IN THE MISSOURI SUPREME COURT

CASE NO. SC95532

CHARLES & MARY ANN HARTER

Appellants

V

NIA RAY, MISSOURI DIRECTOR OF REVENUE

,

Respondent

Appeal from Decision of The Administrative Hearing Commission

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APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

Charles A. Harter 28059 Appellant, Attorney for Appellants
827 S. Sappington, St. Louis, Mo 63126
314-821-1334 harleycharter@sbcglobal.net

CERTIFICATE OF SERVICE

TAKE NOTICE that appellant certifies that a true and correct copy of the foregoing was served electronically pursuant to Rule 43.01 for each party this 15th day of September, 2016, as follows:

Missouri Director of Revenue Nia Ray
Curtis Schube, assistant Attorney General
Curtis.schube@ago.mo.gov

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Respondent's Argument I on page 9, that appellants lack standing to appeal, is absurd. It is based wholly on section 512.020 RSMo which concerns judgments in the circuit court. The Supreme Court has forbidden the Administrative Hearing Commission from issuing "judgments" as unconstitutional under the Article II Separation of Powers of the Missouri Constitution in *State Tax Com'n v. Administrative Hearing Com'n*, 641 S.W.2d 69 (Mo., 1982). Since the AHC is not a circuit court and cannot issue a judgment, the statute cited by respondent is completely irrelevant to this case.

Of course appellants have standing. They are taxpayers. They appeal to this court based on section 621.189 RSMo, which directs that when taxpayers appeal from 621.050 (which are from the respondent director of revenue), "review under this section shall be exclusive and decisions of the Administrative Hearing Commission reviewable pursuant to this section shall not be reviewable in any other proceeding." That "exclusive" and "any other proceeding" language would clearly eviscerate Argument I of respondent's brief concerning section 512.020

Respondent claims on page 13 of its brief regarding section 536.073.3 RSMo, without citation or case analysis, that the word "shall" is mandatory and not discretionary in directing that "the administrative hearing commission shall adopt rules providing for disposition of a contested case by …summary judgment." One

would assume that the attorney general would provide this Court case law to determine whether or not such a use of the word shall is mandatory or discretionary. In that absence, appellants cite *Hedges v. Department of Social Services of Missouri*, 585 S.W.2d 170 (Mo. App .W.D., 1979).

Therein, this Supreme Court said, at page 172, "With respect to whether a statutory requirement (and by analogy a requirement created by administrative regulation) is mandatory or merely directory, the general rule has been stated frequently that when the statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed, whereas, if it merely requires certain things to be done and nowhere prescribes the results that shall follow if such things are not done, the statute is merely directory. State ex rel. Dietrich v. Schade, 167 S.W.2d 135 (Mo.App.1943); State ex rel. Ferro v. Oellermann, 458 S.W.2d 583 (Mo.App.1970); Trantina v. Board of Trustees of Fire. Retire. Sys., 503 S.W.2d 148 (Mo.App.1974); Conner v. Herd, 452 S.W.2d 272 (Mo.App.1970). In the present case, no statute requires the notice in question, and even the regulation which is the only authority setting up the requirement specifies no penalty or consequence for nonnotification. Therefore, under the general rule stated above, the requirement here is only directory."

Likewise, in our present case, the statute in question, to wit section 536.073.3 RSMo, fails to provide a penalty nor consequence given for failure of the AHC to make rules. Thus "shall" here is directory and not mandatory and the argument in this regard of respondent is specious. However, even if the word "shall" were mandatory, as claimed by respondent, the Rule 1 CSR 15-3.446 which it is supposedly based upon the statute 536.073.3, would ironically violate the claimed mandate, in that the rule provides for summary decision, and not the summary judgment of the statute. Respondent fails to note this distinction, but even under respondent's reasoning as given, the rule violates the mandate of the statute and respondent's argument again, is specious.

Further, upon what authority does the director of revenue claim to interpret rules of the administrative hearing commission? This is not a revenue rule. It would seem a clear conflict for the respondent director to dictate the meaning of rules which are intended to be used to curb her authority and review her decisions. As this Supreme Court has already clearly decided in *State Tax Com'n v. Administrative Hearing Com'n*, 641 S.W.2d 69 (Mo., 1982) at page 75, that "The declaratory judgment is a judicial remedy" such that "By purporting to give the Administrative Hearing Commission the power to render declaratory judgments regarding the validity of agency rules, the legislature has attempted to elevate the Administrative Hearing Commission to the status of a court." This decision makes

unconstitutional section 536.073.3 RSMo as a purported attempt to grant the AHC the power to issue a judgment, the statute upon which respondent bases her entire defense, as it purports to grant the AHC the power to issue a judgment.

At page 12 of her brief, respondent said "while there may have been a short time that the Department of Revenue contested Mrs. Harter's disability status…" This is a preposterous statement. Respondent Department of Revenue has been contesting Mrs. Harter's disability status for more than ten years; every single year. (R247) Sometimes two, three or four contests per year. This summer, simultaneously while respondent was preparing their brief to write those words "short time" of respondent's denial of appellant's disability status, respondent again, for tax year 2015 (which return was filed in April of 2016), contested appellants' disability status, denied their claim for refund and demanded they submit a federal form 1099 (Rep. Apx. 3) This constitutes seven years of "contests" of appellant's disability and demands for a federal form 1099 that, as a Missouri teacher, she does not have. Respondent calls this a "short time."

For tax year 2009, the respondent director "contested" disability status on February 17, 2010 (Res. Exh. F); tax year 2010 the "contest" on June 8, 2011 (Res. Exh G); tax year 2012 "contest" on February 26, 2013 (Res. Exh I) and for amended tax year 2012, "contest" on October 22, 2013 (Res Exh. D9). These

official "adjustments" document the "contest" of disability status. This is not a "short time." This is a dedicated government position. Every year after the stipulation of counsel is renewed, the director concedes by granting the refund, but then each next year again "contests." Despite the attempt of the respondent's brief to minimize this conduct, it is not even confined to appellants. Many disabled teachers are treated this way and have their disability "contested." Workers for the director admit this, when upon learning that taxpayer had been denied the property tax credit because she did not have a form 1099, they said "I know about being deemed disabled through the public school system. I see a lot of these." (R. 246)

Appellants submit that the claim respondent's brief at page 12, of agreement to no longer "contest" of disability, does not truly represent the position of the state, but retaliation against appellants. As shown, contemporaneous to respondent's claim that she will no longer contest disability status, she did contest disability status. (RA 3) To demonstrate retaliation, it is interesting that when appellants amended their federal return on unrelated and undisputed issues, it generated a review of their Missouri returns. The initial adjustment of the director was to again "contest" the disability as lack of a form 1099 as the only issue (Res Exh. D9). But a month later, after taxpayer's protest alerted the director to the identity of the amenders, the add-back issues were added (Res Exh. B9, C10).

On page 7 respondent falsely states that the stipulation of counsel was about a QHIP deduction. Although the QHIP has been computed in various ways over the years, it has never been in dispute. Taxpayers have accepted respondent's computations. The Stipulation of Counsel did not concern QHIP, but was that appellant was disabled and entitled to a property tax credit even though she did not have a federal form 1099. This is clear from the letter of the counsel (R 61-2) and from that lawyers discussion with the tax worker to put into effect the stipulation of counsel (R 247). Respondent wishes to distract with the QHP because it has no monetary impact and because it is no longer offered as a deduction, and thus any decision thereon would be moot. The issue before the court is whether or not appellants are eligible for the property tax credit without a federal form 1099.

Continuing the misdirection, respondent's brief says on page 7 that "both parties agreed Mrs. Harter is disabled." This is simply not true. That the director continues to claim that she is not disabled because she cannot produce a federal form 1099, is THE issue in this case. Had the director, in fact, conceded this, then the taxpayers would have had their refunds for years 2008, 2009, 2010, 2011, 2012, 2013, 2014, and now 2015 (RA 3). This, the director does not agree, and to this very day demands appellants produce a form 1099 to prove disability (RA 3). Respondent 's brief claims that the letter from her lawyer (R 61-2) is the agreement, and is the only agreement, and as it was written in 2010, is irrelevant.

Respondent is confused. First off, the letter itself states that the agreement it recites is to have future effect, thus it cannot be irrelevant to years in the future such as those at issue of 2010 – 2013. After stating that she has put a note in the record at revenue, the lawyer states "Hopefully, this will avoid any future problems with processing your property tax credit. If, however, you experience any problems in the future, please do not hesitate to call me." This cannot be irrelevant.

Second, the letter is not the agreement, in the same way that "the map is not the territory" according to Alfred Korzybski in his book Science and Sanity. The agreement, or stipulation of counsel, was made and renewed each year from 2008 to 2013. The letter is but one evidence of the stipulation , although a strong one.

It is illogical of respondent director to claim that the letter of her lawyer written in 2010 is irrelevant to tax years 2010, 2011, 2012 and 2013, when her same lawyer said about appellant in email to the tech worker in the taxation division, that "is there anything he can do to avoid having to call in every year and get his return corrected?" (R 246). The tech worker responds "Have him put a note stating she is disabled through the PSRS and he shouldn't have an issue." Taxpayers followed this advice, but it was not enough to prevent the director from nevertheless "contesting" the disability and demanding a form 1099. However, this shows that the agents of the director, her lawyer and tech worker, were both

seeking to apply to future years, the agreement that a form 1099 was not necessary. Thus the agreement, or stipulation of counsel, is not irrelevant, not even to the director who is bound by these actions of her agents that it is relevant.

CONCLUSION

WHEREFORE, appellants pray in reply to respondent's brief, that this Honorable Court hear Oral Argument on the issues raised by the briefs of the parties and thereafter award to appellants the tax refunds they have claimed.

CERTIFICATE OF COMPLIANCE

I certify the following:

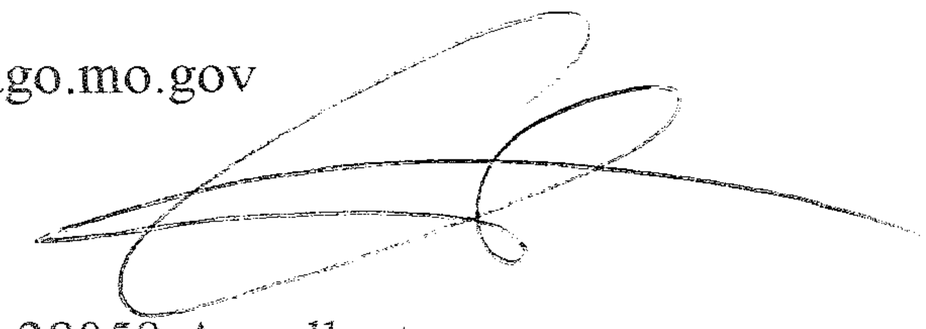
1. The foregoing brief complies with the type and volume limitations of Rule 84.06. The typeface is Times New Roman 14 pt.
2. The signature block of the foregoing brief contains the information required by rule 55.03(a). To the extent that rule 84.06(c)(1) may require inclusions or the representations appearing in rule 55.03(b), those representations are incorporated herein by reference.

3. The foregoing brief, excluding the cover, certificate of service, this certificate and the signature block, contains 2,211 words counted by Word.
4. This brief has been prepared using Microsoft Word format.
5. Appellant has submitted electronic filing as substitute for the CD-ROM or disc as required by rule 84.06(g) and special rule 363, and has been scanned for viruses and is virus free.

CERTIFICATE OF SERVICE

I certify that I served electronically one copy of this Appellant's Brief and Appendix in the form specified by rule 43.01 this 15th day September, 2016 to counsel for Respondent Director Nia Ray, to Curtis Schube, assistant Attorney General;

Curtis.schube@ago.mo.gov



Charles A. Harter 28059 Appellant
827 S. Sappington, St. Louis, Mo 63126

314-821-1334 harleycharter@sbcglobal.net