IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH L. HALL, ESQ.,
Petitioner,
vs.
THE STATE BAR OF NEVADA,
Respondent.

No. 40437

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

This original petition for a writ of prohibition challenges the state bar's denial of petitioner's objection to the panel members selected to serve on the formal hearing panel convened to address professional misconduct allegedly committed by petitioner. Specifically, petitioner alleges that all attorney panel members are impliedly biased against him because they are in competition with him, and because an order of temporary suspension, which was later vacated, was published in the state bar journal. Petitioner contends that his due process rights would be violated if the hearing panel included any attorney panel member.

This court may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions, when such proceedings are in excess of the tribunal's jurisdiction.[1] A petition for a writ of prohibition is addressed to the sound discretion of this court.[2]

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[1]NRS 34.320.

[2]Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

Further, such a writ may issue only when there is no plain, speedy, and adequate remedy at law.[3]

We have previously noted that a petition for a writ of mandamus is the appropriate means for challenging a disqualification decision.[4] In the interest of judicial economy, we construe the petition as one for mandamus relief.[5] A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station,[6] or to control an arbitrary or capricious exercise of discretion.[7]

Petitioner asserts that due process requires an impartial decision maker. He argues that a hearing panel composed primarily of his professional competitors violates due process because the panel members have an interest in depriving him of his license to practice law. In support of this contention, petitioner relies primarily on two federal cases, Gibson

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[3]NRS 34.330.

[4]See City of Sparks v. District Court 112 Nev. 952, 954, 920 P.2d 1014, 1015-16 (1996) (holding that mandamus is properly used to challenge a district court order denying a refusal motion); Goicoechea v. District Court, 96 Nev. 287, 289-90, 607 P.2d 1140, 1141 (1980) (holding that prohibition will not lie to review a disqualification decision); cf. Cronin v. District Court, 105 Nev. 635, 639 n.4, 781 P.2d 1150, 1152 n.4 (1989) (noting that mandamus is properly used to challenge a district court order disqualifying counsel).

[5]See Koza v. District Court, 99 Nev. 535, 665 P.2d 244 (1983).

[6]See NRS 34.160.

[7]See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P. 2d 534 (1981).

v. Berryhill,[8] a U.S. Supreme Court case, and Stivers v. Pierce,[9] a decision by the Ninth Circuit Court of Appeals.

Gibson concerned an Alabama licensing and discipline board for optometrists.[10] The members of the board were all self-employed optometrists, and the optometrists charged with unprofessional conduct were all employees of a commercial enterprise called Lee Optical.[11] The United States Supreme Court considered whether the board members' pecuniary interest in closing down commercial optometry businesses such as Lee Optical created apparent partiality that violated due process.[12] The Court noted that almost half of the state's optometrists were employed by commercial enterprises; therefore, the board members' business could as much as double if the commercial enterprises were closed down.[13] The Court concluded that under these circumstances, the board members' pecuniary interest was sufficient to demonstrate implied bias that violated due process.[14]

Stivers, a case arising in Nevada, involved a civil rights claim by an applicant for a private investigator's license.[15] The applicant,

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[8]411 U.S. 564 (1973).

[9]71 F.3d 732 (9th Cir. 1995).

[10]411 U.S. at 565-67.

[11]Id. at 567.

[12]Id. at 578.

[13]Id.

[14]Id. at 579.

[15]71 F.3d at 736.

Stivers, had purchased a security firm.[16] The purchase agreement required the seller to remain affiliated with the firm as its licensed "qualifying agent" for a few years, to provide Stivers sufficient time to obtain a "qualifying agent" license.[17] Stivers' application was repeatedly denied.[18]

Stivers filed an action under 42 U.S.C. § 1983, alleging that he was denied due process because of the actual and implied bias of a board member, who tainted the rest of the panel.[19] The facts underlying the claim of implied bias were that Stivers, while engaged in his previous employment as a security company manager, competed with one of the board members, Pierce, for the same contracts, and that Stivers' new company, if licensed, would similarly compete with Pierce.[20]

The Ninth Circuit began its analysis by noting that a fair tribunal requires an impartial adjudicator.[21] Nevertheless, one claiming unconstitutional bias must overcome the presumption that an adjudicator will act with honesty and integrity.[22] One way in which this presumption may be overcome is by demonstrating that the adjudicator has a personal

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[16]Id. at 738.

[17]Id.

[18]Id. at 738-39.

[19]Id. at 739. We note that petitioner does not allege actual bias on the part of any panel member. Accordingly, we have limited our discussion of Stivers to the portion of the opinion considering implied bias.

[20]Id. at 737, 742.

[21]Id. at 741.

[22]Id.

or pecuniary interest in the outcome of the proceeding sufficient to create an appearance of partiality that violates due process.[23]

Relying on Gibson, the court stated that due process is violated when the members of a licensing tribunal have a "direct and substantial competitive interest" in the outcome of the proceedings.[24] But not every licensing board that includes industry representatives violates due process.[25] The Ninth Circuit noted that after Gibson, the United States Supreme Court had upheld state statutes providing that the members of licensing boards be drawn from professional organizations. In particular, the Court had held that due process was not violated by adjudicators who "'might conceivably have had a slight pecuniary interest'" in the outcome of the case.[26] The Ninth Circuit observed that while a lawyer in a one-lawyer town would likely have a direct and substantial pecuniary interest in the licensing of a potential competitor in the same town, a lawyer in a city like Los Angeles would probably not have a similarly strong interest in the licensure of one more lawyer in that city.[27]

The Ninth Circuit also considered the impact that a per se rule would have on state licensure structures. The court pointed out that industry representation on licensing boards is an accepted practice in this

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[23]Id.

[24]Id. at 742.

[25]Id.

[26]Id. at 742-43 (quoting Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 825 (1986)).

[27]Id. at 743.

country, and that such representation has advantages that should not lightly be set aside.[28] Considering the facts before it, the court determined that Pierce's pecuniary interest, standing alone, was insufficient to violate due process.[29]

Here, petitioner has alleged no specific competitive relationship to any of the challenged panel members. In addition, petitioner practices in this state's largest metropolitan area, not a small town with few lawyers. He has not alleged any actual bias on the part of any panel member. We conclude that petitioner has not overcome the presumption that the panel members will act with honesty and integrity.

Petitioner has also alleged that the panel members may have prejudged his case by viewing the subsequently-vacated order of temporary suspension in the state bar journal, and so are barred from hearing his case. Petitioner's only support for this allegation consists of a case in which a judge who acted in a quasi-prosecutorial capacity as a "judge-grand jury" was held to be barred from acting as a judge in the case.[30] We conclude that petitioner has not demonstrated that the panel members have likely prejudged his case, particularly considering that the panel members did not issue the order in question, and that it has since been vacated and is of no effect.

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[28]Id.

[29]Id.

[30]In re Murchison, 349 U.S. 133 (1955).

Having considered this petition, we are not satisfied that this court's intervention by way of extraordinary relief is warranted at this time.[31] Accordingly, we

ORDER the petition DENIED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Howard Miller, Chair, Southern Nevada Disciplinary Board
Rob W. Bare, Bar Counsel
Allen W. Kimbrough, Executive Director
Law Office of James J. Ream

[31]See NRAP 21(b); Smith, 107 Nev. 674, 818 P.2d 849.