

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 5323-16

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

ASPLUNDH TREE EXPERT COMPANY

RESPONDENT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS LOCAL UNION 369

INTERVENOR

REVIEW COMMISSION ORDER
DENYING SECRETARY'S REQUEST
FOR INTERLOCUTORY APPEAL

Before us is the Secretary's Request to the Review Commission for Special Permission to Appeal from the Hearing Officer's November 22, 2016 Order Denying Respondent's Motion for Permission to Propound Requests for Admission, to which Respondent did not file a response. Specifically, the Secretary seeks to appeal our hearing officer's interlocutory order providing that Respondent need not seek his permission to propound more than thirty (30) requests for admission because 803 KAR 50:0 10, section 26 (ROP 26) does not impose such a numerical limitation.¹

¹ The Secretary presents valid concerns that our rule allowing an unlimited number of requests for admission may be abused in a particular case and subject the Secretary to an undue burden. Unfortunately, the hearing officer was never presented with that argument prior to him issuing his order. The only issue on which he ruled was whether Respondent had to seek his permission to propound more than thirty requests for admission. Moreover, the Secretary's only

The Commission addressed this exact same issue in *PSC Industrial Outsourcing*, KOSHRC 4900-12, Order on Interlocutory Review (July 2, 2013), and held that the numerical limitation found in CR 33.01(3) does not apply to requests for admission propounded under 803 KAR 50:0 10, Section 26 (ROP 26). As the Commission stated in that case, there are several jurisdictions, including the federal court system, that do not place a numerical limitation on requests for admission. Moreover, the numerical limitation on requests for admission in CR 33.01(3) was not added to the Kentucky Rules of Civil Procedure until around 1984, which was after the Commission had drafted its rules in 1975. *See* Richard H. Underwood, *Discovery in Kentucky: An Overview*, 72 Ky. L. J. 727, 762 (1984). Thus, the Commission drafted its rules at a time when there was no numerical limitation on requests for admission in Kentucky. We are also not persuaded by the Secretary's arguments that the federal cases cited in *PSC Industrial Outsourcing* failed to support that decision. Those cases were cited for a correct proposition of law, which is that a Commission rule of procedure regarding a topic should displace a Kentucky Rule of Civil Procedure on the same topic.

Having reviewed the arguments stated in the Secretary's request, and in light of our recent precedent concerning this same issue, the Secretary's request for a special appeal is hereby denied.

objection to Respondent's requests for admission 31 through 108 was that those requests "exceed the total number of permitted requests pursuant to 803 KAR 50:010(4)(2), 803 KAR 50:010(26), and Kentucky Rules of Civil Procedure 33 and 36." Not only was this not a valid objection under our precedent, by making that his sole objection, the Secretary constrained our hearing officer to adopt a *per se* numerical limit on requests for admission rather than giving him an opportunity to address whether those requests in excess of thirty were otherwise irrelevant, oppressive, harassing, or overly burdensome.

It is so ordered.

February 14, 2017.



Faye S. Liebermann
Chair



Paul Cecil Green
Commissioner



Joe F. Childers
Commissioner

Certificate of Service

I certify that a copy of the foregoing order has been served this 14th day of February, 2017, on the following as indicated:

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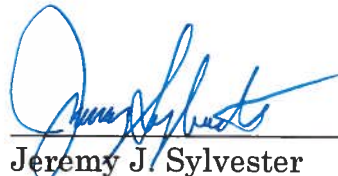
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