

IN THE SUPREME COURT OF MISSOURI

Case No. SC95546

STATE OF MISSOURI ex rel. MISSOURI COALITION FOR THE ENVIRONMENT, et al.

Appellants,

v.

JOINT COMMITTEE ON ADMINISTRATIVE RULES, et al.

Respondents.

**ON APPEAL FROM THE CIRCUIT COURT
OF COLE COUNTY, MISSOURI,
The Honorable Patricia S. Joyce**

RESPONDENT'S BRIEF OF THE MISSOURI SECRETARY OF STATE

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JURISDICTIONAL STATEMENT

This appeal arises from a Judgment entered by the Circuit Court of Cole County, Missouri. The Supreme Court has exclusive appellate jurisdiction over this matter because it involves the validity of Missouri statutes. Missouri Constitution, Article V, § 3.

STATEMENT OF FACTS

On January 8, 2010, the Public Service Commission (“PSC”) filed a proposed rule with Respondent Missouri Secretary of State (“SOS”), and the Joint Committee on Administrative Rules and its individual members (collectively, “JCAR”), (L.F. II 277-325). The proposed rule included sections 4 CSR 240-20.100 (2)(A) and (2)(B)2 (“sections (2)(A) and (2)(B)2”), which involve “geographic sourcing”. (L.F. II 332). The SOS published the PSC’s proposed rule in the February 16, 2010 issue of the Missouri Register. (L.F. I 36 ¶ 18). On June 2, 2010, the PSC filed its final order of rulemaking with JCAR which included sections 4 CSR 240-20.100 (2)(A) and (2) (B). (L.F. III, 395-457). On June 24, 2010, JCAR convened a hearing concerning the PSC’s order of rulemaking for 4 CSR 240-20.100. (L.F. I 85-86 ¶ 9). On July 1, 2010, JCAR disapproved sections (2)(A) and (2)(B)2, and transmitted a letter to the SOS stating “[t]he Committee considers those portions which were disapproved to be held in abeyance at this time and asks that you not publish those portions of the rule.” (L.F. II 273).

On July 6, 2010, the PSC submitted a Revised Order of Rulemaking for 4 CSR 240-20.100 that still included sections (2)(A) and (2)(B)2, to the SOS along with an accompanying letter stating “this rule includes portions disapproved by JCAR but, in accordance with section 536.073.8, the [PSC] is not filing those sections for publication . . . The [PSC] requests that sections

(2)(A) and (2)(B)2 be reserved for later use in the event the [PSC] decides to amend the rule.” (L.F. II 332). On August 16, 2010, the SOS published the Revised Order of Rulemaking (“Rule”) in the Missouri Register with sections (2)(A) and (2)(B)2 designated as “Reserved” and accompanied by a note stating these specific sections were disapproved by JCAR. (L.F. I 37 ¶ 26). The Rule was published in the August 31, 2010 Code of State Regulations without sections (2)(A) and (2)(B)2. (L.F. III 509 ¶ 30-31).

On January 26, 2011, the PSC issued an Order Withdrawing Geographic Sourcing Provisions (2)(A) and (2)(B)2 of 4 CSR 240-20.100 pursuant to the actions of JCAR (“Order”). (L.F. III 473-474). The Legislature passed Senate Concurrent Resolution No. 1 (“Resolution”) on February 1, 2011, which disapproved of sections (2)(A) and (2)(B)2. (L.F. III 498-499). The Governor received the Resolution but did not approve or disapprove it because “the [PSC] approving an order to withdraw the relevant regulations renders [the Resolution] moot” (L.F. III 497). The SOS subsequently published the January 26th Order in the Missouri Register on April 1, 2011. (L.F. III 493-496).

Appellants Missouri Coalition for the Environment, Missouri Solar Applications, LLC, Thomas J. Sager (“Appellants”) initiated action against SOS, JCAR, PSC, and Governor Jeremiah “Jay” Nixon (“Respondents”) in the Circuit Court of St. Louis County on August 19, 2013, and on or about March

17, 2014, the matter was transferred to the Circuit Court of Cole County (“Circuit Court”). (L.F. I 2, 14-32). The Circuit Court granted a Motion for Summary Judgment adverse to the Appellants on May 20, 2015. (L.F. III 515-521). Appellants appealed the Circuit Court’s decision. (L.F. I 12). On November 19, 2015, this Court dismissed the appeal for lack of a final judgment, remanding the case back to the Circuit Court. (L.F. III 522). On January 11, 2016, the Circuit Court entered the final judgment dismissing the case that serves as the basis for this appeal. (L.F. III 530-531).

ARGUMENT

Response to Appellants' Points Relied on I: The trial court did not err in dismissing the petition for writ of mandamus, declaratory judgment and injunctive relief because the Secretary of State properly executed its ministerial duties in that it published the Public Service Commission's rule in the manner submitted by the agency.

Appellants provide three points relied on where they argue the constitutionality of all or parts of sections 536.019, 536.021, 536.028, and 536.073, RSMo. Though Respondent SOS acknowledges the underlying factual issues within each point, point relied on I is the only one directed against the SOS and its execution of ministerial functions. Appellants' request for mandamus, in point relied on I, depends entirely on a finding that the SOS improperly executed its ministerial duty to publish the rule, however, they fail to establish the validity of that claim as a matter of law.

STANDARD OF REVIEW

“The extraordinary relief of mandamus has limited application.” *State ex. Rel. Burns v. Gillis*, 102 S.W.3d 66, 68 (Mo. App. W.D. 2003) (citing *Jones v. Carnahan*, 965 S.W.2d 209, 212 (Mo. App. 1998)). Where a party seeks mandamus, such relief “will lie only when there is a clear, unequivocal, specific right to be enforced.” *State ex rel. Mo. Growth Ass’n v. State Tax Comm’n*, 998 S.W.2d 786, 788 (Mo. banc 1999) (citing *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445, 446 (Mo. banc 1997)). The requesting party must prove “a clear, unequivocal, specific, and positive right to have the official perform the act demanded, and the remedy will not lie if the right is doubtful.” *State ex rel. Thomas v. Neely*, 128 S.W.3d 920, 924 (Mo. App. S.D. 2004) (citing *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. 1998)). “A writ of mandamus will only issue when there is an unequivocal showing that the public office failed to perform a ministerial duty imposed by law”; such a duty “is one that law directs the public official to perform upon a given set of facts, independent of how the official may regard the propriety or impropriety of performing the act in any particular case.” *Neely*, 128 S.W.3d at 924 (citing *Carnahan*, 965 S.W.2d at 213). “To determine whether the right to mandamus is clearly established and exists currently, the court examines the statute under which the relator claims the right.” *Neely*, 128 S.W.3d at 924 (citing *Carnahan*, 965 S.W.2d at 213).

Respondent SOS properly executed its ministerial duties.

Appellants argue the SOS erred in following the instruction of JCAR and the PSC to publish the PSC's rule with paragraphs (2)(A) and (2)(B)2 designated as "Reserved," contending the SOS should be required "to publish the PSC's rule as it was transmitted, including the two disapproved paragraphs (2)(A) and (2)(B)2," without giving effect to the PSC's letter stating those sections were not being filed. (Appellants Brief pg. 21). Appellants would have the SOS publish a rule, or portion thereof, in a manner other than as submitted by the agency, requiring the SOS to overstep its ministerial authority.

The SOS possesses "no discretion" in executing its "duty to publish a final order of rulemaking." *Mo. Coal. for Environ. v. Jt. Comm. Admin. Rules*, 948 S.W.2d 125, 131 (Mo. banc 1997). "Once the rule has been properly submitted, the secretary must publish it." *Id.* (citing § 536.021.7, RSMo Supp. 1992). This duty "is a 'definite ministerial duty imposed by law.'" *Mo. Coal. for Environ.*, 948 S.W.2d at 131 (quoting *State ex rel. Cabool v. Tex. Cnty. Bd. of Equalization*, 850 S.W.2d 102, 105 (Mo. banc 1993)). Section 536.021, RSMo, imposes this ministerial duty and requires the SOS to publish a final order of rulemaking "as soon as practicable after the filing thereof," provided it complies with § 536.024 or an executive order, as applicable. In turn, § 536.024, RSMo, provides that "[a] final order of rulemaking shall not be

filed with the [SOS] until thirty days after such final order of rulemaking has been received by [JCAR].” Within 90 days after either the end of the public comment period for, or any hearing on, the proposed rulemaking, the submitting agency must “file with the [SOS] a final order of rulemaking either adopting the proposed rule, *with or without further changes*, or withdrawing the proposed rule, which order of rulemaking shall be published in the Missouri Register.” § 536.021.5, RSMo Supp. 2004 (emphasis added). If JCAR “disapproves any proposed order of rulemaking, final order of rulemaking *or portion thereof*,” the same cannot be published by the SOS, “so long as the general assembly shall disapprove such by concurrent resolution pursuant to article IV, section 8 within thirty legislative days occurring during the same regular session of the general assembly” and “until the expiration of time necessary to comply with the provisions of article III, section 32.” *Id.* at § 536.021.1.

The SOS received notification of JCAR’s disapproval of “portions” of a “final order of rulemaking” via the letters from JCAR and the PSC. *See* (L.F. II 273 & 332). As part of the PSC’s July 6, 2010, filing of the rule, the SOS received a “Certification of Administrative Rule” certifying that attached was “an accurate and complete copy of the revised order of rulemaking lawfully submitted by the Missouri [PSC] for filing.” *See* (L.F. II 331). Among the attached documents was a letter from the PSC stating the agency was “not

filing [sections (2)(A) and (2)(B)2] for publication,” and instructing those sections “be reserved for later use in the event the [PSC] decides to amend the rule.” *See* (L.F. II 332). Consistent with §§ 536.021 and 536.024, RSMo Supp. 2004, and in conformity with the instructions submitted by the PSC regarding the wording of its rule, the SOS published the rule in the Missouri Register and the Code of State Regulations, marking paragraphs (2)(A) and (2)(B)2 as “Reserved.”

The SOS cannot decline to follow the instructions of a submitting agency regarding the wording of the rule to be published because of the ministerial nature of the SOS’ duty to publish the final order of rulemaking—absent any supporting statutory requirement or authority to do so—nor can it publish a particular version of the rule based on its own determination as to the constitutionality of statutes governing the agency rulemaking process.

In *Mo. Coal. for Environ. v. JCAR*, the Court ordered the SOS to publish a final order of rulemaking that was submitted by the Department of Natural Resources after the SOS declined to publish the final order because it was not submitted to JCAR first, as required by a statute found unconstitutional by the Court. *Mo. Coal. for Environ. v. JCAR*, 948 S.W.2d 125, 130 (Mo. banc 1997). Citing the SOS’ ministerial role in this process, the Court reasoned that “[o]nce the rule has been properly submitted, the

secretary must publish it.” *Id.* at 131. Consistent with the *JCAR* ruling, the SOS published the PSC’s rule in this case as submitted by the agency and in accordance with the filing agency’s instructions regarding the wording of the rule. For the SOS to have declined or published the rule in any manner other than as submitted by the agency would have required the SOS to overstep its authority and act contrary to its ministerial duty.

No Response to Appellants Points Relied On II and III:

Respondent SOS takes no position regarding the validity of Appellants' arguments in points relied on II and III, which challenge the constitutionality of actions taken by the other Respondents.

CONCLUSION

For the reasons stated above, Respondent SOS respectfully requests the Court deny Appellants' request for mandamus, and to the extent Appellants' other requests are premised on a finding that the SOS improperly executed its ministerial duty to publish the rule, the court deny such relief, and grant any other relief as may be proper in the premise.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 2165 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2013 software.
2. That a copy of this notification was sent through the eFiling system on this 8th of June, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief was served on all parties by way of electronic filing on this 8th day of June 2016.

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