

Complaint Counsel's Motion for Summary Decision. Respondent Jerk did not respond to the motion.¹ On November 12, Complaint Counsel filed their reply, and Mr. Fanning filed a surreply on November 19.

Following Mr. Fanning's opposition to Complaint Counsel's motion, on November 4, Complaint Counsel served its Second Request for Admissions on Respondents Jerk and Mr. Fanning. Neither Jerk nor Mr. Fanning responded to the Second Request for Admissions within the ten-day period provided by Commission Rule 3.32(b). *See* Declaration of Beatrice Burke, ¶ 7 (attached to Complaint Counsel's Motion to Supplement the Record). Complaint Counsel now move to add those statements to the record for their pending motion for summary decision as admissions.

In his opposition to the motion to supplement the record, Mr. Fanning admits that he did not respond to the Request for Admissions by November 14, but also states the failure to respond "was obviously an oversight." Fanning Opposition, ¶ 2. He also states that counsel for Mr. Fanning "has taken steps to complete the answers and expects to serve responses forthwith." *Id.* Mr. Fanning argues that Complaint Counsel provides no basis in Commission rules to supplement the summary decision record. He also claims there is undue prejudice against him if the admissions are added to the summary decision record and given conclusive effect.

Analysis

Commission Rule 3.24(a)(3) permits the affidavits supporting or opposing a motion for summary decision to be supplemented with additional discovery. Thus, contrary to Mr. Fanning's argument, Complaint Counsel's motion to supplement the summary decision record is properly before us.

Commission Rule 3.32(b) states that when a party serves written requests for admission on another party, "the matter is admitted unless, within ten (10) days after service . . . the party to whom the request is directed serves . . . a sworn written answer or objection addressed to the matter." Here, as Mr. Fanning admits, he did not respond to the Second Request for Admissions within the deadline. Thus, under Commission rules, the matters are deemed admitted. *See* 16 C.F.R. § 3.32(b). Moreover, absent other action, the admitted matters are deemed "conclusively established." *See* 16 C.F.R. § 3.32(c).

Mr. Fanning argues that his failure to respond to the Second Request for Admissions was inadvertent and that the use of the admissions is prejudicial. There is no question that the consequences to a party of having requests for admission deemed admitted and conclusively established can be severe. We note, however, that parties facing such consequences may appeal to an Administrative Law Judge. Commission Rule 3.32(b) states that requests for admission must be answered within ten (10) days or "such shorter or longer time as the Administrative Law

¹ In fact, Jerk has not provided any response or otherwise participated in this action since Jerk counsel of record filed a notice with the Commission and the Administrative Law Judge that as of July 18, 2014, she and her law firm no longer represent Jerk.

Judge may allow.” 16 C.F.R. § 3.32(b). Rule 3.32(c) provides that the ALJ “may permit withdrawal or amendment [of an admission] when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.” 16 C.F.R. § 3.32(c).

In light of the fact that the relevant requests for admissions were served recently and Mr. Fanning’s failure to respond might be due to excusable oversight, we decline to supplement the summary decision record at this time. We will allow Jerk and Mr. Fanning the opportunity to seek relief from the ALJ for their failure to timely respond to Complaint Counsel’s Second Request for Admissions pursuant to Rule 3.32(c). Any such motion must be filed no later than December 12, 2014.

Accordingly, Complaint Counsel’s Motion to Supplement the Record for Summary Decision is hereby DENIED WITHOUT PREJUDICE.

By the Commission.

Donald S. Clark
Secretary

Issued: December 5, 2014