

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE COMMISSION ON ETHICS OF  
THE STATE OF NEVADA,  
Appellant,  
vs.  
WARREN B. HARDY II, IN HIS  
OFFICIAL CAPACITY AS NEVADA  
STATE SENATOR FOR CLARK  
COUNTY SENATORIAL DISTRICT  
NO. 12,  
Respondent.

No. 53064

**FILED**

**MAY 21 2009**

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting judicial review of a Nevada Ethics Commission decision and entering a permanent injunction in an ethics matter. First Judicial District Court, Carson City; William A. Maddox, Judge.

On February 9, 2009, this court granted respondent's motion for expedited consideration of this matter and, following briefing, the court conducted oral argument on April 20, 2009. Although we enter this order, the issues in this case are of first impression and this appeal shall be resolved by a published opinion to follow.

BACKGROUND

This case began when the Nevada Commission on Ethics instituted administrative proceedings against respondent Senator Warren B. Hardy, II, stemming from a citizen's complaint based on allegations of ethics violations that involve Senator Hardy's voting on legislation during the 2007 legislative session. The alleged ethics violations, in relevant part, asserted that Senator Hardy violated NRS 281A.420 of the Nevada ethics law by failing to adequately disclose an alleged conflict of interest

regarding Senate Bill 509 and by failing to abstain from voting on that bill.<sup>1</sup> NRS 281A.420(2) provides, in relevant part, that

a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by: (a) [h]is acceptance of a gift or loan; (b) [h]is pecuniary interest; or (c) [h]is commitment in a private capacity to the interests of others.

Senator Hardy moved to dismiss the administrative proceeding or for summary judgment on separation of powers and legislative immunity grounds. The Commission subsequently denied Senator Hardy's motion. Although an administrative hearing was scheduled to address the allegations against him, Senator Hardy filed a petition for judicial review of the Commission's denial of his motion to dismiss or for summary judgment in the district court. He also filed an emergency motion for a preliminary injunction.

Following a hearing on the petition and motion, the district court granted Senator Hardy's petition for judicial review of the Commission's decision and entered a permanent injunction preventing the Commission from conducting any further proceedings against Senator Hardy. The court based its decision on several grounds. In relevant part,

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<sup>1</sup>The record shows that in his private capacity, Senator Hardy serves as president of the Associated Builders and Contractors of Southern Nevada, (ABC-LV). Senate Bill 509 related to lease-purchase and installment-purchase agreements that would have affected ABC-LV's members.

the district court held that the Commission was barred from conducting administrative proceedings against Senator Hardy by the constitutional doctrine of separation of powers under Article 3, Section 1 of the Nevada Constitution and that the Legislature cannot waive separation of powers. We agree and affirm the district court's order.

### DISCUSSION

We conclude that the Commission is barred from conducting any further proceedings against Senator Hardy based on the constitutional doctrine of separation of powers. Specifically, we hold that the discipline of legislators is a constitutionally committed function of the Legislature and that the power to discipline cannot be delegated to the extent that the conduct at issue involves a core legislative function such as voting and, by extension, disclosure of conflicts of interest prior to voting. We further hold that the Commission is an agency of the executive branch. Finally, we hold that a legislature cannot waive constitutionally based structural protections such as the separation of powers doctrine.

#### Standard of Review

The decision of whether to grant a permanent injunction rests in the district court's sound discretion and we will not overturn that decision unless it is an abuse of discretion. See Director, Dep't of Prisons v. Simmons, 102 Nev. 610, 729 P.2d 499 (1968), overruled on other grounds by Las Vegas Novelty v. Fernandez, 106 Nev. 113, 787 P.2d 772 (1990). Nonetheless, because the facts surrounding the underlying issues are undisputed, the district court's permanent injunction will be reviewed de novo. See Secretary of State v. Give Nevada A Raise, 120 Nev. 481, 486 n.8, 96 P.3d 732, 735 n.8 (2004). Moreover, in the context of reviewing an administrative decision made under the Administrative Procedure Act,

this court, like the district court, reviews purely legal questions de novo. Garcia v. Scolari's Food & Drug, 125 Nev. \_\_\_, \_\_\_, 200 P.3d 514, \_\_\_ (2009); see also NRS 233B.135(3).

Separation of powers doctrine prohibits one branch of government from impinging on the core function of another

This court has recognized the fundamental importance of the separation of powers doctrine. Galloway v. Truesdell, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967). Nevada's separation of powers doctrine bars one governmental branch from infringing on the powers constitutionally committed to another branch of the government. Secretary of State v. Nevada State Legislature, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004); accord Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000) (recognizing that the Nevada Constitution establishes that "each branch of government is considered to be co-equal, with inherent powers to administer its own affairs"). Specifically, Article 3, Section 1(1) of the Nevada Constitution provides that

[t]he powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive, and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

This court has held that separation of powers principles are "particularly applicable when a constitution expressly grants authority to one branch of government." Secretary of State, 120 Nev. at 466, 93 P.3d at 753 (citations omitted).

Here, Article 4, Section 6 of the Nevada Constitution, expressly grants each house of the Legislature the authority to regulate

the conduct of its own members. In particular, this constitutional provision provides that

[e]ach House shall judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), determine the rules of its proceedings and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member.

Nev. Const. art. 4, § 6. Although this court has not addressed what legislative actions are subject to discipline for disorderly conduct under this constitutional provision, to the extent that a legislator's actions involve a core legislative function, such as voting, and, by extension, disclosure of possible conflicts, any discipline for purported disorderly conduct in the course of exercising these core function activities is a function constitutionally committed to each legislative house with regard to its members. Because the power to discipline is expressly granted to each legislative house by the constitution, it cannot be delegated to another branch of the state government. Secretary of State, 120 Nev. at 466, 93 P.3d at 753.

The Commission is part of the executive branch, as it was created to execute Nevada's ethics laws and it has the power to impose civil penalties. See generally NRS 281A.440; NRS 281A.480. Thus, the Legislature is constitutionally prohibited from delegating its power to discipline its members for disorderly conduct purportedly committed while engaging in core function activities to the Commission.

Here, the ethics allegations against Senator Hardy assert that he violated NRS 281A.420 by failing to adequately disclose an alleged conflict of interest regarding a piece of legislation and by failing to abstain from voting on that bill. Because we have concluded that voting and, by

extension, disclosure, are core legislative functions, disciplinary action for any alleged disorderly conduct is a power constitutionally committed to the senate and thus, cannot be delegated to the Commission.

Legislature may not waive the separation of powers doctrine

To the extent that the Commission maintains that protection under the separation of powers doctrine was waived by the Legislature when it enacted NRS 281A.420, we reject such an assertion. In Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 878-80 (1991), the United States Supreme Court held that constitutionally based structural protections cannot be waived by either the legislative or executive branch. Specifically, in addressing the argument that it should defer to the executive branch's decision that a statute did not represent a legislative encroachment on the executive powers found in the Appointments Clause, the Court concluded that the "roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political." Id. at 878. As a result, the Court rejected this argument, concluding that neither Congress nor the executive branch can waive such a structural protection. Id. at 880.

This court has recognized that separation of powers "is probably the most important single principle of government." Galloway v. Truesdell, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967). Thus, considering this court's recognition of the fundamental nature of this structural protection on Nevada's tripartite system of government, in light of the Supreme Court's conclusion in Freytag that Congress cannot waive such structural protections, it appears to follow that the Legislature cannot, by enacting a statute that delegates certain powers to another branch of the government, waive any separation of powers violation inherent in such a

delegation, through the simple act of enacting that statute. Freytag, 501 U.S. at 878-80.

CONCLUSION

The power to discipline its membership with respect to a core function of voting and, by extension, disclosure of conflicts of interest, is a function constitutionally committed to the Legislature, and it cannot be delegated to another branch of government. Thus, any delegation to the Commission by the Legislature of the power to discipline its members with respect to a core function of voting is an unconstitutional delegation of power in violation of the separation of powers provision of the Nevada Constitution. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

Hardesty, C.J.  
Hardesty

Parraguirre, J.  
Parraguirre

Cherry, J.  
Cherry

Gibbons, J.  
Gibbons

Douglas, J.  
Douglas

Saitta, J.  
Saitta

Pickering, J.  
Pickering

<sup>2</sup>The clerk of this court is directed to stay issuance of the remittitur pending our disposition of this matter by published opinion. NRAP 41(a).

cc: First Judicial District Court Dept. 2, District Judge  
Nevada Commission on Ethics  
Legislative Counsel Bureau Legal Division  
Jacob L. Hafter  
Carson City Clerk