



attendance and testimony of the three witnesses. Our order dated April 18, 2006, also denied the Director's motion to hold this case in abeyance pending the outcome of federal criminal charges based on allegations that also appear in the complaint.

On April 19, 2006, Jackson filed an amended notice of depositions. On April 24, 2006, Jackson filed his response to our order dated April 18, 2006 ("the response"). The response requested an order compelling the three witnesses' attendance and testimony at the rescheduled depositions.

On April 18, 2006, the Director filed a notice of dismissal as to two of the complaint's counts. We entered our order dated April 20, 2006, memorializing the dismissal. Jackson filed the motion for sanctions of dismissal with prejudice and for an Evidentiary Hearing on April 24, 2006 ("the second motion"). The Director filed a response to the second motion on April 25, 2006.

We have authority only as the statutes provide because this Commission is a creation of statute.<sup>1</sup> Neither motion cites any law establishing our authority to grant the relief sought. We have authority to enforce discovery because parties before us may obtain discovery in almost exactly the same manner, under the same conditions, and on the same notice and other requirements as the Missouri Supreme Court rules provide for civil actions in the circuit court.<sup>2</sup> However, the statutes and rules place conditions and limits on that authority as set forth below.

#### B. First Motion

Jackson asks us for an order to compel, sanctions for contumacious disregard of our subpoenas, and an award of expenses including attorney fees. Enforcement of our subpoenas<sup>3</sup>

---

<sup>1</sup>*State Bd. of Regis'n for the Healing Arts v. Masters*, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974).

<sup>2</sup>Section 536.073.2 and our Regulation 1 CSR 15-3.420(1). Statutory references are to the 2000 Revised Statutes of Missouri.

<sup>3</sup>Section 536.077.

and proceedings for contempt before this Commission lie in circuit court upon our application for an order to show cause. We decline to do so because Jackson has failed to support the first motion as set forth below and has not asked to file such action on this Commission's behalf. Therefore, we deny that relief.

We have authority to compel attendance and testimony at a deposition, and to award expenses and attorney fees for failure to do so as follows:

**(f) Failure to Attend Own Deposition.** If a party or an officer, director or managing agent of a party or a person designated under Rules 57.03(b)(4) and 57.04(a), to testify on behalf of a party, fails to appear before the officer who is to take his deposition, after being served with notice, the court may, upon motion and reasonable notice to the other parties and all persons affected thereby, make such orders in regard to the failure as are just and among others, it may take any action authorized under paragraphs (1), (2), (3) and (4) of subdivision (d) of this Rule.

**(g) Failure to Answer Questions on Deposition.** If a witness fails or refuses to testify in response to questions propounded on deposition, the proponent of the question may move for an order compelling an answer[.]

If the motion is granted, the court, after opportunity for hearing, shall require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees[.<sup>4</sup>]

The response includes documents showing that the depositions are for Gerald Cox, Aaron Smith, and Randy Davis. Jackson has not shown that any of those three witnesses is a party or an officer, director or managing agent of a party or a person designated to testify under the specified rules. Therefore, we proceed under the provision for witnesses not in those categories.

---

<sup>4</sup>Rule 61.01. Rules are the 2006 Missouri Supreme Court Rules of Civil Procedure.

To compel the attendance and testimony of a non-party witness at a deposition, Jackson must serve each witness with a notice of deposition<sup>5</sup> and a subpoena.<sup>6</sup> The first motion alleges that Jackson served each witness with a subpoena for the depositions, but the response includes subpoenas and returns only for Cox and Smith. Jackson produced no subpoena and return for Davis. Therefore, we deny the first motion as to Davis on that basis.

We also deny the first motion as to all three witnesses because Jackson has not shown proper service of a notice of deposition. Jackson served notices of deposition for all three witnesses on the Director's counsel. But the Director's counsel has not appeared on behalf of the three witnesses, and Jackson's filings suggest that Cox, Smith and Davis are represented by other counsel. For example, the certificate of service on the first motion and the Response names Steven Sokolik and Dennis Chassaniol as counsel for Cox, Smith and Davis. Letters copied to this Commission, from Jackson's counsel and addressed to Sokolik and Chassaniol, discuss responses by Sokolik and Chassaniol to the first motion. Those letters also discuss a hearing on the first motion and on motions to quash allegedly filed by Sokolik and Chassaniol on behalf of the three witnesses. Jackson makes several references in his 1<sup>st</sup> and second motions and the Response to these motions to quash. But no such motions have been filed in this case, nor have Sokolik or Chassaniol entered an appearance with this Commission. The record does not show that the Director's counsel represents any of the three witnesses.

The same infirmities of process also defeat the request included in the response for an order compelling the three witnesses' attendance and testimony at rescheduled depositions on May 1, 2006, as set forth in an amended notice of deposition. According to the response, Jackson has served only Cox with a subpoena, and the amended notice of depositions shows

---

<sup>5</sup>Rule 57.03(b)(1).

<sup>6</sup>Rule 57.03(a).

service only on the Director's counsel and no service on Sokolik and Chassaniol. Jackson states that the Director's counsel has agreed to re-schedule the depositions for May 1, 2006, as set forth in an Amended Notice of Deposition. The record has yet to reveal why the Director's counsel receives service of notices of depositions of witnesses whom he does not represent, or why his agreement makes any difference in the rescheduling. Moreover, because no witness has yet failed to attend and testify at depositions on May 1, 2006, that request is premature.

Because Jackson has not shown that we have the authority to compel the attendance of the three witnesses, we deny an award of expenses and attorney fees.<sup>7</sup>

### C. The Second Motion

The second motion asks us to sanction the Director for dismissing some of the charges against Jackson, and the Director argues that we have no such authority.

The statutes grant us authority to decide whether Jackson is subject to discipline on the filing of the Director's complaint.<sup>8</sup> That complaint is subject to dismissal only as provided by law.<sup>9</sup> No law authorizing any sanction appears in the second motion. Similarly, while Jackson argues that the partial dismissal undercuts our order denying the Director's motion for abeyance, and that our entry of dismissal deprived him of the right to be heard, we had no discretion to reject the Director's partial dismissal.<sup>10</sup>

Jackson also argues that the dismissed charges violated his rights under the United States Constitution; that Cox, Smith and Davis had information germane to the dismissed charges; and that the partial dismissal prevents the deposition of those witnesses. The dismissed charges are

---

<sup>7</sup>On denial of a motion under Rule 61.01(g), that rule requires an award of expenses and attorney fees to any party who opposed the motion, but the Director did not oppose the motion.

<sup>8</sup>Section 621.110.

<sup>9</sup>*State ex rel. Missouri Dep't of Soc. Servs. v. Administrative Hearing Comm'n*, 814 S.W.2d 700, 702 (Mo. App., W.D. 1991).

<sup>10</sup>Regulation I CSR 15-3.440(2).

no longer within our jurisdiction and, even if they were, we have no authority to decide constitutional issues.<sup>11</sup> But nothing in this or our previous order prevents Jackson from deposing those witnesses on the remaining charges if he has properly noticed and subpoenaed them.

Jackson also argues that the dismissed charges were meritless. On that basis, we have authority to award litigation expenses, including a reasonable attorney fee:

A party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding, unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust.<sup>[12]</sup>

A party prevails if he:

obtains a favorable order, decision, judgment, or dismissal in a civil action or agency proceeding.<sup>[13]</sup>

A “favorable order, decision, judgment or dismissal” is one that gives the party “some relief on the merits of his claim[.]”<sup>14</sup> The controlling factor is the “achievement of the ‘sought for result’ by the party.”<sup>15</sup> But Jackson must first obtain a favorable disposition on all significant issues.<sup>16</sup>

Also:

A party may file a complaint for litigation fees and expenses as authorized by law. Such complaint shall be a separate contested case. The complaint for fees and expenses shall be governed by this chapter.<sup>[17]</sup>

Under those provisions, Jackson’s motion for an award of expenses is premature.

---

<sup>11</sup> *Sprint Communications Co. v. Director of Revenue*, 64 S.W.3d 832, 834 (Mo. banc 2002).

<sup>12</sup> Section 536.087.1.

<sup>13</sup> Section 536.085(3).

<sup>14</sup> *Melahn v. Otto*, 836 S.W.2d 525, 528 (Mo. App., W.D. 1992).

<sup>15</sup> *Id.*

<sup>16</sup> *White v. Missouri Veterinary Med. Bd.*, 906 S.W.2d 753 (Mo. App., W.D., 1995).

<sup>17</sup> Regulation 1 CSR 15-3.560.

Therefore, we deny the second motion.

SO ORDERED on May 1, 2006.



---

JUNE STRIEGEL DOUGHTY  
Commissioner