, or at least, that the oath is administered by someone. ***That an oath is to be administered has been generally assumed.*** *Cf., Warwick v. State* (1874), 25 Ohio St. 21, *State v. Jackson* (1880), 36 Ohio St. 281, and *State v. Townley* (1902), 67 Ohio St. 21. ***The General***

[9] The charge must contain a "concise statement of the facts which the complainant believes indicates an unlawful discriminatory practice." OAC §4112-3-01(C)(3).

Assembly has indulged that assumption in creating the office of notary public, and in empowering those who hold that office to 'administer oaths required or authorized by law.' R. C. 147.07. ...." *Youngstown Steel Door Co. v. Kosydar*, 33 Ohio App. 2d 277, 279 (Cuyahoga County 1973). [Emphasis supplied.]

Just as the General Assembly has ***indulged*** the notion that an oath is administered by creating the office of notary public, it further ***indulged*** that notion, with respect to the signing under oath of charges alleging an unlawful discriminatory practice, by authorizing the appropriate employees of the OCRC to administer oaths. R.C. 4112.09. Accordingly, the jurisdiction of the OCRC has not been invoked by the unsworn Fasanaro charge.

3. The OCRC cannot expand its jurisdiction contrary to statute.

Relator the OCRC is by now well aware that an administrative rule cannot conflict with the Revised Code. *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm'n*, 117 Ohio St. 3d 441 (2008). Despite the foregoing the OCRC enacted OAC §4112-3-01(B)(2) by which it purports to lessen the dignity of the signature on a written charge of housing discrimination required to invoke its jurisdiction from being signed "under oath," as required by as required by R.C. §§4112.04(A)(6), 4112.05(B)(1) and (B)(2), to being signed "under penalty of perjury." Because that administrative rule conflicts with said statutes it is ineffective to expand the jurisdiction of the OCRC.

As a creature of statute, §4112.04, the OCRC has only such jurisdiction as is thus conferred,[10] and it may not, under rules of its own making or otherwise, confer upon itself further jurisdiction or authority. *State ex rel. Byrd v. Sherwood*, 140 Ohio St. 173 (1942). Administrative rules so enacted by the OCRC cannot add to, subtract from, or otherwise conflict

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[10] *State ex rel. McLean v. Industrial Com. of Ohio*, 25 Ohio St. 3d 90, 92 (1986).

with the Revised Code. *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm'n*, 117 Ohio St. 3d 441 (2008), paragraph 2, syllabus. "[A]n administrative rule that is issued pursuant to statutory authority has the force of law unless it is unreasonable or conflicts with a statute covering the same subject matter." *Maralgate, L.L.C. v. Greene County Bd. of Revision,* 130 Ohio St. 3d 316, 321-322 (2011) (internal citations omitted).

The phrase "under oath" is not defined in R.C. Chap. 4112. It is not a special phrase or term of art known only to the OCRC, nor one over which the OCRC has "accumulated substantial expertise." Many statutes require written statements under oath to invoke the jurisdiction of various administrative bodies. See, *e.g.*, *Stanjim Co. v. Board of Revision*, 38 Ohio St. 2d 233 (1974). OAC §4112-3-01(B)(2) does not supply the definition of "under oath." Its application would further render worthless R.C. 4112.09, by which virtually every relevant official of the OCRC is authorized to administer oaths. By virtue of the foregoing Fasanaro's "charge" should never have been "received" by the OCRC in the first place. Relators thus patently and unambiguously lack jurisdiction over the current investigation.

D. A "special statutory proceeding" contemplates an "adjudicatory hearing."

Given that Relators' claim is dependent upon the existence of a special statutory proceeding, the definition of "proceeding" is relevant. As the term "proceeding" implies, and as this Court has repeatedly opined, a special statutory proceeding contemplates an **adjudicatory** process. There is simply no such pending adjudicatory proceeding within the jurisdiction of Relators to which Respondent must defer.

"[T]he term 'proceedings' denotes acts or events taken between the time of commencing an action at law until the entry of a final judgment by a judicial **tribunal. 'Proceedings' evokes a court of law, not the investigatory action** taken by police prior to the filing of a complaint or

a juvenile's initial appearance before a tribunal." *In re M.W.*, 133 Ohio St. 3d 309, 314 (2012). [Emphasis supplied.] Here, the Fasanaro "charge" is currently, albeit illegally, in the "preliminary investigation" stage. See, *e.g.*, Intervenor's complaint, ¶34 (request for "a list of all three hundred sixty (360) current residents," etc.) An **investigation** cannot be a special statutory proceeding. There is no basis for equating the preliminary investigatory stage of Relators' involvement to the adjudicatory stage so as to apply the Deference Rule. While this Court acknowledged the secretary of state's lack of authority to conduct adjudicatory proceedings, it nonetheless pointed out that "***when***" Ms. Brunner issued subpoenas in furtherance ***of her investigation*** she did not exercise quasi-judicial authority in issuing them.

> Therefore, because no statute or other pertinent law required the secretary of state to conduct a hearing resembling a judicial trial ***when*** she decided to issue the subpoenas to relators in furtherance of her investigation of LetOhioVote.org's 2009 campaign-finance report, the secretary of state did not exercise quasi-judicial authority in issuing them. *Scherach*, 123 Ohio St.3d 245, 2009 Ohio 5349, P 22-23, 915 N.E.2d 647; *Parrott*, 117 Ohio St.3d 175, 2008 Ohio 813, P 8-10, 882 N.E.2d 908. [Emphasis supplied.]

State ex rel. LetOhioVote v. Brunner, 125 Ohio St. 3d 420, 2010-Ohio-1895, ¶20. Similarly, here there is clearly "no statute or other pertinent law" which **at this juncture** requires Relators "to conduct a hearing resembling a judicial trial." See, also, *State ex rel. Taft v. Court of Common Pleas*, 63 Ohio St. 3d 190, 193 (1992). "Where, however, a specialized statutory remedy is available **in the form of an adjudicatory hearing**, a suit seeking declaration of rights which would bypass, rather than supplement, the legislative scheme ordinarily should not be allowed." [Citations omitted.] *Taft* involved an **investigation** by the secretary of state. Here, there is obviously no special statutory proceeding to bypass.

E. The OCRC's adjudicatory proceedings are not "exclusive."

The power to adjudicate unlawful discriminatory practices of housing discrimination complaints is not exclusively within the province of the OCRC. As this Court stated in *Smith v. Friendship Vill. of Dublin*, 92 Ohio St. 3d 503, 506-507 (2001), civil and administrative "proceedings" are available forums to resolve housing discrimination cases.

> The General Assembly has specifically **limited** an individual's **ability to bring both an administrative and civil proceeding** in the context of **age discrimination only**. Its exclusion of other forms of discrimination from this limitation makes clear that it intended that **both remedies be available for other forms of discrimination**.

"The protection of an individual's right to pursue private remedies is too central an aspect of Ohio's commitment to nondiscrimination to be limited to, or delayed by, an administrative process." *Dworning v. Euclid*, 119 Ohio St.3d 83, 2008 Ohio 3318, 892 N.E.2d 420, ¶43.

Should any lawful investigation of an unlawful discriminatory practice of housing discrimination ever ripen into a complaint, the charging party and Intervenor, as a respondent, have an absolute right to elect to have that complaint adjudicated in the common pleas court. R.C. §§4112.05(B)(5), 4112.051(A)(2). See, also, R.C. 4112.99.

See, also, *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 879 N.E.2d 174, 2007 Ohio 6442, ¶16, in which this Court held (with emphasis added) that where a complaint "raises genuine issues of material fact," *i.e.*, not "sham" litigation, a standard which Relators have neither raised nor challenged, the "suit … shall proceed in court while the proceedings before the OCRC **shall be stayed**." Accordingly, even were Relators' jurisdiction properly invoked, they simply do not have the requisite exclusive jurisdiction entitling them to the application of the Deference Rule.

F. Respondent is not called upon to determine the merits of Fasanaro's "charge."

The Deference Rule is also dependent upon the exclusive jurisdiction of such proceedings **over the matters committed to them**. See, *e.g.*, *State ex rel. Smith v. Frost*, 74 Ohio St. 3d 107, 112 (1995) ("it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve ***matters committed to special statutory proceedings*** ...."), and *Taft*, at 195. The matters so committed to a properly investigated and convened adjudicatory hearing before Relator the OCRC are simply whether "the respondent has engaged in, or is engaging, any ***unlawful discriminatory practice***." R.C. 4112.05(G). [Emphasis supplied.]

Were Fasanaro's charge not jurisdictionally deficient but instead, properly within the jurisdiction of the OCRC, and were it ever to ripen into the administrative adjudicatory stage, that which would be decided is whether "the respondent has engaged in, or is engaging, any ***unlawful discriminatory practice***." R.C. 4112.05(G). [Emphasis supplied.] That which is at issue in the Litigation is the propriety of the conduct of Respondents, not the conduct of Intervenor. Intervenor seeks no declaration whatsoever as to whether Intervenor committed an underlying unlawful discriminatory practice of housing discrimination. Given that the OCRC cannot issue declaratory judgments or injunctive relief, and Respondent is not being called upon to determine the merits of Fasanaro's "charge," there is no special statutory proceeding being by-passed in the first instance.

VII. Respondent has jurisdiction over Intervenor's declaratory judgment claims.

Intervenor seeks a declaration as to the lawfulness and constitutionality of Relators' conduct. The propriety of such declaratory judgment actions has been consistently sustained. See, *State ex rel. Holcomb v. Wurst*, 63 Ohio App. 3d 629, 632 (Butler County 1989) ("However, the present case does not involve the application of a tax law to a particular parcel of

real property, thus the special statutory jurisdiction of the Tax Commissioner is not involved here. **Holcomb contests the constitutionality of the entire plan for interior inspection of homes. Declaratory relief is appropriate to determine the constitutionality of the governmental action.** See *Katzenbach v. McClung* (1964), 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290."), and *State ex rel. Abx Air v. Ringland,* 150 Ohio App. 3d 194, 199 (Ohio Ct. App., Clinton County 2002) ("**The common pleas court is not being asked to correct property values or assess taxation amounts; rather, the court is being asked to decide whether the procedures set forth in R.C. 3735.65 *et seq.* were properly complied with.** A reading of these statutes gives no indication that they are to be exclusively interpreted and applied by the Ohio Tax Commissioner, although the commissioner clearly has jurisdiction to do so under *Zaino*.")

There is a current real controversy which the declaratory judgment sought will resolve. That said, Intervenor is also entitled to a declaration with respect to its rights *vis a vis* any future investigations by the OCRC in similar situations, *i.e.*, where a charge is similarly not under oath, fails to allege an unlawful discriminatory practice, fails to contain the requisite concise statement of underlying facts on which the charge is based, as well as where even a lawful investigation is sidetracked by unauthorized mediation or premature conciliatory efforts. **Given the penalties for both failure to cooperate in an investigation, *e.g.*, an award of punitive damages, OAC §4112-6-02 and §4112.05(G),** Intervenor states valid claims for declaratory judgment and injunctive relief.

Declaratory relief is clearly available to Intervenor under the analysis set forth in *State ex rel. Taft v. Court of Common Pleas*, 63 Ohio St. 3d 190 (1992). Under *Taft*, one has standing to

bring a declaratory judgment action where civil fines just as severe as criminal fines for the same offense can be imposed, as follows (with emphasis added):

> In *Peltz v. South Euclid* (1967), 11 Ohio St.2d 128, 40 O.O.2d 129, 228 N.E.2d 320, paragraph one of the syllabus, we held that **a person has standing to bring a declaratory judgment action concerning criminal municipal ordinances <u>without first having had to violate the ordinances</u>**. *Pack v. Cleveland* (1982), 1 Ohio St.3d 129, 1 OBR 166, 438 N.E.2d 434, paragraph one of the syllabus, extended this holding to state criminal statutes. **We see no reason why *Peltz* and *Pack* should not apply with equal force to prosecutions before the commission that may result in civil fines just as severe as criminal fines for the same offenses**, or may result in criminal prosecution after the hearing before the commission via referral for prosecution by the commission.

Id., 196. Given that **civil fines** for violating the provisions of R.C. Chap. 4112 **far exceed penalties for <u>lesser</u> criminal offenses**, Intervenor has standing to bring its declaratory judgment action not only with respect to the current investigation by defendants, but also with respect to future investigations.

The $10,000.00 statutory cap on punitive damages awardable under §4112.05(G)(1)(a) far exceeds the $5,000.00 statutory cap of §2929.29(A)(8) on fines for the first degree misdemeanor criminal violation <u>by an organization</u> for interfering with housing per R.C. 2927.03(A), despite the fact that said criminal violations involve more egregious conduct. The $10,000.00 statutory cap on punitive damages awardable under § 4112.05(G)(1)(a) far exceeds the $1,000.00 statutory cap of R.C. 2929.28(A)(2)(a)(i) on fines for the first degree misdemeanor criminal violation <u>by an individual</u> for interfering with housing per R.C. 2927.03(A), despite the fact that said criminal violations involve more egregious conduct. Because the R.C. 4112.05 administrative proceedings are not of the same type of proceedings held as exclusive by the Ohio Supreme Court, and further, because Intervenor, as respondent in such administrative proceedings, is subject to the imposition of civil damages far more severe than the criminal fines

applicable to even more egregious criminal conduct, which punitive damages are based, in part, on a respondent's failure to cooperate in an investigation, OAC §4112-6-02 and §4112.05(G), declaratory relief is available to Intervenor under *Taft*.

"Once the Commission receives a charge it has the discretion to decide whether or not to initiate an investigation," citing *State ex rel. Westbrook v. Ohio Civil Rights Com.*, 17 Ohio St. 3d 215 (1985). But the OCRC ignores the fact that the Fasanaro "charge" is not a charge which the OCRC is authorized to receive, let alone investigate. §4112.04(A)(6). The OCRC has no discretion as to whether it may receive and investigate a charge not made "under oath."

VIII. Relators have an adequate remedy at law.

Relators fail to acknowledge the adequacy of their right to appeal any adverse ruling by Respondent, Fasanaro's right to proceed independently with an action pursuant to R.C. 4112.051 or R.C. 4112.99, or the existence of other obvious and available means by which avail themselves of an adequate remedy in the ordinary course of law. Such adequate remedies can be readily found within R.C. Chap. 4112 itself. It is not Intervenor's burden to advise Relators thereof. The mere existence of such remedies deprives Relators of entitlement to the writ of prohibition sought.

IX. Conclusion.

For the reasons set out above, Relators can adduce no set of facts by which they could be entitled to judgment. According, Intervenor is entitled to Judgment on the Pleadings in its favor thereby dismissing Relators' complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to S. Ct. Prac. R. 3.11(B)(1) & (C)(1), a copy of the foregoing has been forwarded by e-mail to opposing counsel Eric E. Murphy, Esq., attorney for Relators, at eric.murphy@ohioattorneygeneral.gov and to Charles E. Hannan, Esq., attorney for Respondent, at channan@prosecutor.cuyahogacounty.us, this 6th day of March, 2014.

Paul M. Greenberger