

**Minutes of February 13, 2001**

-----

## **Supreme Court of Missouri**

en banc

### **FOR TRANSFER AND RECOMMENDATIONS FOR TRANSFER**

Kansas Association of Private Investigators, et al., Appellants-Respondents,  
vs.  
Joseph J. Mulvihill, et al., Respondents-Appellants.

Respondents-Appellants' application for transfer from the Missouri Court of Appeals, No. WD57956 consolidated with WD57957, denied. Price, C.J., not participating.  
[Review request by Police Board denied]

### **Opinion Missouri Court of Appeals Western District**

Case Style: Kansas Association of Private Investigators, et al., Appellant/Respondent  
v.  
Joseph J. Mulvihill, et al., Respondent/Appellant.

Case Number: WD57956

Handdown Date: 11/14/2000

Appeal From: Circuit Court of Cole County, Hon. Thomas Brown

Counsel for Appellant: Douglas S. Stone

Counsel for Respondent: Dale H. Close

Opinion Summary:

This appeal concerns alleged illegal rulemaking on the part of the Kansas City, Missouri, Board of Police Commissioners.

AFFIRMED AND REMANDED.

Court holds:

- (1) The Missouri Court of Appeals has no jurisdiction to review a summary judgment granted in federal court.
- (2) The trial court was correct in finding that two fee increases were illegal because a) it was appropriate to disregard stipulations that amounted to a legal conclusion, and b) the agency did not "incorporate by reference" under Missouri's Administrative Procedure Act.
- (3) The trial court was correct in awarding retroactive damages.
- (4) The case is remanded to rule on a motion for attorney's fees.

Citation:

Opinion Author: Harold L. Lowenstein, Judge

Opinion Vote: AFFIRMED AND REMANDED. Stith and Newton, J.J., concur.

Opinion:

The parties' appeals in this case stem from two decisions of the Kansas City, Missouri, Board of Police Commissioners (Board) to increase the licensure fees charged to private security officers seeking limited police powers in Kansas City, Missouri. The plaintiffs include a Kansas association composed of private investigators as well as individual Kansas and Missouri investigators (collectively referred to as Investigators). The defendants include the Board, the individual members of the Board, as well as the license officer and counsel for the Board. The Investigators' seven-count petition, filed as a class action, sought a judgment declaring that the fee increases were the result of illegal rulemaking and prayed for injunctive relief, actual damages and for additional relief under 42 U.S.C. section 1983 (1994).

Factual and Procedural History

This appeal primarily concerns

- 1) the validity of regulations increasing license fees for private security officers as

promulgated by the Board, and

- 2) whether the trial court could award damages based on the fees increased by the invalid rulemaking.

The Investigators include the Kansas Association of Private Investigators (KAPI), a not-for-profit membership corporation which is authorized to conduct business in Missouri and is composed in part of members who require licenses from the Board. The other Investigators are William Sanders, Alcops, Inc., Jerry Geraldine Basson, Valerie Dutro, John Ellis and Michael Galbreath, who are also in the business of private detection, private investigations and/or private security throughout the Kansas City, Missouri, area and require licenses from the Board.

The Board is an agency of the State of Missouri, established pursuant to section 84.350 RSMo, 1994,(FN1) and has the authority to "regulate and license all private security personnel and organizations" within Kansas City, Missouri, under section 84.720. At the time the suit was filed, the Board was comprised of Jeffrey Simon, Joseph Mulvihill, James F. Ralls, Jr., Dr. Stacey Daniels, and Emanuel Cleaver II, the five police commissioners.(FN2) These Board members were sued in their individual as well as their official capacities. Additionally, the petition names defendants Tamy Gallagher, in her official capacity as Supervisor of the Private Officers Licensing Section at the police department and in her individual capacity, and Dale Close, a legal advisor for the police department, in his individual capacity.(FN3)

The Investigators' petition primarily concerns two sets of fee increases for private security licenses: one which became effective in 1988 (Pre-1997 Fee Structure), another which became effective February 3, 1997 (1997 Fee Increase).(FN4) Three classes were certified: Class I were persons who possessed a license as of February 3, 1997; Class II were persons who previously held a license but after February 3, 1997, had their licenses revoked for non-payment of the increased license fee; and Class III were persons who paid license fees for issuance, renewal or transfer of a license at any time after September 29, 1998.

In this suit filed in Cole County, Investigators sought:

- (I) a declaratory judgment defining terms in section 84.720;
- (II) declaratory and injunctive relief based on alleged illegal rulemaking from the 1997 Fee Increase and subsequent enforcement of those illegal rules;
- (III) declaratory and injunctive relief based on alleged illegal rulemaking from Pre-1997 Fee Structure and subsequent enforcement of those illegal rules;
- (IV) a declaratory judgment that a particular one-time fee was "arbitrary and capricious";
- (V) declaratory and injunctive relief with respect to a regulatory exception for off-duty members of the Kansas City, Missouri Police Department;
- (VI, VII) two counts of damages under 42 U.S.C. section 1983 (1994) against two Police Commissioners, Close and Gallagher.

This case first was removed to federal court. U.S. Magistrate Knox granted summary judgment in favor of the Board on Counts VI and VII and remanded the remainder of the case to Cole County. The sole point of Investigators' appeal is to contest the U.S. District Court's grant of summary judgment on the two section 1983 claims.

The rest of the appeal is brought by the Board. With regard to Counts II and III, the circuit court held that both the Pre-1997 Fee Structure and the 1997 Fee Increase constituted void rulemaking and awarded refunds of the fees to the Plaintiffs and issued an injunction against enforcement of either fee structure.(FN5) For purposes of the Pre-1997 Fee Structure, the trial court apparently relied on the fact that the Board's regulations have not contained specific license fee amounts for issuance of licenses since 1988.(FN6)

The 1997 Fee Increase involved a 1994 regulation. In 1994, the Board gave itself permission to increase license fees "from time-to-time" by posting the fees increases at the Private Officers Licensing Section. This 1994 regulation was codified at Title 17, CSR, section 10-2.040(1).(FN7) The amount of any proposed fee increase was not included in the Missouri Register and never adopted into the rule. In 1997, the Board increased the fees pursuant to the 1994 rule, again without publishing the fee increases in the Missouri Register. Although the parties jointly stipulated that the Board complied with section 536.021 of the Missouri Administrative Procedure Act (MAPA) when it adopted the rules relating to fee changes, the trial court found that both the Pre-1997 Fee Structure and the 1997 Fee Increase constituted void rulemaking and issued a permanent injunction against enforcement of either scheme. The Board appeals those rulings and the ruling that granted retroactive relief in the form of refunds for the license fees.

## Standard of Review

Review of a grant of summary judgment is essentially de novo. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). As such, this court reviews the trial court's determination independently, without deference to that court's conclusions. *Id.*

## Analysis

### I. Investigators' Appeal

Does this court have jurisdiction to review a summary judgment granted in federal court?

Investigators did not utilize the federal court system to contest Judge Knox's rulings on Counts VI and VII. Instead, Investigators ask this court to review the federal court's decision granting summary judgment in favor of the Board under 42 U.S.C. section 1983 (1994). This court is without jurisdiction to review a judgment of a federal district court. This court's jurisdiction arises from the Missouri Constitution, which allows for appellate review of judgments of Missouri tribunals where exclusive jurisdiction does not lie in the Supreme Court of Missouri. Mo. Const. art. V, section 3. Moreover, the right to appeal is statutory. *Schulze v. Erickson*, 17 S.W.3d 588, 590 (Mo. App. 2000). "An appellate court lacks jurisdiction to hear an appeal if it is not authorized by statute." *Id.* No statutory authority exists to appeal a federal district decision to a Missouri appellate court. This point is denied.

## II. Board's Appeal

### A. Did the trial court err in finding the Pre-1997 Fee Structure and the 1997 Fee Increase illegal?

The next question is whether the trial court erred in finding the Pre-1997 Fee Structure and the 1997 Fee Increase illegal. The Board makes two arguments: one relying on joint stipulations of the parties, the other its asserting compliance with section 536.021. The Board first argues that the trial court erred in concluding that the Pre-1997 Fee Structure and the 1997 Fee Increase are illegal based on joint stipulations made by the parties. With regard to the Pre-1997 Fee Structure, the Board relies on the following stipulation: "Section 10-2.040 was proposed in accordance with the procedures contained in Section 536.021 of the Revised Statutes of Missouri, including the requirement that there be a thirty day comment period before the final orders of rulemaking was published." With regard to the 1997 Fee Increase, made pursuant to the 1994 rule, the Board relies on the following stipulation: "Board's Regulations, which were adopted effective on or after January 31, 1994 were adopted in accordance with the procedures required by Section 536.021 of the Revised Statutes of Missouri." It is within the province of the court, not the parties, to determine whether a rule is issued in accordance with the law. The Board correctly argues that the Investigators are bound by stipulations of fact, but courts are not bound by stipulations that attempt to fix a conclusion of law. *Bull v. Excel Corp.*, 985 S.W.2d 411, 415 (Mo. App. 1998); *Midella Enters., Inc. v. Missouri State Highway Comm'n*, 570 S.W.2d 298, 301 (Mo. App. 1978). Stipulating that the Board correctly followed the MAPA when it promulgated rules is an issue of law. Because the parties inappropriately stipulated to matters of law, the trial court was free to disregard the stipulations and make a conclusion of its own. So, too, this court disregards the stipulations made here.

Independent of the stipulations, the Board argues that the trial court erred in finding that the Board violated section 536.021.2 of MAPA.(FN8) The Board contends that it complied with that section because it "incorporated by reference" the proposed fee increase pursuant to the second sentence of section 536.021.2(3). The first sentence of that subsection requires the agency to give notice of the entire text of a proposed rule unless the material is so extensive as to be unduly cumbersome. section 536.021.2(3). The second sentence allows incorporation by reference so long as the material incorporated is made available at the headquarters of the state agency. *Id.* "The very purpose of the notice procedure for a proposed rule is to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification.... To neglect the notice...undermines the integrity of the procedure." *St. Louis Christian Home v. Missouri Comm'n on Human Rights*, 634 S.W.2d 508, 515 (Mo. App. 1982); *NME Hospitals, Inc. v. Department of Social Services*, 850 S.W.2d 71, 74 (Mo. banc 1993). The Board incorrectly argues that a proposed rule may be incorporated by reference. The statute, however, states that a rule may incorporate material by reference--not that all of the material may be incorporated by reference. section 536.021.2. In addition to prescribing the method of applying for a license, the crux of the Board's 1994 rule is that it will establish license fees. section 10-2.040(1). There is no material to incorporate by reference; a license fee is a rule(FN9) and it should have been published. By posting the license fees at the agency's office instead of following proper notice requirements, the Board defeated the purpose and the spirit of MAPA. Thus, the Board failed to comply with the notice and comment procedures laid out in section 536.021. A rule adopted in violation of section 536.021 is void. *NME Hospitals*, 850 S.W.2d at 74. This point is denied.

B. The trial court did not err in awarding retroactive damages. On the issue of whether the circuit court had jurisdiction to award retroactive damages, the parties spend a great deal of their argument on whether the agency action at hand was a rule or a decision. The Board argues that the agency action should be considered a decision that enforced the rule it promulgated. Thus, the

Board argues either that section 536.050.1 does not apply and the Investigators should have exhausted their administrative remedies, or alternatively that the trial court was only able to award prospective relief because the challenge is to the validity of a rule. Because of a 1996 amendment to section 536.050(FN10) and because of a 1997 case from the Supreme Court of Missouri (discussed below), any question of whether the agency action here was a rule or a decision is now rendered insignificant. In arguing that the court cannot award retroactive damages, the Board relies on section 536.050.1 and *State ex rel Goldberg v. Darnold*, 604 S.W.2d 826, 832 (Mo. App. 1980). In *Goldberg*, the trial court was limited to a declaration of the validity of a rule adopted by the Department of Revenue, which would only have a prospective effect. *Id.* Retroactive damages were not permitted. *Id.* As such, the Board argues that in the instant case the trial court had no jurisdiction to award a refund in fees.

But when *Goldberg* was decided in 1980, section 536.050.1 vested jurisdiction in the circuit courts to determine the "validity of rules, or of threatened applications thereof", and section 536.050.2 vested jurisdiction in the Administrative Hearing Commission (AHC) to determine the validity of rules and other agency actions.(FN11) Because of that rubric, under *Goldberg* anyone affected by an agency decision was required to exhaust his or her administrative remedies or seek merely a declaratory judgment on the validity of a rule from the circuit court. What the Board fails to note is that the General Assembly divested jurisdiction from the AHC to declare the validity of rules when section 536.050.2 was repealed and replaced in 1996.(FN12) Thus, for a determination of the validity of the license fees, the Investigators properly brought their action in the circuit court.

Because jurisdiction was only proper with the circuit court, whether the administrative action is categorized as a rule or an adjudication is irrelevant. The requirement of exhausting administrative remedies set out in section 536.050.2 Cum. Supp. 1999 is equally irrelevant because the only appropriate arena in which to bring a declaratory action on the validity of a rule is with the circuit court.(FN13) Moreover, where jurisdiction is proper for declaratory relief, a claim for damages under section 536.050 is appropriate. *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 261 (Mo. banc 1997).

*Riordan* involved the Board of the Police Retirement System of St. Louis, and the Board of Police Commissioners of Metropolitan St. Louis. In that case, the Retirement Board sought a declaratory judgment regarding a rule promulgated in 1993 and sought damages related to a travel reimbursement incurred pursuant to that rule. *Id.* at 259, 261. Relevant to this appeal, the Supreme Court of Missouri held that section 536.050 applied to the action for damages in addition to the declaratory judgment regarding the validity of a rule. Because section 536.050 is equally applicable to the case at hand, damages are permitted under *Riordan*.(FN14) This court is constitutionally bound to follow precedent set forth by the most recent Supreme Court of Missouri decision. *Killion v. Bank Midwest, N.A.*, 987 S.W.2d 801, 813 (Mo. App. 1998). This point is denied.

C. Investigators' attorneys fees. Investigators have filed a motion for attorneys fees. The case is remanded to the trial court solely for the purpose of ruling on Investigators' motion for attorneys fees pursuant to section 536.050.3.

### Conclusion

The judgment of the trial court is affirmed. The case is remanded to the trial court for the sole purpose of ruling on Investigators' motion for attorneys fees. Costs to be divided equally among the parties.

Footnotes:

- FN1. All further statutory references are to the Revised Statutes of Missouri, 1994, unless otherwise indicated.
- FN2. The composition of the Board has since changed. Mayor Kay Barnes replaced Emanuel Cleaver II, and Dennis Eckold replaced James F. Ralls, Jr. as Commissioners. The other named defendants remain in their current positions.
- FN3. Further references to all of the defendants will be as "Board" unless otherwise indicated.
- FN4. The 1997 Fee Increase consists of increases to the amount of the Pre-1997 Fee Structure, a new "agency license" and "agency fee," the creation of new subclassifications for armed and unarmed licenses, and a one-time surcharge for automation.
- FN5. Neither party appealed the remaining rulings: the court held that the declaratory judgment sought in Count I was resolved by a stipulation by the parties; the court declined to rule on Count IV because it was not a ripe controversy; and the court awarded summary judgment to the Board in Count V.
- FN6. The 1988 regulation apparently was not presented to the court. However, a stipulation by the parties reads as follows: "Board's Regulations have not at any time since September 29, 1988 contained the specific License Fee amount charged by Board for issuance of Licenses."
- FN7. The full text of Title 17, CSR, section10-2.040(1) follows: "From time-to-time [sic] the board will establish a schedule of fees for various services provided by the Private Officers Licensing Station. The schedule of fees is posted in the Private Officers Licensing Section office. The board shall have the authority to set a minimum initial application process. In the event that the applicant meets all of the qualifications for licensure, the application fee shall be applied toward the total cost of the license, as established by the board."
- FN8. The text of section 536.021.2 RSMo. Cum. Supp. 1999 follows:  
A notice of proposed rulemaking shall contain:
  - (1) An explanation of any proposed rule or any change in an existing rule, and the reasons therefor;
  - (2) The legal authority upon which the proposed rule is based;

- (3) The text of the entire proposed rule or the entire text of any affected section or subsection of an existing rule which is proposed to be amended, with all new matter underlined or printed in boldface type and with all deleted matter placed in brackets, except that when a proposed rule consists of material so extensive that the publication thereof would be unduly cumbersome or expensive, the secretary of state need publish only a summary and description of the substance of the proposed rule so long as a complete copy of the rule is made immediately available to any interested person upon application to the adopting state agency at a cost not to exceed the actual cost of reproduction. A proposed rule may incorporate by reference only if the material so incorporated is retained at the headquarters of the state agency and made available to any interested person at a cost not to exceed the actual cost of the reproduction of a copy. When a proposed amendment to an existing rule is to correct a typographical or printing error, or merely to make a technical change not affecting substantive matters, the amendment may be described in general terms without reprinting the entire existing rule, section or subsection... (Emphasis added.)
  
- FN9. As the trial court noted, not only does a license fee meet the general definition of a rule under MAPA, but the term is also expressly excluded from MAPA's list of items that do not constitute a rule. Section 536.010 of MAPA defines "rule" as: [E]ach agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include: (g) A specification of the prices to be charged for goods or services sold by an agency as distinguished from a license fee, or other fees. (Emphasis added.)
  
- FN10. Below is the full text of sections 536.050.1 and 536.050.2 RSMo. Cum. Supp. 1999:
  - 1. The power of the courts of this state to render declaratory judgments shall extend to declaratory judgments respecting the validity of rules, or of threatened applications thereof, and such suits may be maintained against agencies whether or not the plaintiff has first requested the agency to pass upon the question presented. The venue of such suits against agencies shall, at the option of the plaintiff, be in the circuit court of Cole County, or in the county of the plaintiff's residence, or if the plaintiff is a corporation, domestic or foreign, having a registered office or business office in this state, in the county of such registered office or business office. Nothing herein contained shall be construed as a limitation on the declaratory or other relief which the courts might grant in the absence of this section.
  
  - 2. Any person bringing an action under subsection 1 of this section shall not be required to exhaust any administrative remedy if the court determines that:
    - (1) The administrative agency has no authority to grant the relief sought or the administrative remedy is otherwise inadequate; or

- (2) The only issue presented for adjudication is a constitutional issue or other question of law; or
  - (3) Requiring the person to exhaust any administrative remedy would result in undue prejudice because the person may suffer irreparable harm if unable to secure immediate judicial consideration of the claim. Provided, however, that the provisions of this subsection shall not apply to any matter covered by chapters 288, 302, and 303, RSMo.
- FN11. The text of section 536.050.1 was the same as it is today. See supra note 10. Until 1996, section 536.050.2 read as follows: The validity or applicability of any rule, regulation, resolution, announced policy, applied policy, or any similar official or unofficial interpretation or implementation of state agency authority, other than in a contested case or in a law enforcement proceeding, may be determined in an action to be brought by the filing of a written complaint with the administrative hearing commission by any interested person, or duly constituted entity, who is affected by such interpretation or implementation in a manner or to a degree distinct and different from other members of the general public. The complaint shall set forth the manner or degree in which the agency action or position affects the complainant, and the reasons for believing such action or position to be invalid or inapplicable to the complainant. (Emphasis added.) As noted infra, this version of section 536.050.2 was repealed and replaced in 1996.
  - FN12. The repeal was presumably a reaction to a Supreme Court of Missouri case which declared section 536.050.2 (before the 1996 amendment) unconstitutional. See *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69 (Mo. banc 1982).
  - FN13. In so holding, this court urges the General Assembly to revisit sections 536.050.1 and 536.050.2. Section 536.050.1 was considered an exception to the requirement of exhaustion of administrative remedies. ("If an action involves an agency rule, the exhaustion of administrative remedies does not apply" *Missouri Health Care Ass'n v. Missouri Dep't of Social Servs.*, 851 S.W.2d 567, 569 (Mo. App. 1993).) As such, the enactment of section 536.050.2 requiring exhaustion of the exception to exhaustion is puzzling. Moreover, this court urges the legislature to review section 536.050 in the context of the recent Dierker decision, infra, as well as the Goldberg framework.
  - FN14. See Alfred S. Neely, 20 Missouri Practice, Administrative Practice and Procedure, section 7.20 (2d ed. Supp. 2000).

Separate Opinion:  
None

This slip opinion is subject to revision and may not reflect the final opinion adopted by the Court.

**IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI**

Case No. CV198-203CC

Division No. 1

**KANSAS ASSOCIATION OF PRIVATE INVESTIGATORS, et al.,**

**Plaintiffs,**

**VS.**

**JOSEPH J. MULVIHILL, et al.,**

**Defendants.**

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND INJUNCTION**

This matter came before the Court for final hearing on August 25, 1999. Plaintiffs Kansas Association of Private Investigators, William Sanders, Alcops, Inc., Jerry Geraldine Basson, Valerie Dutro, John Ellis and Michael Galbreath appeared through their counsel, Douglas S. Stone of King Hershey Coleman Koch & Stone of Kansas City, Missouri. Defendants appeared through their counsel Dale H. Close, of the Legal Advisor's Office of the Kansas City, Missouri Police Department and Brian E. Round of Kansas City, Missouri.

### **● I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Plaintiffs initially filed their petition for Declaratory Judgment, Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Damages (the "Original Petition") on February 18, 1998, in this Court. An Amended Petition (the "Petition") was filed by Plaintiffs on August 14, 1998. The Petition named as Defendants all members (sometimes collectively called the "Police Commissioners") of the Kansas City Board of Police Commissioners (the "KC Police Board"), as well as certain Police Commissioners in their individual capacities. Additionally, the Petition names as Defendants Tamy Gallagher, in her official capacity as Supervisor of the Private Officers Licensing Section (the "Licensing Section") of the Kansas City, Missouri Police Department (the "Police Department"), and in her individual capacity, and Dale Close, in his individual capacity.

The Petition, as filed, contained seven (7) counts. In Count I, Plaintiffs seek a declaratory judgment defining certain terms used in Section 84.720, RSMO. Count II seeks a declaratory judgment and injunctive relief with respect to what Plaintiffs allege was illegal rulemaking in late 1996 and early 1997 (the "1997 Fee Increase") and subsequent enforcement of those illegal rules on the part of the Board. Count III seeks a declaratory judgment and injunctive relief with respect to alleged illegal rulemaking in 1988 (the "Pre-1997 Fee Structures") and the subsequent enforcement of the illegal rule(s) by the Board. In Count IV, Plaintiffs request a declaratory judgment providing that the terms of a rule adopted by the KC Police Board are "arbitrary and capricious." Count V seeks declaratory and injunctive relief with respect to an alleged de facto exemption granted by the Board to off-duty Kansas City, Missouri Police Officers from the regulations governing the granting of licenses to provide private security services (a "Private Security License") issued under Chapter 2, Division 10, Title 17 of the Missouri Code of State Regulations (the "Board's Regulations"). Finally, in Counts VI and VII, Plaintiffs alleged violations of 42 U.S.C. Section 1983 by certain Police Commissioners, Close and Gallagher.

The petition was filed as a class action, and each count specified the class and the class

representative(s). The Plaintiffs filed a motion with this Court to certify the classes pursuant to Missouri Rule of Civil Procedure 52.08 on March 25, 1999, and on April 29, 1999 this Court entered its order certifying the classes.

On February 26, 1998, Defendants, pursuant to 28 U.S.C. § 1441, removed this case to the United States District Court for the Western District of Missouri, Central Division ("U.S. District Court"). On June 29, 1998, Defendants filed a Motion for Summary Judgment on Counts VI and VII of the Petition, and on July 10, 1998, Plaintiffs filed a Motion for Summary Judgment on Counts I, II, III, and V of the Petition. The parties appeared before U.S. Magistrate Knox at the U.S. District Court on August 31, 1998, to argue both Summary Judgment Motions. On October 21, 1998, Magistrate Knox granted summary judgment in favor of Defendants on Counts VI and VII of the Petition (both of which claims arise under federal law) and declined to exercise supplemental jurisdiction with respect to the remaining issues in the case. Magistrate Knox remanded the case to this Court, and the parties' respective motions for summary judgment on Counts II, III and V of the Petition were reasserted before this Court and heard by the Court on December 30, 1998. On April 29, 1999, this court entered its Findings of Fact, Conclusions of Law and Injunction, in which the Court granted summary judgment in favor of Plaintiffs on Count II of the Petition, granted summary judgment in favor of Defendants on Count V of the Petition, and declined to grant summary judgment on Count III of the Petition.

The parties appeared before the Court on August 25, 1999, with respect to the following remaining issues in the case: (1) a determination of the types of services covered by the term "security services" found in Section 84.720, RSMo and/or the term "private security services" found in the Board's Regulations; (2) a determination whether at any time since September 29, 1988, there existed a legally valid license fee for Private Security Licenses; (3) a determination of the amount of the refund to which Plaintiffs and other Class I members are entitled as a result of the Board's enforcement of the invalid 1997 Fee Increase; and (4) a determination of the amount of the refund to which Plaintiffs and other Class III members are entitled as a result of the Board's enforcement of invalid license fee structures since at least September 29, 1988.

At the August 25, 1999 hearing, the Court admitted the parties' Joint Stipulation of Facts and Anticipated Testimony ("Joint Stipulations"), subject to Plaintiffs' reservations regarding the admissibility of anticipated testimony found in paragraphs 37, 38 and 39 of the Joint Stipulations. Plaintiffs objected to such testimony on the following three grounds: (1) as irrelevant to any issue before the Court, (2) as hearsay, and (3) based on Defendants' failure to produce evidence with respect to the issues raised in such testimony when requested to do so during discovery.

Subsequent to the August 25, 1999 hearing, the parties filed a Joint Supplemental Stipulation with respect to the issues raised by Count I of the Petition (the "Supplemental Stipulation").

- **II. EVIDENTIARY RULING.**

The anticipated testimony of Major James Corwin, found in paragraphs 37, 38 and 39 of the Joint Stipulations purports to address the following two factual issues: (1) the Board's decision-making process with respect to the 1997 Fee Increase, and (2) the receipt (or non-receipt) of comments by the Board with respect to rulemaking by the Board in 1994. The Court finds that the proposed testimony (the "Excluded Evidence") is inadmissible on three grounds.

First, the proposed testimony is not relevant to any issue in this case. The Board's motive for increasing the license fees charged for Private Security Licenses is irrelevant to the determination of whether the rule was properly adopted, and comments (or lack thereof) in 1994 to general revisions to the Board's Regulations have no bearing upon relevant issues in this case. Therefore, such testimony is inadmissible. Second, the Court finds that the proposed testimony is hearsay. Major Corwin was not a member of the Board, and cannot testify to another's intent, because such testimony must necessarily be derived from the statements of others. Similarly, there is no evidence that Major Corwin directly received public responses and any testimony by him in that regard also must necessarily be based upon the statements of others. Accordingly, Major Corwin's proposed testimony on those matters constitutes hearsay and is inadmissible. Finally, the portion of Major Corwin's proposed testimony that relates to financial status of the Board is necessarily based on the budgets, bank statements, ledgers and other financial documents of the Board and the Private Officer's Licensing Section, which were not made available by Defendants when Plaintiffs properly requested such information in discovery. This Court will not allow Defendants to introduce such evidence indirectly and without having provided Plaintiffs with any supporting documentation.

### ● III. FINDINGS OF FACT

1. The Court hereby incorporates those findings of fact contained in the Findings of Fact, Conclusions of Law and Injunction entered by the Court on April 29, 1999 (the "April 29 Ruling"). *{Those rulings are as follows in italics:}*

- *The KC Police Board was established pursuant to Section 84.350, RSMO, and is a "State Agency" of the State of Missouri within the meaning of Section 536.010(5), RSMO.*
  
- *The KC Police Board issues licenses ("Private Security Licenses") to and regulates persons and entities providing private security services in Kansas City, Missouri, and charges fees for the issuance and renewal of such licenses ("License Fees").*

- *3. The Police Commissioners, or their respective predecessors in office, acting in their official capacity as members of the KC Police Board, at a meeting of the KC Police Board on December 17, 1996, approved an increase in the License Fees and a reclassification of Private Security Licenses, effective January 1, 1997 (the "Fee Increase and License Reclassification").*
  
- *4. The Police Commissioners, or their respective predecessors in office, acting in their official capacity as members of the KC Police Board, are and were required to comply with the procedures described in Section 536.021, RSMO, when adopting, amending or rescinding a "rule", as that term is defined in Section 536.010(4), RSMO.*
  
- *5. The Police Commissioners, or their respective predecessors in office, acting in their official capacity as members of the KC Police Board, adopted the Fee Increase and License Reclassification without complying with the procedures described in Section 536.021, RSMO.*
  
- *6. The Police Commissioners, or their respective predecessors in office, acting in their official capacity as members of the KC Police Board, have not, since at least as early as September 29, 1988, complied with the procedures described in Section 536.021, RSMO, with respect to the adoption of any License Fee for Private Security Licenses.*
  
- *7. The Police Commissioners, acting in their official capacity as members of the KC Police Board, and Gallagher, acting in her official capacity as Supervisor of the Licensing Section, have been and are enforcing, demanding payment of and collecting License Fees for Private Security Licenses, including pursuant to the Fee Increase and License Reclassification.*
  
- *8. The KC Police Board and/or the Licensing Section have terminated Private Security Licenses held or possessed by Plaintiffs Ellis and Galbreath and others on the stated basis of the non-payment of the amount purportedly payable as the License Fee pursuant to the Fee Increase and License Reclassification (the "Terminations").*

- *9. The Private Security Licenses of Plaintiffs Sanders and Basson have lapsed and cannot be renewed or reissued without payment of the amount being demanded by the KC Police Board and/or the Licensing Section pursuant to the Fee Increase and License Reclassification.*
  
- *10. The Police Commissioners, acting in their official capacity as members of the KC Police Board and Gallagher, acting in her official capacity as Supervisor of the Licensing Section, do not require that Private Security Licenses be obtained by, nor do they require the payment of License Fees for Private Security Licenses by, Kansas City, Missouri police officers who provide private security services.*

2. The court hereby incorporates the facts stipulated to by the Parties in the Joint Stipulations, except with respect to the Excluded Evidence.

3. Plaintiffs objected to the adoption of the 1997 Fee Increase promptly following its adoption by the Board.

4. The Court notes that the anticipated testimony found in paragraphs 40 and 41 of the incorporated Joint Stipulations is uncontroverted and finds that the License Fee payments made by Plaintiffs and by the members of the classes represented by Plaintiffs were made in order to avoid forfeiture of the payor's right to do business in the city of Kansas City, Missouri.

● **IV. CONCLUSIONS OF LAW**

○ **A. Prior Findings.**

The court hereby incorporates those conclusions of law contained in the April 29 Ruling *{Those findings were (in italics):*

- *The Fee Increase and License Reclassification are "rules" within the meaning of Section 536.010, RSMO.*

- *The Fee Increase and License Reclassification adopted by the KC Police Board constitute "rules" within the meaning Chapter 536, RSMO. A rule is defined for purposes of Section 536.021, RSMO, in Section 536.010(4), RSMo. which reads in pertinent part as follows:*
  - *(4) "Rule" means each agency statement of general applicability that implements, interprets or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include:*
  - *... (g) A specification of the prices to be charged for goods or services sold by an agency as distinguished from a license fee or other fees.*
- *Section 536.010, RSMO (emphasis added). This definition makes it clear a license fee for Private Security Licenses such as that imposed by the KC Police Board and enforced by the Licensing Section, is a rule, both because it meets the general definition of the term, and because of the express exclusion of license fees from the list of items which do not constitute a rule. Additionally, the License Reclassification meets the general definition of the term "rule," because it implements and prescribes policies of the KC Police Board and the Licensing Section.*
- ***The Fee Increase and License Reclassification are void.***
- *Section 536.021, RSMO, provides that "[no rule shall hereafter be made, amended or rescinded by any state agency unless such agency shall first file with the secretary of state a notice of proposed rulemaking and a subsequent order of rulemaking, both of which shall be published in the Missouri Register by the secretary of state . . .]" Subsection 6 of Section 536.021, RSMO, provides that any rule, or amendment or rescission thereof, made after January 1, 1976, shall be void unless made in accordance with Section 536.021, RSMO.*
- *The KC Police Board is a state agency and it is required to follow Section 536.021, RSMO when adopting a rule. The KC Police Board did not comply with the requirements of Section 536.021, RSMO, when it adopted the Fee Increase and the License Reclassification. No notice of proposed rulemaking, or subsequent order of rulemaking was filed with the Secretary of State, nor were either published in the Missouri Register. Additionally, no license fee structure*

*resulting from the KC Police Board's actions appears in the Board's Regulations.*

- *Because the KC Police Board failed to follow statutorily prescribed rule-making procedures in the adoption of the Fee Increase and License Reclassification, the Fee Increase and License Reclassification are void. Accordingly, summary judgment with respect to Count II of the Petition is proper because there is no genuine issue of material fact with respect to Count II and Plaintiffs are entitled to judgment in their favor on the issues raised in Count II as a matter of law.*
  
- ***Remedy Under Count II***
  
- *A permanent injunction against enforcement of the Fee Increase and License Reclassification is an appropriate remedy because the failure of the KC Police Board to follow statutory prerequisites for the adoption of agency rules and the continued enforcement of these void and unenforceable rules by the Licensing Section has caused and will continue to cause Plaintiffs irreparable harm, for which they have no adequate remedy at law. The harm suffered by the Plaintiffs outweighs any harm that may be suffered by Defendants as a result of the imposition of an injunction by this Court and the public interest will be served by the grant of such injunctive relief.*
  
- *The Court is not at this time deciding whether or to what extent a refund of all License Fees paid by Plaintiffs and any members of any classes certified in this action is to be awarded, and reserves its decision on that matter pending further hearing.*
  
- ***Count V***
  
- *In Count V of the Petition, plaintiffs challenge the fact that police officers who are employees of the Police Department are not required to be licensed under the provisions of Section 84.720, RSMO, nor are they charged a fee similar to the fees for the licensing of non police officers. Plaintiffs allege that neither the statute nor any regulations established by the KC Police Board provides an exception or exemption for police officers and they further allege that this in essence constitutes a de facto exemption without proper rulemaking, procedures as required by Section 536.021, RSMO.*
  
- *The Court finds that Defendants have promulgated regulations following Section*

84.720, RSMO, which require individuals providing private security services within the City limits of Kansas City, Missouri, to possess a license from the KC Police Board. The definition of who must obtain a license is set out in Title 17, Code of State Regulations, Section 10-2.010(4)(A). Clearly, Kansas City, Missouri police officers fall outside the definition of the regulations. Kansas City, Missouri police officers are, from time to time, allowed to work off-duty but in connection with any off-duty work, Police Department Personnel Policy 630-4 limits their authority and states as follows:

*"The legal authority vested in a sworn member while working off-duty employment is limited to the enforcement of federal and state statutes and municipal ordinances. Members will not use their police authority to enforce a private employer's policies and regulations."*

- *It is evident from the above that police officers are not working as private security officers and are not included in the definition of private security officers found in the Code of State Regulations.*
- *The police authority of a private security officer in Kansas City, Missouri, is set out in the Code of State Regulations. The police authority for a Sworn member of the Police Department is set out in Section 84.350 et seq., RSMO. Police officers are not required to be licensed in order to have police authority and police officers, even off-duty, are not performing private security services.*
- *The Court finds that Defendants have created no de facto exemption without proper rulemaking procedures and that Defendants are entitled to judgment as a matter of law on Count V of the Petition.*
- **B. Count I.** In Count I of the Petition, Plaintiffs sought the Court's interpretation of Section 84.720, RSMo, and of certain provisions of the Board's Regulations. The matters raised by Count I of the Petition are fully resolved by the Supplemental Stipulation.
- **C. Remedy Under Count II.**
- The Court finds that the Class I members are entitled to a refund as a matter of

law of all License Fees paid to the Board and/or the Licensing Section since the Board's adoption and enforcement of the 1997 Fee Increase. A refund is an appropriate remedy for plaintiffs who have *involuntarily* paid taxes (or license fees) under an illegal tax (or license fee) increase. See *State ex rel. S.S. Kresge Co v Howard*, 208 S.W.2d 247, 250 (Mo. Banc. 1947); *Community Fed. Savs. & Loan Ass'n v. Dir. Of Revenue*, 752 S.W.2d 794, 797 (Mo. Banc. 1988); *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716, 718 (Mo. Banc.1998). Plaintiffs have established that the Board illegally adopted the 1997 Fee Increase, and that Plaintiffs and class members paid the required license fees in order to continue operating their businesses within the city limits of Kansas City, Missouri. (See Paragraphs 40 and 41 of the Joint Stipulations).

- Under Missouri law, a payment made to avoid "harsh consequences" is not voluntary. See *Community Fed Savs. & Loan Ass'n*, 752 S.W.2d at 797 (citing *Manufacturer's Casualty Ins.*, 330 S.W.2d at 267). The Supreme Court of Missouri has held that "the payment of a tax in order to avoid the forfeiture of the payor's right to continue in business 'constituted such duress as would render the payment of the tax involuntary.'" *Kresge*, 208 S.W.2d at 250.
  
- The evidence presented in this case establishes that Plaintiffs (including the class members represented by various Plaintiffs) risked the assessment of a harsh penalty if they did not pay the illegally adopted license fees; they would be unable to continue their businesses within the city limits of Kansas City, Missouri and the conduct of their businesses in the Kansas City, Missouri metropolitan area would be substantially harmed by their inability to operate within the city limits. (See Paragraphs 40 and 41 of the Joint Stipulations). Additionally, the evidence has established that if Plaintiffs continued to conduct their businesses within the city limits of Kansas City, Missouri, without paying the illegal License Fees, they would be subject to prosecution for the commission of a misdemeanor. (See Paragraph 32 of the Joint Stipulations) Because the payments made by Plaintiffs and the class members were made to avoid the assessment of various "harsh penalties", the Court finds that the payments were not voluntary and that Plaintiffs are entitled to a refund of those payments as a matter of law. In addition, the order of a refund is within the general equitable power of the Court to remedy the effect of the illegal action by the Board.
  
- Although defendants have asserted the affirmative defenses of estoppel and waiver to Plaintiffs' claims in Count II, the Court finds that Defendants did not meet their burden of proof on such defenses with respect to Count II of the Petition.
  
- **D. The Board has never adopted a valid license fee structure.**

- This Court previously concluded that the 1997 Fee Increase constituted void rulemaking on the part of the Board because the procedures required by Section 536.021, RSMo were not followed. The license fees charged prior to the 1997 Fee Increase also constitute "rules" as defined in Section 536.010(4), RSMo, and have not been properly adopted as required by Section 536.021, RSMo. (See Paragraph 6 of the April 29 Ruling and Paragraph 27 on the Joint Stipulations). Applying the exact same analysis under which this Court found the Board's 1997 Fee Increase unlawful, the Court finds that the license fees adopted by the Board since September 29, 1988 have not been adopted in compliance with the procedures described in Section 536.021, RSMo. Accordingly, the Court finds that all license fee structures imposed since September 29, 1988, are void under Section 536.021, RSMo.

- **E. Remedy Under Count III.**

- **1. Permanent Injunction.**

- The Court finds that a permanent injunction against enforcement of the Pre-1997 Fee Structures is an appropriate remedy for Plaintiffs and the Class III Members. The Court has previously enjoined the Defendants from further enforcement of the license fees adopted in the 1997 Fee Increase. If the Court does not issue an injunction preventing the Board and/or its agents from enforcing the Pre-1997 Fee Structures, the Board might continue to require applicants for Private Security Licenses to pay the license fees imposed under such illegal structures.

- An injunction is an appropriate remedy in this instance because the failure of the Board to follow statutory prerequisites for the adoption of agency rules and the continued enforcement of these void and unenforceable rules by the Licensing Section has caused and will continue to cause Plaintiffs irreparable harm, for which they have no adequate remedy at law. The harm suffered by the Plaintiffs if Defendants continue to enforce the pre-1997 Fee Structures outweighs any harm that may be suffered by Defendants as a result of the imposition of an injunction by this Court and the public interest will be served by the grant of such injunctive relief.

- **2. Refund.**

- The Court finds that the Plaintiffs and the Class III members are entitled as a matter of law to a refund of all License Fees paid to the Board and/or the Licensing Section since September 29, 1988. As was the case with the license fees paid following the 1997 Fee Increase, all license fee payments made by Plaintiffs and the Class III Members since September 9, 1988 were made to allow Plaintiffs and the Class III members to continue operating their businesses, and were therefore made involuntarily. Accordingly, Plaintiffs and the Class III Members are entitled to a refund of such payments as a matter of law. The court notes again that it may also order such a refund under its general equitable powers to remedy past unlawful conduct where there is no adequate remedy at law. (See discussion under Section IIIC, above)
  
- Defendants have also asserted the affirmative defense of estoppel and waiver with respect to Plaintiffs' request for a refund of the license fees paid under the Pre-1997 Fee Structures in Court III of the Petition. It is the Defendants' burden to prove the applicability of such affirmative defenses. Due to the lapse of time between the payment of license fees under the Pre-1997 Fee Structures and the filing of the Original Petition, these affirmative defenses merit more discussion with respect to Count III than Count II.
  
- Equitable estoppel is not a meritorious defense to Count iii, because under Missouri law, "[e]quitable estoppel is impotent to purge transactions of the fatal infirmity of being in violation of law". *Himmel v. Leimkuller*, 329 S.W.2d 264, 271 (Mo.Ct.App. 1959)(citing *Donovan v. Kansas City*, 175 S.W.2d 874, 881 (Mo. Banc. 1943)). In *Himmel*, the Court stated that, "a void order raises no duty to act, and no one is under any duty to protect himself from an illegal act by speaking or otherwise acting." *Himmel* at 271. Therefore, the Board's illegal rulemaking imposed no duty to act on Plaintiffs, and Defendants may not assert that Plaintiffs are estopped from challenging the illegal rules or from receiving a refund of the illegally collected license fees.
  
- Even if estoppel were a theoretically meritorious defense to Count III, the Court finds that Defendants have not provided sufficient evidence to meet their burden to prove all elements of estoppel. The purpose of equitable estoppel is to "preclude one from denying his own expressed or implied admission that another person has *in good faith accepted and acted upon*." *Tom Davis Ins. Ag. V. Shively*, 799 S.W.2d 195, 197 (Mo.Ct.App. 1990) (emphasis added). Under Missouri law, the following three elements must be established for a Court to find equitable estoppel: "(1) an admission, statement or act inconsistent with a claim afterwards asserted or sued upon, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act." *Resnick v. Blue Cross and Blue Shield of Missouri*, 912 S.W.2d 567, 573 (Mo.Ct.App. 1995) (citing *Peerless Supply Co. V. Industrial Plumbing*

*and Heating Co.*, 460 S.W.2d 651, 666 (Mo. 1970)). The burden of proving estoppel is on the party asserting it, who must "prove every element of the estoppel claim with 'clear and satisfactory evidence.'" *Id.*

- Defendants have not established with clear and satisfactory evidence that they accepted and acted upon Plaintiffs' payment of the illegal fees prior to challenging the fee structure, and that such action caused Defendants injury. Additionally, Defendants must have established that they relied on Plaintiffs' actions to their detriment and that such reliance was made in good faith. Defendants have not met this burden and therefore the Court finds that Plaintiffs and the Class III Members are not estopped from seeking a refund of all license fees paid under the Pre-1997 Fee Structures. The Court notes that even if Defendants had submitted evidence of their reliance on Plaintiff's payment of the license fees, a governmental body should not be allowed to assert that it did not correct its own illegal actions because it relied "in good faith" on the fact that the public did not challenge those actions.
  
- As to the affirmative defense of waiver, Defendants have not presented any evidence that satisfies their burden to establish that Plaintiffs have waived their claims or right to a refund under Count III. Waiver is "the intentional relinquishment of a known right which may be implied from a party's conduct." *Granneman v. Columbia Ins. Group*, 931 S.W.2d 502, 505-506 (Mo.Ct.App. 1996). In order for the relinquishment to be implied, the conduct must "clearly and unequivocally show a purpose to relinquish the right." *Id.* The conduct must be "so consistent with ... an intention to renounce a particular right or benefit that no other reasonable explanation of the conduct is possible." *Investors Title Co. V. Chicago Title Ins.*, 983 S.W.2d 533 (Mo.Ct.App. 1998). Defendants have provided no evidence showing a clear relinquishment by Plaintiffs of the right to challenge the illegal rules of the Board or to obtain a refund of the illegally collected license fees.
  
- The evidence has established other reasonable explanations for Plaintiffs' payments of the illegal license fees, including a desire not to lose their right to conduct business in Kansas City. The payment of the license fees under such circumstances does not prevent Plaintiffs from obtaining a refund of the fees. The general rule in Missouri is that "a person who has paid a license fee or tax based on an invalid statute or ordinance cannot recover the amount paid if the payment was made *voluntarily* with full knowledge of the fact." *Manufacturer's Casualty Ins. Co. V. Kansas City*, 330 S.W.2d 263, 265 (Mo.App. 1959) (emphasis added). However, as discussed above, the courts also recognize that "the payment of a tax in order to avoid the forfeiture of the payor's right to continue in business 'constituted such duress as would render the payment of the tax involuntary.'" *State ex rel. S.S. Kresge Co.*, 208 S.W.2d at 250. A refund is an appropriate remedy for taxes (or license fees) imposed illegally and paid involuntarily. *See id.*

- In this case, Plaintiffs and the Class III Members faced the choice of paying an illegally adopted fee, forfeiting their business operations, or committing a crime. Even though Plaintiffs did not specifically challenge the illegality of the license fees until 1996, the void rule raised no duty to act or complain (see *Himmel*, supra), and Plaintiffs' and the Class III Members' entitlement to a refund of the illegal fees collected since September 29, 1988 is not rendered stale in the absence of a duty to object.

- **F. SOVEREIGN IMMUNITY**

- Defendants attempted to amend their Answer and assert the defense of sovereign immunity to Plaintiffs' claims under the remaining counts of the Petition fewer than five business days before the hearing on this matter scheduled for August 25, 1999. The Court denied Defendants' motion as untimely. In any event, Defendants' assertion of sovereign immunity as a defense in this case is without merit. With respect to the Board's obligation to refund the illegally collected license fees sought by Plaintiffs in Counts II and III of the Petition, Missouri law provides that a refund of illegally collected and involuntarily paid taxes (or license fees) is a proper remedy that is not barred by sovereign immunity.
- The general rule in Missouri is that taxes (or license fees) paid *voluntarily*, although imposed under illegal or void statutes (or rules), cannot be refunded without the aid of a statutory remedy waiving sovereign immunity. See *Community Fed. Savs. & Loan Ass'n v. Dir. of Revenue*, 752 S.W.2d 794, 797 (Mo.banc. 1988). When the payments are made involuntarily, however, a common law remedy remains available. In *State ex rel. S.S. Kresge Co. v. Howard*, 208 S.W.2d 247, 250 (Mo.banc. 1947), the Missouri Supreme Court stated that "under the common law if the payment of a tax is deemed involuntary, a tax which is unlawfully collected may be recovered back ... [s]o the only question as to the common law right ... to a refund is whether the payment of the tax was voluntary or involuntary." See also *Community Fed. Savs. & Loan Ass'n v. Dir. of Revenue*, 752 S.W.2d 794, 797 (Mo. Banc. 1988); *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716, 718 (Mo. Banc. 1998). The principle set out by the *Kresge* Court and upheld in *Community Federal* and *Ring* is a common law exception to sovereign immunity which applies to illegal taxes or license fees that are collected through involuntary payments. As discussed in Section IIIC above, payments made to avoid harsh penalties are not made voluntarily. See *Kresge* at 250; *Community Federal* at 797. Therefore, the Court finds that under Missouri law, sovereign immunity does not prevent Plaintiffs and the Class I and Class III Members from obtaining a refund of the license fees involuntarily paid and illegally collected by the Board pursuant to the void license fee structures.

- **G. COUNT IV.**

- Count IV of the Petition asks the Court to declare that the amount to which the License Fees were increased by the 1997 Fee Increase is arbitrary, capricious and unreasonable, and further asks that the Court enjoin the Board from re-adopting License Fees at that level. The Court believes that Count IV presents a request for an advisory opinion and does not provide a ripe controversy. Accordingly, the Court will dismiss Count IV without prejudice.

- **IV. ORDER.**

Based upon the foregoing, it is by the Court this 25th day of October 1999.

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

- 1. All prior interlocutory orders and judgments in this case are deemed final.
- 2. That pursuant to the Court's incorporation of the Supplemental Stipulation, the failure or refusal of the Board to comply with the Supplemental Stipulation shall be a violation of this order.
- 3. That the Class I members are entitled, as a matter of law, and pursuant to the Court's powers under the general principles of equity, to a refund of all License Fees paid since the Board's adoption and enforcement of the 1997 Fee Increase.
- 4. That judgment is granted to Plaintiffs individually and as members of the class they represent on Count III of the Petition, in accordance with Paragraphs 5

through 13 below.

- 5. That all license fees imposed by the Board since September 29, 1988 are void and unenforceable under Missouri law.
  
- 6. That the Board has no validly promulgated or enforceable license fees for private security licenses.
  
- 7. That the Class III members are entitled, as a matter of law, and pursuant to the Court's powers under general principles of equity, to a refund of all License Fees paid since September 29, 1988.
  
- 8. That by definition, Class III includes all of the Class I members.
  
- 9. That within twenty (20) days of the date this Order is entered, the Board shall determine, and certify to the Court in writing with reasonable documentation, the name and last known address of each Class III Member, the amount of License Fees paid by such Class III Member since September 29, 19988, and the total amount of License Fees paid since September 29, 1988 regardless of whether the Board is able to attribute a particular License Fee to a particular payor; and within five (5) days of filing such certification the Board shall deposit that total amount with the Court to be refunded to the Plaintiffs and the Class III Members.
  
- 10. That Dennis C. Eckhold, Joseph J. Mulvihill, Jeffrey J. Simon, Dr. Stacey Daniels and Mayor Kay Waldo Barnes, in their official capacities as members of the Board, Tamy Gallagher, in her official capacity as Supervisor of the Licensing Section, any employee of the Kansas City, Missouri Police Department or of the Board, and their respective officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of this Injunction by personal service or otherwise, be, and they are hereby

permanently enjoined from directly or indirectly demanding payment of and/or collecting any License Fees for issuance, renewal or reinstatement of Private Security Licenses unless and until the Board promulgates a License Fee in compliance with the procedures set forth in Chapter 536, RSMo, required to be complied with for the valid promulgation of rules.

- 11. That Dennis C. Eckhold, Joseph J. Mulvihill, Jeffrey J. Simon, Dr. Stacey Daniels and Mayor Kay Waldo Barnes and Tamy Gallagher are commanded to provide a copy of this Injunction to their respective officers, agents, servants, employees and attorneys, and to post and maintain posted, a copy of the same in a conspicuous place in the public portion of the office of the Licensing Section.
  
- 12. This Order shall also be effective against any successors in office to Dennis C. Eckhold, Joseph J. Mulvihill, Jeffrey J. Simon, Dr. Stacey Daniels and Mayor Kay Waldo Barnes, in their official capacities as members of the Board, and against any successor in employment to Tamy Gallagher in her official capacity as Supervisor of the Licensing Section.
  
- 13. That the Board shall notify the Class I Members and the Class III Members of their right to a refund in the following two ways: (1) commencing on the date of this Order and continuing for a period of eighteen (18) months thereafter, the Board shall include a notice of the right to the refund with each Private Security License renewal notice issued by the Board or its agents; (2) within fifteen (15) days after the date of this Order, and thereafter no less frequently than once every other calendar month until the eighteenth (18th) full calendar month after the date of this Order, the Board shall, at its expense, cause to be published in the Kansas City Star a notice, in form to be submitted to the Court for prior approval, of the availability of the refunds ordered herein.
  
- 14. That this Court shall retain jurisdiction over this Case in order to assure compliance with this Order.
  
- 15. That Count IV of the Petition is dismissed without prejudice.

- 16. That all court costs are assessed against the Board, including future costs of administering the relief granted hereby.
  
- 17. That the Clerk of the Court is directed to mail a copy of this Findings of Fact, Conclusions of Law, Judgment and Injunction to all counsel or record.

**SO ORDERED**

Date: 25 October 1999

Signature

Thomas Brown

Judge, Circuit Court of Cole County

***ORDERED on 29 April 1999.***

- 1. That the License Fees are "rules" as defined in Section 536.010, RSMO.
  
- 2 . That the Fee Increase and License Reclassification each constitute a "rule" as that term is defined in Section 536.010, RSMO.
  
- 3 . That the KC Police Board failed to comply with Missouri law when it adopted

the Fee Increase and License Reclassification.

- 4. That the Fee Increase and License Reclassification are void and unenforceable under Missouri law. ...

Date: April 29, 1999 Signature Thomas J. Brown Judge, Circuit Court of Cole County

**IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI**

Case No. CV198-203CC

Division No. 1

**KANSAS ASSOCIATION OF PRIVATE INVESTIGATORS, et al.,**

**Plaintiffs,**

**VS.**

**JOSEPH J. MULVIHILL, et al.,**

**Defendants.**

**JOINT SUPPLEMENTAL STIPULATION**

**COME NOW** Plaintiffs Kansas Association of Private Investigators, William Sanders, Alcops, Inc., Jerry Geraldine Basson, Valerie Dutro, John Ellis and Michael Galbreath by counsel, and Defendants Joseph J. Mulvihill, Jeffrey J. Simon, Dennis C. Eckold, Dr. Stacey Daniels-Young and Mayor Kay Barnes, in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri (the "Board"), by counsel, who stipulate to the following and agree that the following may be incorporated into the final judgment of the Court in the above-captioned action:

- 1. The Board does not believe that any of the services or activities listed on the attached Exhibit A constitute "security services" within the meaning of Section 84.720, RSMo, as currently in effect.
  
- 2. Notwithstanding any provision of any rule or regulation adopted by the Board, unless

and until Section 84.720, RSMo, is hereafter amended to provide such regulatory and licensing authority, or an appellate court of competent jurisdiction holds that the Board possesses such regulatory and licensing authority, the Board shall not, nor attempt to (a) regulate the conduct of any of the services or activities listed on the attached Exhibit A, or (b) require the possession of a license in order to lawfully perform any one or more of the services or activities listed on the attached Exhibit A.

- 3. Nothing contained in this Stipulation affects the power or authority of the Board under Section 84.720, RSMo, to (a) regulate the conduct of any service or activity that is not listed on the attached Exhibit A and that otherwise constitutes "security services" within the meaning of Section 84.720, RSMo ("Regulatable Services"), or (b) require the possession of a license in order to lawfully perform Regulatable Services whether or not such person or entity also performs any one or more of the services or activities listed on the attached Exhibit A.

Signature Doug Stone, King Hershey Coleman Koch & Stone, Attorney for Plaintiffs

Signature Dale Close, Legal Advisor's Office, Kansas City Police Department, Attorney for Defendants

## **EXHIBIT A**

1. Perform background checks on potential employees, investigate information provided by potential employees on job applications and in job interviews, record movements of potential employees, and fingerprint employees.

2. Administer written exams and conduct exercises designed to test an employee or potential employee's integrity and potential conduct.

3. Interview potential buyers of products and collect demographic information with respect to market trends and buyers' reactions to products.

4. Conduct personality screening tests on personnel.

5. Compile comparison shopping information and observe consumer behavior
6. Visit business sites to observe the quality of service provided and/or to test the products produced.
7. Visit job sites to check for compliance with OSHA regulations, conduct ergonomic studies, and conduct worker compliance monitoring.
8. Conduct surveys of buildings in order to determine extent of existing building security and review methods of security administration with owners and employees of businesses.
9. Monitor E-mail in and out of businesses.
10. Investigate hacking concerns raised by business owners or other individuals and provide hacking prevention advice.
11. Provide and install copyright infringement programs.
12. Design computer security procedures to be implemented by businesses or individuals.
13. Perform bail bond enforcement, including locating and recovering individuals, provided the person performing the service is unarmed and does not exercise or purport to exercise police powers.
14. Provide service of court process, provided the person performing the service is unarmed and does not exercise or purport to exercise police powers.
15. Perform private corrections operations, including electronic monitoring of prisoners on house arrest and physical checks of offenders off the correctional site, including at work sites.
16. Serve as Court-appointed victim's advocates by investigating situations and representing the victim's rights in court.

17. Provide, operate and maintain Global Position System services to individuals and businesses.

18. Provide live feed closed circuit television and/or sound systems for clients, to be used for electronic monitoring for home or business security.

19. Provide lo-jack services (electronic tracking systems for automobiles) for clients to be used for retrieval in the event an automobile is stolen.

20. Provide adoption information services, including conducting interviews and reviewing public records to discover and learn about natural parents/children.

21. Serve as child advocates and investigate facts of a case and represent the rights of the child in Court.

22. Provide genealogical research services.

23. Conduct paternity testing and investigations of non-criminal activities and health status of potential fathers.

24. Compile and/or use fingerprinting databases, and provide classification and comparison for clients.

25. Perform DNA testing at the request of clients, as well as compile and/or use DNA databases.

26. Perform laboratory examinations, including the examination of firearms and comparison of fibers and other types of trace evidence.

27. Conduct handwriting analysis.

28. Conduct scientific testing of materials.

29. Provide encryption and decryption services for computers used in organizations to protect systems and sensitive information.

30. Serve as information brokers, providing databases or electronic systems that search other systems.

31. Serve as chauffeurs, which may include incidental defensive and evasive driving.

32. Provide personal risk analysis for individuals, analyzing behavior and suggesting alternatives for greater safety.

33. Provide personal and residential security surveys, including evaluation of safety hazards and suggestion of corrective actions.

34. Design, recommend, sell and/or install security devices, including but not limited to home, auto and business alarm systems.

35. Perform polygraph services.

36. Perform psychological stress evaluations to determine respondent's veracity.

37. Perform voice stress analysis, including use of computer programs to test respondent's veracity.

38. Location and/or repossession of property on behalf of creditors.

39. Perform investigations for the purpose of obtaining information with reference to:

(a) the identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations,

transactions, acts, reputation or character of any person, unless the investigation is being conducted in relation to a prior act or event that may constitute a crime under Missouri law; or

(b) the location, disposition or recovery of lost property or property to be repossessed or recovered by a creditor (as distinguished from property which is suspected to have been stolen).