

Supra's Motion to Strike and Motion for Sanctions. Supra also included a request to accept its Response Out of Time. On September 23, 1998, BellSouth filed its Opposition to Supra's request to accept its Response to BellSouth's Motion to Strike.

Supra's Motion to Dismiss and Motion to Strike and BellSouth's Opposition and Motion to Strike are only addressed in this Order to the extent that they apply to Docket No. 980800-TP. To the extent that they apply to Docket No. 980119-TP, we have addressed them by a separate Order. Our determination on these motions is set forth below.

MOTIONS

I. ORAL ARGUMENT

Supra and BellSouth filed their requests for oral argument on the Motions to Strike in accordance with Rule 25-22.058, Florida Administrative Code. Due to the nature of Supra's and BellSouth's Motions to Strike, we granted the requests for oral argument and limited it to five minutes per side.

II. SUPRA'S MOTION TO FILE RESPONSE OUT OF TIME

SUPRA

Supra stated that BellSouth's Motion was served by hand delivery on September 10, 1998. Therefore, Supra's Response was due September 17, 1998. Supra's Response was four days late. Supra stated that it was unable to timely file its response due to activities and deadlines in this docket and Docket No. 980119-TP. Supra asked, therefore, that we accept its late-filed Response.

BELLSOUTH

In its response, BellSouth argued that Supra has not stated good cause for filing its response out of time. BellSouth stated that a busy schedule does not excuse an untimely filing. BellSouth noted that Supra could have sought an extension of time to file its response before the filing deadline, but did not. BellSouth asked, therefore, that we deny Supra the right to file its response out of time.

Determination

We are aware that there have been numerous activities in this docket and Docket No. 980119-TP. The response deadlines set forth in Rule 25-22.037(2), Florida Administrative Code, are, however, clear. The purpose of the rule is to ensure that pleadings and responses are filed in a timely manner and that no party is unduly burdened or inappropriately benefitted by the timing of pleadings and motions. These rules are equally applicable to the parties in this case. Supra's request is, therefore, denied.

III. MOTIONS TO STRIKE

SUPRA

Supra asked that we strike BellSouth's Answer to Supra's complaint because of misconduct in this proceeding. Supra alleged that BellSouth engaged in misconduct by offering a Commission staff person who had been involved in this Docket a position with BellSouth. Supra stated that this staff person, MaryRose Sirianni, was lead on this docket, as well as Docket No. 980119-TP. Because she was offered a position with BellSouth, and has now accepted that position, Supra complained that she can no longer participate in resolving this case. Supra asserted that Ms. Sirianni participated in a walk-through of the central offices at issue in this Docket, which took several hours to complete. Supra further asserted that as a result of BellSouth's employment of Ms. Sirianni, our staff will no longer be able to complete the handling of the issues in this case. Supra argued that in view of the importance of this case, BellSouth's actions in offering Ms. Sirianni a position are clearly improper.

Supra also complained that BellSouth has the resources to hire anyone. Supra added that it ". . . is not an accident that this staff person was offered a position by BellSouth at this point in time." September 2, 1998, Motion at p. 4. Supra charged that BellSouth offered Ms. Sirianni a position in order to avoid Ms. Sirianni's further involvement in this docket and in Docket No. 980119-TP. Supra argued that Ms. Sirianni has demonstrated her knowledge, experience, and ". . . willingness to challenge BellSouth. . .," therefore, BellSouth would prefer to have her removed from these cases so that less experienced staff members will be required to complete these cases. September 2, 1998, Motion at p. 5. Supra stated that no other Commission staff member is able to handle these cases as capably as Ms. Sirianni. Thus,

Supra argued that it is a violation of due process for BellSouth to offer Ms. Sirianni a position with BellSouth.

Supra further asserted that this is "misconduct of the highest order. . .," which has deprived Supra of its right to a fair hearing. Supra argued that this is analogous to jury tampering. Supra argued that, according to Rule 1.540, Florida Rules of Civil Procedure, BellSouth's actions are sufficient basis for the Commission to strike BellSouth's Answer to Supra's complaint. Rule 1.540, Florida Rules of Procedure, states, in part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

Supra stated that BellSouth's action is ". . . premeditated, targeted, and abusive of the process." September 2, 1998, Motion to Dismiss at p. 14. Supra asked, therefore, that BellSouth's Answer to Supra's Complaint be stricken.

BELLSOUTH

In its Opposition and Motion to Strike, BellSouth asserted that Supra's allegations are without merit. BellSouth stated that its offer of employment to Ms. Sirianni is permissible under Section 112.313(9)(a)(6)(c), Florida Statutes. In accordance with that Section, the restrictions on employment set forth in Section 112.313, Florida Statutes, do not apply to a person employed by the agency prior to December 31, 1994. BellSouth has also attached the affidavit of Nancy Sims to its Opposition and Motion to Strike. The affidavit stated that BellSouth did not offer Ms. Sirianni a position in order to avoid her participation in these dockets or to influence the outcome of the dockets. BellSouth stated that it had no "sinister" motive in hiring Ms. Sirianni. BellSouth also asserted that our staff is capable of handling these dockets without Ms. Sirianni's participation and assistance. BellSouth added that Supra has offered no evidence to substantiate its claims that BellSouth's misconduct was premeditated.

BellSouth stated that Supra knew that BellSouth's conduct was lawful.¹ BellSouth argued, therefore, that Supra's Motion should be denied as a sham pleading pursuant to Rule 1.150, Florida Rules of Civil Procedure.² BellSouth added that Supra's Motion contains "scandalous" matters, that should also be stricken in accordance with Rule 1.140, Florida Rules of Civil Procedure. BellSouth stated that scandalous matters are accusations against another party that are unnecessary and accusatory. BellSouth argued that such things include allegations that reflect upon one's moral character or that detract from the dignity of the court.³

BellSouth also asked that sanctions be imposed upon Supra for filing this Motion. BellSouth argued that administrative proceedings are no place for improper or frivolous pleadings, as set forth in Section 120.57(1)(b)(5), Florida Statutes. BellSouth argued that Supra's Motion to Dismiss qualifies as an improper and frivolous pleading. BellSouth argued that the only purpose for Supra's Motion is to "throw mud," delay the case, and to harass BellSouth. September 9, 1998, Opposition and Motion to Strike at p. 5. According to BellSouth, there is no legal basis for Supra's Motion. Thus, BellSouth asked that we impose reasonable sanctions on Supra, including the imposition of attorneys' fees and costs.⁴

¹ Citing Supra's Motion at ¶ 22, where Supra notes that the employment restrictions in Section 112.313, Florida Statutes, do not apply to Ms. Sirianni, in accordance with Section 112.313(9)(a)(6)(c), Florida Statutes.

²Citing Menke v. Southland Specialities Corp., 637 So. 2d 285 (Fla. 2nd DCA 1994).

³Citing Burke v. Mesta Machinery Co., 5 F.R.D. 134 (Pa. 1946) and Martin V. Hunt, 28 F.R.D. 35 (D.C. Mass. 1961). BellSouth also cites Ropes v. Stewart, 45 So. 31 (Fla. 1907), wherein the Court granted a motion to strike scandalous allegations that the defendant had used perjury and evil influence on the judge and jury.

⁴Citing Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, wherein the Commission stated that it has the authority to impose sanctions pursuant to Section 120.57(1)(b), Florida Statutes.

Determination

Upon consideration, we view Supra's Motion to Strike BellSouth's Answer as a sham pleading.

Ms. Sims stated in her affidavit that BellSouth offered Ms. Sirianni a position based upon her experience, instead of a desire to influence the outcome of this Docket. We note that Ms. Sirianni was not the only staff member who participated in the walk-through at the central offices at issue in this case. In addition, Ms. Sirianni was never assigned as a staff member to this case, Docket No. 980800-TP. There has also been a second walk-through of these offices in recent weeks involving additional Commission staff members. Furthermore, the hiring of Ms. Sirianni by BellSouth did not necessitate a change in the scheduled handling of this case. While Ms. Sirianni's knowledge and experience were valuable assets to us, the Commission staff members responsible for this case are capable of handling this case in a proper and timely manner.

Based on the facts as known by us and as set forth in Ms. Sims's uncontroverted affidavit, we believe that Supra's Motion is factually false and may be considered a sham pleading in accordance with Rule 1.150, Florida Rules of Civil Procedure.

We also believe that Supra's Motion may be considered a frivolous pleading in accordance with Section 120.57 (1)(b)(5), Florida Statutes, because there is no legal basis or justification for the motion. In past cases, we have stated that "In determining whether a motion is improper pursuant to Section 120.57(1)(b)(5), Florida Statutes, we must solely focus on whether there was some legal justification for its filing." Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495, at p. 21. Supra has stated in its own Motion that the agency employment restrictions set forth in Section 112.313, Florida Statutes, are not applicable to Ms. Sirianni. Supra's only other asserted legal basis for its Motion is Rule 1.540, Florida Rules of Civil Procedure, regarding dismissal for fraud or misconduct. Supra does not allege fraud, but, instead, alleges that BellSouth has engaged in misconduct. Misconduct is defined by Black's Law Dictionary as

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior. . .

Black's Law Dictionary, 6th Ed. (1990). Supra has not identified any rule or law which BellSouth broke when it offered Ms. Sirianni a position, nor has Supra provided any factual or legal support for its assertions that BellSouth hired Ms. Sirianni in an attempt to improperly influence the outcome of these two dockets. Also, Rule 1.540, Florida Rules of Civil Procedure, is not applicable in this instance. Supra asks that we strike BellSouth's Answer to Supra's complaint. Supra is not seeking relief from a judgment, decree or order. We find no basis in law or in fact for Supra's Motion. Thus, we shall consider Supra's Motion to Strike a frivolous motion. For these reasons, we hereby grant BellSouth's Motion to Strike Supra's Motion to Strike for Misconduct.

IV. REQUEST FOR SANCTIONS

BELLSOUTH

BellSouth asked that sanctions be imposed upon Supra for filing the Motion to Strike for Misconduct. BellSouth argued that administrative proceedings are no place for improper or frivolous pleadings, as set forth in Section 120.57(1)(b)(5), Florida Statutes. BellSouth argued that Supra's Motion qualifies as an improper and frivolous pleading. BellSouth further argued that the only purpose for Supra's Motion is to "throw mud," delay the case, and harass BellSouth. September 9, 1998, Opposition and Motion to Strike at p. 5. According to BellSouth, there is no legal basis for Supra's Motion. Thus, BellSouth asked that we impose reasonable sanctions on Supra, including the imposition of attorneys' fees and costs.⁵

As noted above, we did not accept Supra's late-filed response to BellSouth's Motion.

As we have indicated herein, Supra's Motion to Dismiss shall be considered a frivolous pleading in accordance with Section 120.57 (1)(b)(5), Florida Statutes. There is no legal basis or justification for Supra's motion.

⁵Citing Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, wherein the Commission stated that it has the authority to impose sanctions pursuant to Section 120.57(1)(b), Florida Statutes.

In Order No. PSC-96-1320-FOF-WS, we relied on Mercedes Lighting and Elec. Supply, Inc. v. State, Dep't of General Services, 567 So. 2d 272, 278 (Fla. 1st DCA 1990) in rendering its decision on a request for attorney's fees and costs. We noted that in Mercedes Lighting, the court stated:

The rule [against frivolous or improper pleadings contained in Rule 11, Federal Rules of Civil Procedure] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." The court further noted, that "a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition.

Order No. PSC-96-1320-FOF-WS at p. 21, citing Mercedes Lighting, 567 So. 2d at 276. We further considered the court's holding that improper purpose in a pleading "may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake." Id. at 278, Order No. PSC-96-1320-FOF-WS at 19. We added that ". . . it is important to consider what was reasonable at the time the pleading was filed." Order No. PSC-96-1320-FOF-WS at p. 20. We also stated that there must be some legal justification for the filing in question. Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495, at p. 21.

Supra has stated in its Motion to Strike that the agency employment restrictions set forth in Section 112.313, Florida Statutes, are not applicable to Ms. Sirianni. As set forth in this Order, Supra's only other asserted legal basis for its Motion is Rule 1.540, Florida Rules of Civil Procedure, regarding relief from a decree or order based upon fraud or misconduct. Misconduct is, however, defined as

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior. . .

Black's Law Dictionary, 6th Ed. (1990). Supra has not identified any rule or law that BellSouth violated when it offered Ms. Sirianni employment. Therefore, we find that there is not any legal basis for Supra's Motion. Even if one considers that the

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proceedings in Docket No. 980800-TP have been quite contentious between the parties and that the end results of this case may be quite significant for both parties, we do not believe that this pleading can be considered reasonable under the circumstances. We shall, therefore, consider Supra's Motion to Strike to be a frivolous motion.

While we find that Supra's Motion to Strike is frivolous, we acknowledge that sanctions should only be imposed when truly warranted, in order to avoid ". . .chill[ing] an attorney's enthusiasm or creativity in pursuing factual or legal theories." Order No. PSC-96-1320-FOF-WS at p. 21, citing Mercedes Lighting, 567 So. 2d at 276. We emphasize that further pursuit by Supra of such legally and factually deficient theories shall not be considered lightly. Nevertheless, we shall not grant BellSouth's request for sanctions for Supra's filing of the Motion to Strike for Misconduct.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Motion to Accept Response Out of Time filed by Supra Telecommunications & Information Systems is denied. It is further

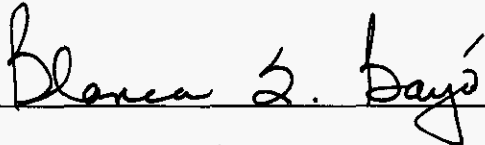
ORDERED that the Motion to Strike filed by BellSouth Telecommunications, Inc. is granted. It is further

ORDERED that BellSouth Telecommunications, Inc.'s request for sanctions is denied. It is further

ORDERED that this Docket shall remain open pending the outcome of the October 21, 1998, hearing.

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By ORDER of the Florida Public Service Commission this 23rd
day of October, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

BK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060,

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Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.