

IN THE SUPREME COURT OF MISSOURI

No. SC 93698

JOHN T. IMPEY,

Appellant,

vs.

MISSOURI ETHICS COMMISSION, ET AL.,

Respondents.

**Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Circuit Judge**

BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

Appellant John T. Impey (“Impey”) appeals from a judgment of the Cole County Circuit Court dismissing his petition for judicial review. (L.F. 105-06.) Impey brought his petition for judicial review following a determination by the Missouri Ethics Commission finding probable cause that he violated RSMo. § 130.031.8, an ethics law. (L.F. 5-10, 57-60.)

Impey argued that he need not take the matter to the Administrative Hearing Commission prior to seeking relief in the circuit court, despite the requirement of RSMo. § 105.961.5 (A.L. 1997, S.B. 16). (L.F. 68-73.) He asserted that the statutory requirement that he proceed first to the Administrative Hearing Commission violated Art. V, § 18 of the Missouri Constitution. (L.F. 68-73, 114-120). The circuit court disagreed, and upheld the constitutionality of the administrative process set forth at RSMo. §§ 105.961.3 through .5 (A.L. 1997, S.B. 16). (L.F. 105-06.) Impey appealed to this Court, challenging the constitutionality of the administrative process set forth at RSMo. § 105.961 (A.L. 1997, S.B. 16). (L.F. 149.) The Court has exclusive appellate jurisdiction over that question. Mo. Const. Art. V, § 3.

STATEMENT OF FACTS

A. The Statutory Procedure

RSMo. § 105.961¹ provides a process for investigation and resolution of complaints made to the Missouri Ethics Commission (“Commission”) pursuant to RSMo. § 105.957. Upon receipt of such a complaint, the Commission must assign the matter to an investigator. RSMo. § 105.961.1. The investigator must “investigate and determine the merits of the complaint,” and then submit a report to the Commission. *Id.* The Commission must review the report and determine whether “there is reasonable grounds for belief that a violation has occurred.” *Id.* at (1).

If the Commission concludes that there are such grounds, but that the violation concerned is not criminal or is not appropriate for criminal

¹ The 2013 Cumulative Supplement contains the version of RSMo. § 105.961 amended in 2010 by Senate Bill 844 (which was struck down by the Court in *Legends Bank v. State of Missouri*, 361 S.W.3d 383 (Mo. 2012)), as well as the version of the statute amended in 1997 by Senate Bill 16 (which is now in effect and was in effect for all time periods relevant to this case). Unless otherwise stated, this brief’s citation to RSMo. § 105.961 is to the version amended in 1997 by Senate Bill 16.

prosecution, then “the commission shall conduct a hearing which shall be a closed meeting.” RSMo. § 105.961.3. “The hearing shall be conducted pursuant to the procedures provided by sections 536.063 to 536.090 and shall be considered to be a contested case *for purposes of such sections*. The commission shall determine, in its discretion, whether or not that there is probable cause that a violation has occurred.” *Id.* (emphasis added).

If the Commission determines that there is probable cause to believe that there was a violation, and that action other than referral for criminal prosecution or to a disciplinary authority would be appropriate, then the Commission must take one or more of the actions identified at RSMo. §§ 105.961.4(1) through .4(6). RSMo. § 105.961.4. Before doing so, the Commission must “give actual notice to the subject of the complaint.” *Id.* at .5. The subject may, within fourteen days of actual notice, ask the Administrative Hearing Commission (“AHC”) to consider the proposed action. *Id.* Invoking one’s right to a hearing before the AHC results in an automatic stay of the Commission’s action. *Id.*

In 2010, the legislature passed Senate Bill 844 (“S.B. 844”). S.B. 844 “added section 37.900,” and also “repealed and enacted a number of sections in chapters 105, 115, and 130.” *Legends Bank v. State of Missouri*, 361 S.W.3d 383, 385 (Mo. 2012). Among the statutes amended was RSMo. § 105.961. RSMo. § 105.961 (A.L. 2010, S.B. 844) provided for review of the

Commission's probable cause determination and proposed action by the Cole County Circuit Court instead of by the AHC. *Id.* at .6. In February of 2012, this Court found that S.B. 844 violated Art. III, § 21 of the Missouri Constitution, the original purpose requirement. *Legends Bank*, 361 S.W.3d 383, 385. The Court thus invalidated "the multiple provisions" of S.B. 844 "relating to . . . ethics." *Id.* at 387. Those provisions included RSMo. § 105.961 (A.L. 2010, S.B. 844).

B. The Events Involving Impey

In August of 2011, the Commission received a complaint against Impey. (L.F. 7, 11-12.) The Commission assigned the complaint to an investigator who performed an investigation and provided a report. (*Id.* at 7, 17-21.) Following receipt of this report, the Commission determined that there were reasonable grounds to believe that a violation had occurred, and proceeded with a hearing as set forth at RSMo. § 105.961.3. (L.F. 7, 22.)

In September of 2012, following the hearing, the Commission made a determination of probable cause that Impey violated RSMo. § 130.031.8. (L.F. 29, 32.) As a proposed action, the Commission sought a fee through reconciliation of \$100 per RSMo. § 105.961.4(6). (L.F. 37.) The Commission provided Impey with actual notice of its probable cause determination and proposed action. (L.F. 8, 29-37, 57-67.) The Commission's notice informed Impey that he had the right to take the matter to the AHC at that point. (*Id.*

at 66.) Impey did not take the matter to the AHC. App. Br. 10. (L.F. 106.) Instead, he filed a petition for judicial review in circuit court. (L.F. 5-37.)

The Commission moved to dismiss Impey's petition because he failed to exhaust his administrative remedies. (*Id.* at 51-67.) Impey resisted this motion by arguing that the statutory procedure violates Art. V, § 18 of the Missouri Constitution. (L.F. 68-73.) The circuit court upheld the statutory procedure and dismissed Impey's petition. (*Id.* at 105-06.)

STANDARD OF REVIEW

In this case, the Court reviews the circuit court's dismissal, as well as its constitutional ruling, *de novo*. See *Coleman v. Missouri Secretary of State*, 313 S.W.3d 148, 151 (Mo. App. W.D. 2010). See also *St. Louis County v. Riverbend Estates Homeowners' Association*, 408 S.W.3d 116, 135 (Mo. 2013). "A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution; it should be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution." *Badahman v. Catering St. Louis*, 395 S.W.3d 29, 35 (Mo. 2013). "This presumption of constitutionality compels [the Court] to adopt any reasonable reading of the statute that will allow its validity and to resolve all doubts in favor of constitutionality." *State ex rel. Hilburn v. Staeden*, 91 S.W.3d 607, 609 (Mo. 2002). The party challenging the validity of a statute "bears the burden of proving the statute[] clearly and undoubtedly violate[s] the constitution." *Riverbend Estates*, 408 S.W.3d 116, 135 (Mo. 2013).

I. The administrative procedure set forth at RSMo. §§ 105.961.3 through .5 does not violate Article V, § 18 of the Missouri Constitution because that procedure does not constitute a contested case. (Response to Point Relied On I.)

Article V, § 18 of the Missouri Constitution states in pertinent part that “[a]ll final decisions . . . on any administrative . . . body . . . which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts.” The “decisions” referenced in this section are contested case decisions. *See Barnes Hospital v. Missouri Commission on Human Rights*, 661 S.W.2d 534, 535 (Mo. 1983) (quoting *Percy Kent Bag Co. v. Missouri Commission on Human Rights*, 632 S.W.2d 480, 487 (Mo. 1982)). *See also Lederer v. Department of Social Services*, 825 S.W.2d 858, 862-63 (Mo. App. W.D. 1992)² (citing Art. V, § 18 after noting that the AHC’s decision in that

² The *Lederer* court’s construction of RSMo. § 36.390.9 was struck down by this Court’s decision in *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. 1993). As the court noted in *Board of Registration for the Healing Arts v. Trueblood*, 368 S.W.3d 259 (Mo. App. W.D. 2012), “*Lederer*’s general discussion of the

case “was formulated in terms of the direct *judicial review* the constitution, as well as statute, accords to a party aggrieved by an administrative decision in a contested case.”). The standards of review found at RSMo. § 536.140, the Administrative Procedure Act’s contested case review statute, align with those provided at Art. V, § 18. And only a contested case would “affect private rights” with a “final decision” that is “judicial or quasi-judicial” in nature.

Impey argues that the administrative procedure set forth at RSMo. §§ 105.961.3 through .5 violates Art. V, § 18 of the Missouri Constitution. App. Br. 16. In order to make his argument, Impey argues that these statutory sections create a contested case procedure for the Commission. *Id.* at 21. This argument is incorrect. The administrative process of the Commission does not constitute a contested case. Therefore, Article V, § 18 does not require direct judicial review of the Commission’s decision.

“Where a statute’s language is clear, courts must give effect to its plain meaning and refrain from applying rules of construction unless there is some ambiguity.” *Ross v. Director of Revenue*, 311 S.W.3d 732, 735 (Mo. 2010). “The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible,

nature of, and differences between, administrative and judicial review remains good law, however.” *Id.* at n.6.

and to consider the words in their plain and ordinary meaning.” *South Metropolitan Fire Protection District v. City of Lee’s Summit*, 278 S.W.3d 659, 666 (Mo. 2009). “It is a well accepted canon of statutory construction that if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended.” *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. 1991).

A. RSMo. § 105.961 creates a hearing before the Commission that invokes certain contested case procedures, but is not a contested case.

When the Commission concludes that there are reasonable grounds to believe that a violation has occurred, and criminal prosecution is not applicable or appropriate, the Commission conducts a hearing to determine probable cause. But the statute implicitly excludes that hearing from the scope of “contested cases.” The hearing is required by RSMo. § 105.961.3, which states that:

the commission shall conduct a hearing which shall be a closed meeting and not open to the public. The hearing shall be conducted pursuant to the procedures provided by sections 536.063 to 536.090 and shall be considered to be a contested case for purposes of such sections. The commission shall determine, in

its discretion, whether or not there is probable cause that a violation has occurred.

Id. The hearing at issue “shall be considered to be a contested case for purposes of [sections 536.063 to 536.090].” *Id.* If this hearing were a contested case, then there would no need for it to be “considered to be a contested case for purposes of” certain statutes; rather, those statutes³, and others, would apply by operation of law. “Each word, clause, sentence, and section of the statute will be given meaning, and this Court will not interpret the statute in a way that renders some phrases mere surplusage.” *Farish v. Missouri Department of Corrections*, 416 S.W.3d 793, 796 (Mo. 2013). The statute’s use of the word “considered,” combined with its specification of statutes setting forth certain contested case procedures, indicates that these specified laws do not otherwise apply to this hearing. That is, this hearing is not a contested case, but it shall be *considered* as one for the purposes of certain sections of law.

RSMo. § 105.961.3 also excludes the application of some contested case statutes to this hearing. By expressly stating that the hearing before the Commission “shall be considered to be a contested case for purposes of” certain sections of Chapter 536 applicable to contested cases, the legislature

³ RSMo. §§ 536.063 through .090 include several contested case procedures.

has implicitly excluded the others. “[The Court] recognize[s] the rule of statutory construction that the express mention of one thing implies the exclusion of another.” *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 32 (Mo. 1988). Prominent among the omitted contested case statutes are RSMo. §§ 536.095 and 536.100. RSMo. § 536.095 authorizes an agency conducting a contested case hearing to seek a contempt order from a court. RSMo. § 536.100 authorizes a person to seek judicial review of final decisions in contested cases. By excluding these statutes from the contested case statutes listed at RSMo. § 105.961.3, the legislature clarified that the hearing at issue in this case is not a contested case, and the Commission’s determination following that hearing may not be appealed as one.

B. The determination of the Commission as set forth at RSMo. §§ 105.961.3 through .5 lacks the finality necessary for a contested case.

The hearing process as set forth at RSMo. §§ 105.961.3 through .5 is also excluded from the universe of “contested cases” because the probable cause determination lacks the finality necessary for a contested case. RSMo. § 536.010(4) defines “[c]ontested case” as “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.” In order for an agency proceeding to “determine” the “legal rights, duties, or privileges of specific parties,” *id.*, that

proceeding must include a “final decision[],” Mo. Const. Art. V, § 18. *See Parker v. City of Saint Joseph*, 167 S.W.3d 219, 221-22 (Mo. App. W.D. 2005) (holding that employment termination decision subject to arbitration was not final for purposes of RSMo. § 536.100 or Art. V, § 18).

After the hearing required by RSMo. § 105.961.3, “[t]he commission shall determine, in its discretion, whether or not that there is probable cause that a violation has occurred.” *Id.* If the Commission determines that there is probable cause of a violation, and “that some action other than referral for criminal prosecution or for action by the appropriate disciplinary authority would be appropriate,” then the Commission must take one or more of the actions listed at RSMo. §§ 105.961.4(1) through .4(6). The Commission “shall give actual notice to the subject of the complaint of the proposed action.” *Id.* at .5. The Commission’s proposed action is automatically stayed by appeal to the AHC. *Id.*

The determination of the Commission following the hearing created by RSMo. § 105.961.3 does not determine the legal rights, duties, or privileges of specific parties, and is not a final decision within the meaning of Art. V, § 18 of the Missouri Constitution. Impey cites *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. 1993) in support of his argument to the contrary. App. Br. 20. However, *Asbury* is distinguishable from this case on the issue of finality. In *Asbury*, the Court observed that “[s]ection 36.390.9 specifically provides that

‘[d]ecisions of the personnel advisory board *shall be final and binding* subject to appeal by either party [to] ... the administrative hearing commission or by the circuit court ... but not both.’ (Emphasis added.)” *Id.* at 202.

The Court continued as follows:

The use of the words “final and binding” indicates finality for purposes of appellate review. They do not indicate tentative, provisional, or contingent decisions that are subject to reconsideration. [Citation omitted.] Had these words not been used, one might attempt to deem the PAB decision as an intermediary agency decision, being final only after AHC review. The use of these terms, however, precludes such a reading. Moreover, a reading of these terms as merely interlocutory agency action would be inconsistent with the option granted to the aggrieved party to proceed immediately to review by the circuit court.

Id. at 202.

In contrast to the scheme confronted in *Asbury*, neither the language in nor the structure of RSMo. § 105.961 indicates finality. On the contrary, the statutory language and procedure reveals a decision that is “intermediary” and “subject to reconsideration.” *Asbury*, 846 S.W.2d 196, 202. The Commission’s standard of proof under RSMo. § 105.961.3 is probable cause.

Id. Contested cases⁴ heard by the personnel advisory board used a preponderance of the evidence standard. *Fujita v. Jeffries*, 714 S.W.2d 202, 206 (Mo. App. E.D. 1986).

In *Schnell v. Zobrist*, 323 S.W.3d 403 (Mo. App. W.D. 2010), the Court of Appeals cited *Fujita* with approval in a discussion of standards of proof and standards of review in contested cases. *Schnell* at 411-13. “[I]n determining whether the preponderance of the evidence supports a party’s position, the trier of fact must resolve conflicting evidence and decide which of the parties’ positions is more probable, more credible and of greater weight.” *Id.* at 412. This standard contrasts with the probable cause standard, which “does not require a fact finder to balance conflicting evidence.” *Jamison v. Department of Social Services*, 218 S.W.3d 399, 411 (Mo. 2007). The Commission’s research has revealed no contested cases that use the probable cause standard of proof, and the authorities above

⁴ RSMo. § 36.390.9 (1986) created a contested case procedure. Its language presents a distinct contrast to the language found at RSMo. § 105.961.3. “The hearing shall be deemed to be a contested case and the procedures applicable to the processing of such hearings and determinations shall be those established by chapter 536, RSMo.” RSMo. § 36.390.9 (1986).

demonstrate why there can be none. The procedure set forth at RSMo. §§ 105.961.3 through .5 is no exception.

Other aspects of the Commission's statute indicate that the Commission's determination is not final. The Commission's determination leads to a "proposed action," according to RSMo. § 105.961.5. Unlike the statute in *Asbury*, this statute does not state that the Commission's determination is "final and binding." *Asbury*, 846 S.W.2d 196, 202 (Mo. 1993). Nor does this statute permit the subject of the Commission's determination to appeal to a circuit court. The only appeal of the Commission's determination is to the AHC. RSMo. § 105.961.5.

For purposes of finality, the probable cause determination of the Commission as set forth at RSMo. §§ 105.961.3 through .5 is akin to the probable cause determinations reviewed in *Artman v. State Board of Registration for the Healing Arts*, 918 S.W.2d 247 (Mo. 1996), and *State ex rel. Walker v. Missouri State Board of Registration for the Healing Arts*, 926 S.W.2d 148 (Mo. App. E.D. 1996). In *Artman*, the Court upheld the constitutionality (procedural due process) of a probable cause hearing concerning medical incompetency, even though the board permitted no discovery prior to hearing or presentation from the doctor's counsel at hearing. *Artman*, 918 S.W.2d 247, 249-51. "Because the Board did not adjudicate or make binding determinations about Artman at the probable

cause hearing, the hearing was investigative in nature.” *Id.* at 251. The Court recognized the doctor’s entitlement to additional process prior to action on his license. *Id.* “So long as before a license is revoked, the physician has a meaningful hearing with notice and an effective opportunity to defend, due process is satisfied.” *Id.*

In *Walker*, a doctor litigated to prohibit the board from holding its probable cause hearing.⁵ *Walker*, 926 S.W.2d 148, 150. The court permitted the hearing, citing *Artman*. *Walker* at 151. In *Walker*, the court noted that the board needed only probable cause to require the doctor’s re-examination. *Id.* at 150. However, if the doctor failed the exam, the board could not take action on the doctor’s license without “a contested case hearing.” *Id.* at 151.

Subjects of complaints before the Commission find themselves in a much better situation than the doctors before the board in *Artman* and *Walker*; the Commission can make no determination against an individual that is free from contested case review. RSMo. § 105.961.5. Yet the board’s requirement of re-examination based on probable cause was upheld. *Walker* at 151. “The procedure followed by the Board has been judicially approved.” *Id.* The same must hold for the Commission’s probable cause determination.

⁵ The doctor in *Walker* challenged the board’s process under Chapter 536, and requested that the hearing proceed as a contested case. *Walker* at 150-51.

The right to have the AHC make the final administrative decision, as provided at RSMo. § 105.961.5, reinforces the preliminary nature of the Commission's determination. When a person as to whom probable cause has been found invokes his right to a hearing at the AHC, the AHC "actually steps into the [Commission]'s shoes and becomes the [Commission] in remaking the [Commission]'s decision. This includes the exercise of any discretion that the [Commission] would exercise." *Department of Social Services v. Mellas*, 220 S.W.3d 778, 783 (Mo. App. W.D. 2007) (cited in *State Board of Registration for the Healing Arts v. Trueblood*, 368 S.W.3d 259, 265-66 (Mo. App. W.D. 2012) as a generally-applicable quality of the AHC's role).

The Court of Appeals has applied this same principle to matters coming from the Commission. *Missouri Ethics Commission v. Wilson*, 957 S.W.2d 794 (Mo. App. W.D. 1997).

The AHC performs the same role as the administrative hearing officer authorized to hear contested cases within an agency. . . .

The function intended by the legislature for the AHC is to render, on the evidence heard, the administrative decision of the agency.

. . . The decision of the AHC then becomes the decision of the department.

Id. at 798 (internal citations omitted). And although this Court has not addressed the question as to the Commission, it has acknowledged the

general principle. *Custom Hardware Engineering & Consulting, Inc. v. Director of Revenue*, 358 S.W.3d 54, 58 (Mo. 2012). See also *Department of Social Services v. Little Hills Healthcare, LLC*, 236 S.W.3d 637, 644 (Mo. 2007) (“The legislature’s intent was for the [AHC] to render the agency’s decision.”).

The AHC’s ability “to render, on the evidence heard, the administrative decision of the agency,” *Wilson*, 957 S.W.2d 794, 798, contradicts Impey’s claim that the Commission’s probable cause determination constitutes a “final decision” within the meaning of Art. V, § 18 of the Missouri Constitution. Upon his request, the AHC would step into the Commission’s shoes and utilize all authority and discretion that the Commission possesses. *Department of Social Services v. Mellas*, 220 S.W.3d 778, 783 (Mo. App. W.D. 2007). The AHC remakes whatever legal determinations the Commission initially made. *Wilson*, 957 S.W.2d 794, 798-99. Even in instances where the AHC concurs with those legal determinations, the AHC need not utilize its discretion in the same manner as the agency. *Trueblood*, 368 S.W.3d 259, 267 (Mo. App. W.D. 2012). A determination from the Commission subject to the AHC’s *de novo* process is not a final decision.

II. While the Commission’s probable cause determination and proposed action gave Impey the statutory authority to proceed to the AHC, his legal rights, duties, or

**privileges were not affected. (Response to Point Relied On
IV.)**

Impey argues that he is “aggrieved” by the Commission’s probable cause determination, and that the circuit court’s holding to the contrary is error. App. Br. 47. This argument is incorrect. The circuit court held that “[t]he probable cause determination is simply a condition precedent to enforcement action,” and that “[Impey] is not aggrieved by a probable cause determination.” (L.F. 105-06.) The circuit court understood that the Commission’s probable cause determination gave Impey an administrative remedy (not a judicial one), and that Impey had the right and obligation to pursue that remedy before bringing his case to the circuit court. (*Id.* at 106.)

But Impey never took his case to the AHC. App. Br. 10. Therefore, the Commission may take one of the actions set forth at RSMo. § 105.961.4. Those actions include a cease-and-desist letter, *id.* at .4(1), a notice of requirement “to file, amend or correct” documents that must be provided by campaign finance or ethics laws, *id.* at .4(2), a report to the Commission’s executive director, *id.* at .4(3), a letter of concern or reprimand, *id.* at .4(4), a letter of no further action, *id.* at .4(5), and, “[t]hrough reconciliation agreements or civil action, the power to seek fees for violations in an amount not greater than one thousand dollars or double the amount involved in the violation,” *id.* at .4(6). The Commission may also “initiate formal judicial

proceedings” for one or more of the orders set forth at RSMo. §§ 105.961.5(1) through .5(4). Having chosen not to divert his case to the AHC before the Commission took the next step, he missed his chance for review. He has no statutory or constitutional right to proceed to circuit court as an alternative to or substitute for an AHC action.

The Court of Appeals addressed a similar issue in *Parker v. City of Saint Joseph*, 167 S.W.3d 219 (Mo. App. W.D. 2005). In *Parker*, a terminated city employee filed a petition for judicial review in circuit court before completing a mandatory arbitration remedy. *Id.* at 221. The circuit court dismissed for failure to exhaust administrative remedies, and the Court of Appeals affirmed. *Id.* at 221-22. Parker argued that the arbitration process violated Art. V, § 18 of the Missouri Constitution and RSMo. § 536.100 because it interfered with “his right to immediate and direct judicial review of the City’s final decision.” *Id.* at 221. The court disagreed. *Id.* at 222.

The *Parker* court emphasized the significant principles underlying the exhaustion doctrine.

The purpose of exhaustion is to prevent premature interference with agency processes so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its expertise, and to compile a record that is adequate for judicial review.

Id. at 221. The court also distinguished *Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. 1993). *Parker* at 222. “The *Asbury* decision recognized that additional levels of administrative review may be required, as long as judicial review is immediately available once the agency decision is final.” *Id.*

The only action the Commission proposed to take in its September 2012 filing was to seek the payment of a fee from Impey “[t]hrough reconciliation agreement” pursuant to RSMo. § 105.961.4(6). (L.F. 37.) Such an action does not aggrieve Impey. At any rate, the issue of whether Impey may someday be aggrieved by some alternative action of the Commission taken under RSMo. §§ 105.961.4 or .5 is not at issue in this case. At this point, the Commission’s action does not aggrieve Impey, and the circuit court’s finding on this point is correct.

III. The circuit court lacked the statutory authority to address whether the Commission’s determination and action violated Impey’s right of free political speech or the Commission’s own statutory limitations. (Response to Points Relied On II and III.)

For his second point relied on, Impey argues for reversal on the basis that the statute applied by the Commission in its determination and action violates his rights under U.S. Const. Amend. I and Art. I, § 8 of the Missouri Constitution. App. Br. 5, 29. For his third point relied on, Impey argues for

reversal on the basis that the statute granting the Commission the authority to seek fees for violations (RSMo. § 105.961) is unconstitutional, and that the predecessor version of that statute (L. 1991, S.B. 262) does not permit the Commission to seek fees for violations. App. Br. 41. Because Impey failed to exhaust his administrative remedies in this case, the circuit court lacked the statutory authority to proceed on these arguments. The Court should affirm the circuit court's dismissal.

“Insofar as prior cases have held that the failure to exhaust administrative remedies is a question of subject matter jurisdiction, those cases have been overruled by the Supreme Court.” *Evans v. Empire District Electric Company*, 346 S.W.3d 313, 316 (Mo. App. W.D. 2011). “When a statute speaks in jurisdictional terms or can be read in such terms, it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief that courts may grant.” *Id.* (quoting *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 255 (Mo. 2009)). *See also Coleman v. Missouri Secretary of State*, 313 S.W.3d 148, 154 (Mo. App. W.D. 2010). Even so, “[t]he law requires pursuit of one’s administrative remedies as a pre-requisite to judicial review.” *Shafinia v. Nash*, 372 S.W.3d 490, 493 (Mo. App. W.D. 2012).

Impey filed his petition for judicial review with the circuit court pursuant to the contested case review procedures of Chapter 536. (L.F. 8-9.) As stated in *Coleman*:

[t]he right to file a petition for review described in Section 536.110.1 is thus constrained by the conditions to the right to file a petition for review described in section 536.100. Those conditions are clear: (1) exhaustion of all remedies provided by law, and (2) being aggrieved by a final decision in a contested contest.

Coleman, 313 S.W.3d 148, 153-54 (Mo. App. W.D. 2010). But as discussed above, Impey did not exhaust all remedies provided by law, and was not aggrieved by a final decision in a contested case. Therefore, Impey did not meet the conditions for filing a petition for review under RSMo. § 536.110. In the absence of this statutory authority, Impey had no statutory authority on which to base his petition for judicial review. The circuit court could not reach the issues raised by Impey's petition because it lacked the statutory authority to proceed. Thus, the circuit court did not err by dismissing Impey's petition.

The circuit court's lack of statutory authority to proceed holds even in light of the constitutional nature of Impey's arguments. Constitutional arguments can and must be raised before the AHC. *Lemay Building Corp. v. Director of Revenue*, 889 S.W.2d 835, 836-37 (Mo. banc. 1994). Additionally, the presence of a constitutional argument among other issues in dispute in litigation does not excuse a litigant from exhausting his administrative remedies. *Foremost Insurance Company v. Public Service Commission*, 985

S.W.2d 793, 795 (Mo. App. W.D. 1998). This practice ensures that a constitutional question “will not be decided unless essential to the disposition of the case.” *Id.* Among other challenges, Impey’s petition for judicial review alleges that the Commission’s determination and action “[i]s unsupported by competent and substantial evidence upon the whole record.” (L.F. 9.) That same petition seeks a “de novo review” by the circuit court pursuant to RSMo. § 536.140.3. (*Id.* at 8.) Given the AHC’s power to remake the decision of the Commission, it is quite plausible that the AHC could have resolved Impey’s dispute with the Commission without resort to the constitutional issues presented in Points II and III.⁶

CONCLUSION

For the foregoing reasons, the judgment of the circuit court should be affirmed.

⁶ Due to non-ripeness and lack of necessity, even if the Court were to reverse the circuit court’s dismissal, Impey’s Points II and III raise issues that should first be addressed by the lower court if necessary on remand. *See J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 257-58 (Mo. 2009). *See also Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556, 568 (Mo. App. W.D. 2008).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed electronically pursuant to Rule 103 through Missouri Case Net, on this 21st day of March, 2014, to:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 5,933 words.

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