

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DAVID REGAN,
Appellant,
vs.
THE STATE OF NEVADA; AND BOARD
OF PAROLE COMMISSIONERS,
Respondents.

No. 50813

FILED

JUN 13 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order dismissing appellant's complaint for failure to state a claim. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant Michael David Regan filed a complaint against respondents, the State of Nevada and its Board of Parole Commissioners, alleging that the Board violated Nevada's Open Meeting Law, NRS Chapter 241, when he appeared before it in January 2007. Regan sought an order declaring the January 2007 parole hearing void and directing the Board to reconsider his parole application in a new hearing.

After this court held that the Board was not subject to the Open Meeting Law in the 2007 decision Witherow v. State, Board of Parole Commissioners,¹ respondents moved to dismiss Regan's complaint under NRCP 12(b)(5) for failure to state a claim upon which relief could be

¹123 Nev. ___, 167 P.3d 408 (2007).

granted. Regan then countermoved to supplement his complaint with allegations that the Board violated certain NRS Chapter 213 provisions and certain due process requirements. The court denied Regan's counter motion to supplement his complaint and granted respondents' motion to dismiss. Regan has appealed.

On appeal, Regan argues that instead of dismissing his complaint, the district court should have allowed him to supplement or amend his complaint to allege statutory and due process violations.² We review orders granting NRCP 12(b)(5) motions to dismiss de novo.³ A complaint should be dismissed under NRCP 12(b)(5) only when the plaintiff could prove no set of facts that would entitle him to relief.⁴ And if a complaint can be amended to state a claim for relief, leave to amend is preferred over dismissal.⁵ Although a motion for leave to amend under

²The district court treated Regan's filing as a motion to supplement his complaint under NRCP 15(d) and properly denied that motion because Regan was not attempting to remedy any wrongs that arose after his complaint was filed, but was merely asserting new legal bases for his claims in light of recently developed law. See Las Vegas Network v. B. Shawcross, 80 Nev. 405, 408, 395 P.2d 520, 521 (1964) (recognizing that a supplemental pleading under NRCP 15(d) is appropriate to raise factual events that occurred after the complaint was filed). For the same reason, however, it is appropriate to construe Regan's filing as requesting to amend his complaint under NRCP 15(a).

³Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. ___, ___, 181 P.3d 670, 672 (2008).

⁴Id.

⁵Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 22, 62 P.3d 720, 734 (2003).

NRCP 15(a) is addressed to the district court's sound discretion, that discretion must not be abused, and leave to amend should be freely given when justice requires.⁶

Here, since it appears that Regan could amend his complaint to state claims upon which relief could be granted, we conclude that justice requires that he be allowed to do so. In particular, Regan's proposed amendments alleged specific violations of NRS 213.130 requirements existing at the time of his parole hearing,⁷ which provided that parole hearings must be held open to the public, except for the Board's post-public hearing private deliberation, and allow for victim testimony.⁸

Further, Regan's proposed amendments challenged the Board's refusal to allow him to object to evidence and to impeach, rebut, and cross-examine witnesses. In Witherow, we reiterated that "[a]t a minimum, a quasi-judicial proceeding must afford each party (1) the ability to present and object to evidence, (2) the ability to cross-examine witnesses, (3) a written decision from the public body, and (4) an opportunity to appeal to a higher authority."⁹ Although we also explained that, under NRS 213.130(3), only those rights conferred by specific statute concerning parole hearings are enforceable, we recognized that that

⁶Id.

⁷See 2007 Nev. Stat., ch. 528, §§ 10.5, 17, at 3261-62, 3265.

⁸See, e.g., NRS 213.130(3), (4), and (5).

⁹123 Nev. at ___, 167 P.3d at 411 (quoting Stockmeier v. State, Dep't of Corrections, 122 Nev. 385, 391-92, 135 P.3d 220, 224 (2006)).

provision was not effective until October 1, 2007.¹⁰ Here, Regan's proposed amendments alleged that, during his pre-October 1, 2007, parole hearing, the Board failed to comply with the "basic protections available in a court of law" that must be afforded during quasi-judicial proceedings.¹¹ Because, in Witherow, we concluded that the Board acts in a quasi-judicial capacity when it conducts parole hearings,¹² it appears that Regan has proposed viable claims for relief with respect to basic trial protections.¹³

Accordingly, because Regan proposed to amend his complaint to assert viable claims for relief,¹⁴ the district court abused its discretion in denying him leave to do so. Thus, as Regan should have been allowed to amend his complaint to assert specific allegations supporting his claims for relief, the court erred in dismissing his complaint, and we

¹⁰Id.


¹¹Id.

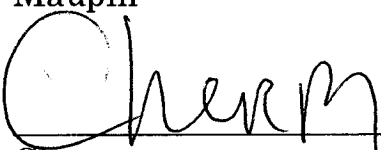
¹²Id. at ___, 167 P.3d at 412.

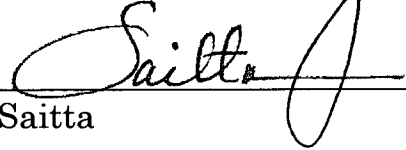
¹³To the extent that Regan's proposed amendments alleged that the Board failed to properly consider the merits of his application for parole and the discretionary factors set forth in NAC 213.520, they fail to state viable claims. See Severance v. Armstrong, 96 Nev. 836, 838, 620 P.2d 369, 370 (1980), rehearing denied, 97 Nev. 95, 624 P.2d 1004 (1981). Also, any proposed claims based on NRS 213.130 subsections that were not in effect at the time of the January 2007 hearing are not viable.

¹⁴Respondents' argument that they are entitled to absolute or discretionary immunity is without merit, as Regan did not seek to impose liability, but rather, requested a new parole hearing. See, e.g., NRS 41.031(1) (waiving sovereign immunity from liability in certain circumstances).

ORDER the judgment of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.


_____, J.

Maupin

_____, J.
Cherry


_____, J.
Saitta

cc: Hon. James Todd Russell, District Judge
Michael David Regan
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk