

2016 JAN 22 PM 3: 23

IN THE COURT OF CLAIMS OF OHIO

DAVID BENTKOWSKI,

Plaintiff,

vs.

OHIO LOTTERY COMMISSION

Defendant.

Case No. 2014-00651

JUDGE PATRICK MCGRATH

THE OHIO LOTTERY
COMMISSION'S NOTICE
OF INVALID SUBPOENA

AND MOTION TO QUASH
THE SUBPOENA OF
DENNIS BERG

ORIGINAL

1. Plaintiff's attempted service of the subpoena was improper under Civ.R. 45(B); therefore, the subpoena is invalid.

Mr. Bentkowski's process server left a subpoena for Dennis Berg with Traci Konesky, a Lottery employee who happened to be in the first floor reception area of the Lottery's downtown Cleveland office building. *See* Affidavit of Traci Konesky. The subpoena indicates that it was served at Mr. Berg's residence, but that is not true. *Id.* And leaving a subpoena with a co-worker or secretary at a person's place of employment is not an authorized means of serving a subpoena under the civil rules. Civ.R. 45(B) permits service of a subpoena in one of four ways: (1) delivery in person, (2) reading it to the person, (3) leaving it at a person's place of residence, or (4) sending it certified mail return receipt requested. Plaintiff attempted to leave it at Mr. Berg's place of employment. This is not one of the four authorized methods. His place of employment is not his place of residence. *Stammen v Woodruff*, 2nd Dist. Drake No. 1039, 1981 WL 2552 *3 (Sept 28, 1981).

The trial court is permitted to refuse to honor a subpoena left with a co-worker at a person's place of business. *City of Columbus v Timson*, 10th Dist. Franklin No. 87AP-939, 1988 WL 70463, *5 (June 30, 1988). It makes sense that leaving a subpoena with a secretary or receptionist who is not involved in the litigation is improper considering one cannot leave a subpoena with a witness's own trial attorney. *Carosella v Conwell*, 183 Ohio App.3d 688, 742 N.E.2d 188 (2000). A witness cannot

be compelled to testify when a subpoena is served improperly. *Landoll v Dowell*, 10th Dist. Franklin Nos. 94APF05-617, 94APF05-623, 94APF05-618, 94APF05-622, 1995 WL 100560, * 7 (1995). Before certified mail was a permitted method of service, the 10th District held that a witness could not be compelled to testify when the subpoena was served via certified mail. *Id.* Even though she showed up to the deposition, she did not have to testify. *Id.*

The civil rule was recently amended to permit an additional method of service, that is, by certified mail. Civ.R. 45, staff notes July 1, 2008 Amendments. Had the legislature intended to permit service by leaving it at a person's place of employment, it could have added that option to the language of the rule. However, it did not. Furthermore, Civ.R. 5, which deals with the service of pleadings, permits service by leaving the document at the person's place of employment. This option was intentionally omitted from Civ.R. 45. There are only four options for service and Plaintiff failed to comply with any of them.

Furthermore, the address on the subpoena is not the address where the subpoena was left. It is not the address for Mr. Berg's place of employment. Finally, the process server who delivered the subpoena *had not even been appointed to do so*. Mr. Bentkowski's motion for his appointment was filed on January 20, 2016, but that motion had not been granted at the time he appeared in the Lottery's reception area. For these reasons, the subpoena is invalid and Mr. Berg should not be compelled to testify at trial.

2. Mr. Berg, a high-level government official with no unique personal knowledge, should not be compelled to testify.

In previously granting a Motion to Quash in this case, the Court set out the law regarding compelled testimony of high-level government officials. Mr. Berg is the Director of the Ohio Lottery Commission and should not be bothered to drive to Columbus to provide second-hand information. The information he would provide would be that which he learned from Ms. Popadiuk, who will testify at the trial and who is the object of Mr. Bentkowski's sole remaining claim in this

case, that she terminated him not for the reasons she has identified—his condescension, poor performance and inability to follow her instructions, among other things—but instead retaliated against him for criticizing her as having treated other employees in a discriminatory manner. The only remaining issue, then, is why Ms. Popadiuk terminated Mr. Bentkowski. Mr. Bentkowski admitted that he never told Mr. Berg that he had concerns about her behavior. Consequently, Mr. Berg could not have been part of the alleged retaliatory decision if he did not know about Mr. Bentkowski's underlying opposition.

Mr. Berg should not be compelled to give testimony unless Mr. Bentkowski can show that (1) his testimony is necessary to obtain relevant information that cannot be obtained from any other source, and (2) his testimony would not significantly interfere with his ability to perform his governmental duties. *Bentkowski v Ohio Lottery Commission*, Entry Granting Motion to Quash, Ct of Cl. 2014-00651 (Aug. 28, 2015), citing *New York v Oneida Indian Nation of N.Y.*, N.D.N.Y. No. 95-CV-0554, 2001 U.S. Dist. LEXIS 21616, *8-9 (Nov. 9, 2001). The essential considerations, then, are whether the information is available through alternative sources and if Mr. Berg has unique personal knowledge that cannot be obtained elsewhere. *Id.*

Requiring Mr. Berg to be absent from his office and travel to Columbus for a day is unduly burdensome especially considering he will not provide any unique information about Ms. Popadiuk's decision to terminate.

Respectfully Submitted,

MICHAEL DEWINE
Ohio Attorney General



RANDALL W. KNUTTI (0022388)
Assistant Attorney General
Principal Attorney
Court of Claims Defense
150 E. Gay Street, 18th Floor
Columbus, Ohio 43215
(614) 466-7447
Randall.Knutti@OhioAttorneyGeneral.gov
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that I sent this document by regular United State mail, postage prepaid, on January 22, 2016 to:

Brent L. English
The 820 Building
820 West Superior Avenue, 9th Floor
Cleveland, Ohio 44113


RANDALL W. KNUTTI (0022388)

IN THE COURT OF CLAIMS OF OHIO

DAVID BENTKOWSKI,

Plaintiff,

vs.

OHIO LOTTERY COMMISSION

Defendant.

Case No. 2014-00651

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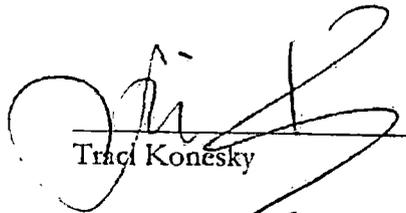
AFFIDAVIT OF TRACI KONESKY

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

Traci Konesky, having first been cautioned and sworn, states as follows:

1. I am a program administrator at the Ohio Lottery Commission.
2. On Wednesday, January 20, 2016 just before 2:00 p.m. I was in the first-floor lobby of the Lottery's building in downtown Cleveland. A man who did not introduce himself to me handed me two subpoenas, one for Dennis Berg, the Lottery's Director, and the other for Lawrence Miltner, the Lottery's Chief Legal Counsel. Copies of those subpoenas are attached to this Affidavit.

FURTHER AFFLIANT SAYETH NAUGHT.


Traci Konesky

Sworn to before me and subscribed in my presence this 22nd day of January, 2016.


NOTARY PUBLIC MICHAEL R. SEWINSKI
ATTORNEY - NO EXPIRATION



COURT OF CLAIMS OF OHIO

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614. 387.9800 or 1.800.824.8263
www.cco.state.oh.us

Subpoena

David A. Bentkowski

Plaintiff

v.

Case Number: 2014-00651

Ohio Lottery Commission

Defendant

Judge: Patrick M. McGrath

To: Dennis Berg

36004 Haverford Place

Avon, Ohio 44011

YOU ARE HEREBY COMMANDED TO:

- Attend and give testimony at a (trial) (hearing) (deposition) on the date, time and at the place specified below.
- Attend to testify and produce documents and/or tangible things at a (trial) (hearing) (deposition) on the date, time and at the place specified below.
- Produce and permit inspection and copying, on the date and at the time and place specified below, of any designated documents that are in your possession custody or control.
- Produce and permit inspection and copying, testing or sampling, on the date and at the time and place specified below, of any tangible things that are in your possession, custody or control.
- Permit entry upon the following described land or other property, for the purposes described in civil 34(a)(3)), on the date and at the time and place specified below.

Description of land or other premises:

DATE: 01/26/16

TIME: 10:00 a.m.

PLACE: Court of Claims of Ohio, The Ohio
Judicial Center, 65 South Front Street,
Third Floor, Columbus, Ohio 43215

DESCRIPTION OF ITEMS TO BE PRODUCED:

THE STATE OF OHIO

County, ss

To the Sheriff of _____

County, Ohio, Greetings:

YOU ARE HEREBY COMMANDED TO SUBPOENA THE ABOVE NAMED PERSON.

WITNESS MY HAND AND SEAL OF SAID COURT THIS _____ DAY OF _____, 20____
CLERK OF THE COURT OF CLAIMS OF OHIO.

BY: _____

Assistant Clerk

REQUESTING PARTY INFORMATION:

NAME:

Brent L. English, Esq.

(ATTORNEY FOR:)

David A. Bentkowski

TELEPHONE NUMBER

216-781-9917

NOTE: READ ALL INFORMATION ON THIS SUBPOENA.

Civil Rule 45 (C) Protection of persons subject to subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

(2) (a) A person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing or trial.

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply;

(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

(4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

Civil Rule 45 (D) Duties in responding to subpoena.

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labelled to correspond with the categories in the subpoena. A person producing documents pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials under Civ. R. 26(B)(3) or (4), the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Civil Rule 45 (E) Sanctions.

Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. A subpoenaed person or that person's attorney who frivolously resists discovery under this rule may be required by the court to pay the reasonable expenses, including reasonable attorney's fees, of the party seeking the discovery. The court from which a subpoena was issued may impose upon a party or attorney in breach of the duty imposed by division (C)(1) of this rule an appropriate sanction, which may include, but is not limited to, lost earnings and reasonable attorney's fees.

RETURN OF SERVICE

I RECEIVED THIS SUBPOENA ON _____, AND SERVED THE PARTY
NAMED ON THE REVERSE

HEREOF BY _____ ON _____

I WAS UNABLE TO COMPLETE SERVICE FOR THE FOLLOWING REASON:

Sheriff's Fees

Service _____

Mileage _____

Copy _____

Total _____

Signature of serving party

Circle one: Deputy Sheriff Attorney

Process Server Deputy Clerk

Other _____



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David A. Bentkowski

Plaintiff

v.

Case Number: 2014-00651

Ohio Lottery Commission

Defendant

Judge: Patrick M. McGrath

To: Lawrence J. Miltner, Esq.

26984 Brahms Drive

Westlake, Ohio 44145

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BY: _____
Assistant Clerk

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Brent L. English, Esq.

(ATTORNEY FOR:)

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