

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN WITHEROW,
Appellant,
vs.
DORLA M. SALLING AND SUSAN
MCCURDY,
Respondents.

No. 41832

FILED

SEP 21 2007

JANET M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

JOHN WITHEROW,
Appellant,
vs.
THE STATE OF NEVADA BOARD OF
PAROLE COMMISSIONERS,
Respondent.

No. 42497

JOHN WITHEROW,
Appellant,
vs.
THE STATE OF NEVADA BOARD OF
PAROLE COMMISSIONERS,
Respondent.

No. 42498

JOHN WITHEROW,
Appellant,
vs.
THE STATE OF NEVADA BOARD OF
PAROLE COMMISSIONERS,
Respondent.

No. 42499

JOHN WITHEROW,
Appellant,
vs.
THE STATE OF NEVADA BOARD OF
PAROLE COMMISSIONERS,
Respondent.

No. 42500

ORDER GRANTING PETITION FOR REHEARING

This is a petition for rehearing from this court's order affirming in part, reversing in part, and remanding consolidated appeals from district court orders denying in part a petition for a writ of

mandamus and dismissing several actions for failure to state a claim. First Judicial District Court, Carson City; William A. Maddox, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

We previously issued an order disposing of the above-captioned appeals. Respondents filed a combined petition for rehearing/motion for a stay, and this court subsequently granted the stay and directed an answer from the appellant. Having considered the arguments therein and having reached a decision in a sister case, Witherow v. State Board of Parole Commissioners, Docket No. 42387, we conclude that rehearing is warranted under NRAP 40(c). We grant the respondents' petition for rehearing, vacate our prior order affirming in part, reversing in part and remanding, and issue this order in its place.

Writ of mandamus

Docket number 41832 involves an appeal from an order denying in part and granting in part a petition for writ of mandamus to compel Dorla M. Salling, Susan McCurdy and the State of Nevada Board of Parole Commissioners (the Board)¹ to comply with certain provisions of the Administrative Procedure Act and a provision in Nevada's parole statutes.² "A writ of mandamus is available to compel the performance of

¹The proper defendant in this case is the Board, not the members of the Board in their individual capacities.

²District court case number 02-00290A.

an act which the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion.”³

We review a decision to deny or grant a petition for writ of mandamus for an abuse of discretion.⁴ A writ of mandamus may issue to compel the performance of an act which the law requires.⁵ A writ of mandamus should only issue to control discretionary actions where there is a manifest or arbitrary and capricious abuse of discretion.⁶

The district court determined that Witherow was entitled to a copy of all or a part of the parole regulations contained in the Nevada Administrative Code (NAC) pursuant to NRS 233B.070(7). However, the district court subsequently held that the Board was not required to provide a copy of the regulations until Witherow proffered the “copying costs.”

Witherow contends that the district court abused its discretion when it failed to compel the Board to provide a copy of the NAC unless Witherow proffered the “copying costs.” We agree.

While we review the district court’s decision to grant a writ for an abuse of discretion, we review the district court’s statutory

³County of Clark v. Doumani, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998) (internal citations omitted); see NRS 34.160.

⁴Id.

⁵NRS 34.160.

⁶Washoe County DA v. Dist. Court, 116 Nev. 629, 636, 5 P.3d 562, 566 (2000); see also City of Sparks v. Dist. Ct., 112 Nev. 952, 954, 920 P.2d 1014, 1015-16 (1996).

interpretation de novo.⁷ “When interpreting a statute, we first determine whether its language is ambiguous. If the language is clear and unambiguous, we do not look beyond its plain meaning, and we give effect to its apparent intent from the words used, unless that meaning was clearly not intended.”⁸

NRS 233B.070(7) provides:

Each agency shall furnish a copy of all or part of that part of the Nevada Administrative Code which contains its regulations, to any person who requests a copy, and may charge a reasonable fee for the copy based on the cost of reproduction if it does not have money appropriated or authorized for that purpose.

The language of the statute is unambiguous. The district court concluded that Witherow is a “person” for the purpose of this statute. We agree. If the Legislature had intended to exclude prisoners from the definition of “person,” it could have done so.

The Board is an “agency” for the purposes of NRS 233B.070. The statute unambiguously states that an agency must provide a copy of all or part of the NAC which contains the Board’s parole regulations to any person who so requests. Further, the statute provides that the Board may charge a reasonable fee for copies of the parole regulations, if, and only if, it “does not have money appropriated or authorized” for providing such copies.

⁷Stockmeier v. Psychological Review Panel, 122 Nev. 534, 539, 135 P.3d 807, 810 (2006).

⁸Id.

The district court failed to determine whether the Board had money appropriated for the purpose of providing copies of its parole regulations. Instead, the district court arbitrarily held that the Board was not required to provide a copy of the parole regulations until Witherow proffered “monies for the copies.” NRS 233B.070(7) does not always require persons to proffer monies as a prerequisite to obtaining a copy of the parole regulations; it merely states that the agency may charge a fee for the copy if the agency does not have money appropriated or authorized for providing such copies. The Board never claimed that it did not have money appropriated or authorized for providing copies of its parole regulations.

Therefore, we conclude that the district court abused its discretion in holding that Witherow was not entitled to a copy of the parole regulations. We reverse the denial of mandamus as to this issue and remand for a determination as to whether the Board has money set aside or authorized to provide copies of its parole regulations. If the Board is found to have money appropriated or authorized then the district court must compel the Board to provide a copy of its parole regulations, and Witherow need not proffer money to obtain a copy. If it is found that the Board does not have money appropriated then the Board may require Witherow to pay a reasonable fee in exchange for a copy of its regulations.

As to Witherow’s remaining requests for mandamus relief, we conclude that the district court did not abuse its discretion in denying the same.⁹

⁹The Board is not required to furnish a petition form to Witherow; the Board need only “prescribe by regulation the form” to be used. See NRS 233B.100(1). Additionally, nothing in NRS 213.1085(4) requires the
continued on next page . . .

Dismissal of Witherow's complaints with prejudice

Docket numbers 42497, 42498, 42499 and 42500¹⁰ involve appeals from orders dismissing various causes of action with prejudice, including claims for injunctive, declaratory, and monetary relief. NRCP 12(b) provides that a complaint may be dismissed for "failure to state a claim upon which relief can be granted."¹¹ When "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56."¹² If the district court considers matters outside of the pleadings, this court will "review the dismissal order as if it were a summary judgment."¹³

In granting the motions to dismiss with prejudice, the district court considered matters outside of the pleadings. Therefore, we review the motions to dismiss as if they were motions for summary judgment.

A district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as

... continued

Board's executive secretary to answer all correspondence from state prisoners.

¹⁰District court case numbers 03-00321A, 03-00608A, 03-01224A and 03-01336A, respectively.

¹¹NRCP 12(b).

¹²NRCP 12(c).

¹³Thompson v. City of North Las Vegas, 108 Nev. 435, 438-39, 833 P.2d 1132, 1134 (1992).

to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹⁴

We review a motion for summary judgment de novo.¹⁵

a. Parole, due process, and Section 1983

Witherow’s most serious allegations involve the Board’s alleged violation of his due process and equal protection rights caused by their allegedly arbitrary and capricious actions in the administration of his parole proceedings.¹⁶

It is well settled under Nevada law that prisoners do not have a right to parole, and any parole standards set by the Legislature or the Board cannot act as the basis for a suit against the Board or its members.¹⁷ Parole is an “act of grace of the state.”¹⁸ While prisoners may have a protectible due process right to apply for parole, they do not have a protectible due process right in being granted release on parole.¹⁹ Further, this court has held that Nevada’s parole statutes “only give[] rise

¹⁴NRCP 56(c).

¹⁵Miller v. Jones, 114 Nev. 1291, 1296, 970 P.2d 571, 575 (1998).

¹⁶Witherow raised his right to due process in parole proceedings primarily in the district court case underlying docket number 42498.

¹⁷See NRS 213.10705. The Legislature has expressly provided that no suit can be brought against the Board based on parole standards set by the Legislature or by the Board. Therefore, all claims based on these parole standards must fail.

¹⁸Id.

¹⁹Severance v. Armstrong, 97 Nev. 95, 96, 624 P.2d 1004, 1005 (1981).

to a 'hope' of release on parole, and the Board's discretionary decision to deny parole is not subject to the constraints of due process."²⁰

In regards to Witherow's federal due process violations and Section 1983 claims, a validly obtained conviction under federal law extinguishes a prisoner's liberty interest in release.²¹ For this reason, an inmate does not have a protectible expectation of parole unless that expectation is created by state statute.²² "A state is under no constitutional obligation to create a parole system, and even when it does, the mere possibility of parole does not a fortiori result in a protectible expectation of release."²³ "Unless state statute mandates that parole 'shall' be granted 'unless' a designated exception applies, a federal due process protected interest does not arise."²⁴ As discussed above, Nevada's parole statutes do not create a protectible expectation of parole.

Therefore, the district court properly dismissed all of Witherow's state due process claims and all claims that arose out of the state parole statutes and parole standards.²⁵ Additionally, the district court properly dismissed all of Witherow's federal due process and equal

²⁰Weakland v. Bd. of Parole Comm'rs, 100 Nev. 218, 219-20, 678 P.2d 1158, 1160 (1984).

²¹Greenholtz v. Inmates of Nebraska, 442 U.S. 1, 7 (1979).

²²See id.

²³Severance v. Armstrong, 96 Nev. 836, 839, 620 P.2d 369, 370 (1980) (quoting Averhart v. Tuttsie, 618 F.2d 479, 481 (7th Cir. 1980)).

²⁴Kelso v. Armstrong, 616 F. Supp. 367, 369 (D. Nev. 1985).

²⁵Witherow raises the alleged due process violations primarily in the case underlying docket number 42498.

protection claims.²⁶ Consequently, we affirm the district court's dismissal of these claims.

b. Notice of the Board's public meetings under the Open Meeting Law

In the case underlying docket number 42500, Witherow alleges that the Board violated Nevada's Open Meeting Law by failing to provide him with notice of its public meetings, and he requests that every meeting held by the Board in violation of the Open Meeting Law be declared void pursuant to NRS 241.036.²⁷

We recently concluded in Witherow's sister appeal, Witherow v. State Board of Parole Commissioners, Docket No. 42387, that the Board need not comply with the Open Meeting Law when conducting parole hearings. Thus, we affirm the district court's dismissal of Witherow's claims under the Open Meeting Law.

c. Failure of the Board to mail a notice of its intent to act upon its own regulations

In the case underlying docket number 42499, Witherow challenged regulations adopted by the Board on October 12, 2001, under NRS Chapter 233B, otherwise known as the Administrative Procedure Act. Pursuant to NRS Chapter 233B, "[n]o regulation adopted after July

²⁶We note that Witherow is not entitled to relief under the Equal Protection clause because Witherow failed to allege or show that he was a member of a protected class and that he was discriminated against on the basis of race, gender, religion, origin, or any other suspect or quasi-suspect class.

²⁷NRS 241.036 provides that, "[t]he action of any public body taken in violation of any provision of this chapter is void."

1, 1965, is valid unless adopted in substantial compliance with this chapter but no objection to any regulation on the ground of noncompliance with the procedural requirements of NRS 233B.060 to 233B.0617, inclusive, may be made more than 2 years after its effective date.”²⁸ Witherow challenges the regulations adopted by the Board on October 12, 2001, and he filed his complaint on September 2, 2003; less than two years after the challenged regulation was adopted.²⁹ Therefore, Witherow filed his complaint within the two-year statute of limitations.

Pursuant to NRS 233B.050, the Board must make its rules and regulations “available for public inspection.” Additionally, notice of intent to act upon a regulation must “[b]e mailed to all persons who have requested in writing that they be placed upon a mailing list, which must be kept by the agency for that purpose.”³⁰ Witherow alleged that the Board failed to place Witherow on a mailing list for proposed changes to its regulations even though Witherow had mailed at least one written request to be placed on the mailing list.

Even if Witherow’s allegations are accepted as true, Witherow fails to allege any other defect in the Board’s adoption of proposed amendments to its regulations.³¹ The use of the language “adopted in

²⁸NRS 233B.0617.

²⁹As for Witherow’s claim challenging all meetings prior to October of 2001, such claim was outside of the statute of limitations and was properly dismissed.

³⁰NRS 233B.0603(1)(e).

³¹Witherow also seeks declaratory relief under NRS 233B.110. NRS 233B.110 only allows a person to bring a suit for declaratory relief when the regulation in question “interferes with or impairs . . . the legal rights

continued on next page . . .

substantial compliance” instead of “total compliance” in NRS 233B.0617 indicates the legislature’s intent that an agency’s adopted regulation should only be rendered invalid if the agency fails to substantially comply with NRS Chapter 233B. Witherow does not allege that the Board failed to comply with other provisions of NRS Chapter 233B, or for that matter, other subsections of NRS 233B.0603. The Board’s failure to place one person on its mailing list for notice of its proposed changes to its regulations does not negate the Board’s otherwise substantial compliance with NRS Chapter 233B. Consequently, we conclude that the regulation adopted at the July 23, 2003 hearing is not invalid.

Therefore, we conclude that the district court properly dismissed Witherow’s claims for declaratory, injunctive and monetary relief as to Witherow’s NRS Chapter 233B claims because those claims either fell outside of the statute of limitations or were meritless.³²

d. Inspection and copying of parole hearing documents

In case number 42498, Witherow asserts that the Board must allow him to inspect, copy and correct any documents that the Board reviewed or relied upon when it revoked his parole and denied his

... continued

or privileges of the plaintiff.” Witherow has no legal right or expectation in parole. Nor is parole a privilege, it is merely an act of grace by the state. Thus, Witherow’s claim for relief under NRS 233B.110 is without merit.

³²However, we note that in the district court underlying case number 41832, the district court already granted a petition for a writ of mandamus requiring the Board to provide Witherow with notice of the Board’s intent to act upon its own regulations pursuant to NRS 233B.0603(1)(e).

subsequent parole applications pursuant to NRS 179A.100, 179A.150 and 239.010. Witherow contends that his due process rights have been violated by the Board's failure to allow him to inspect all documents relating to his parole and that he has suffered damages as a result. As discussed above, Witherow has no reasonable expectation of parole, no protectible liberty interest in being released on parole, and no entitlement to due process in any parole proceedings other than such process expressly provided for by statute. Therefore, Witherow's due process claims must fail.

NRS 239.010 merely requires that the Board allow persons to inspect and copy public records during normal office hours. The Board is not preventing Witherow from appearing and inspecting its public records during normal office hours; it is Witherow's incarceration that is preventing him from appearing and inspecting the Board's public records. To assert a violation of NRS 239.010, Witherow must show that the Board, and not his incarceration, is preventing him from inspecting the Board's public records. Witherow has not done so here.³³

Further, NRS 213.1075 provides in part, "all information obtained in the discharge of official duty by an employee of the Division or the Board is privileged and may not be disclosed directly or indirectly to anyone other than the Board, the judge, district attorney or others entitled to receive such information." Therefore, we conclude that all documents obtained by Board members for official use in parole hearings are

³³We note that the Board's failure or refusal to release Witherow on parole does not qualify as an act preventing him from inspecting its records.

generally confidential and need not be disclosed to parole applicants.³⁴ Thus, Witherow cannot inspect, copy, or correct any documents reviewed by the Board in denying his parole, including letters from victims, letters or reports from correctional facilities, or any other documents to the extent that such documents are privileged under NRS 213.1075.

Vexatious litigant

In docket number 42498, Witherow contends that the district court abused its discretion when it determined that Witherow was a vexatious litigant without giving Witherow notice and an opportunity to be heard. We are inclined to agree.

The Nevada Constitution allows courts to issue writs of prohibition “and all other writs proper and necessary to the complete exercise of their jurisdiction.”³⁵ The district court has the power to permanently restrict a vexatious litigant’s right to access the courts.³⁶ Further, “this court examines restrictive orders under an abuse of discretion standard.”³⁷ While we do not deny the district court’s power to issue writs that reasonably limit a person’s access to the courts, we do note

³⁴We further note that the right of access set forth in NRS 179A.150(1) does not apply “to data contained in intelligence, investigative or other related files, and does not include any information other than information contained in a record of criminal history.”

³⁵Nev. Const. art. 6, § 6.

³⁶Jordan v. State, Dep’t of Motor Vehicles, 121 Nev. 44, 59, 110 P.3d 30, 41-42 (2005).

³⁷Id. at 62, 110 P.3d at 44.

that such power must be exercised within the framework recently developed in Jordan v. State, Dep't of Motor Vehicles.³⁸

Pursuant to Jordan, a four-factor analysis guides courts in balancing the various interests implicated by court-access restrictions on vexatious litigants: (1) due process requires notice and an opportunity to be heard before the issuance of a restrictive order; (2) the district court must create an adequate record for appellate review; (3) the district court must make substantive findings as to the frivolous or harassing nature of litigant's actions; and (4) the restrictive order must be narrowly drawn to address the specific problem encountered.³⁹

A party is entitled to notice and an opportunity to be heard before he is found to be a vexatious litigant. In the case underlying docket number 42498, the district court, acting sua sponte, restricted Witherow's ability to file cases with the district court. In its ruling, the district court stated:

[T]his Court orders that Plaintiff is prohibited from filing anything in this Court unless the Plaintiff gets the Court's prior permission. Any pleading to be filed by the Plaintiff must be first delivered to chambers and must attempt to litigate an issue that has not already been ruled upon. If Plaintiff's filing contains any matters that have previously been litigated and decided, the Court will fine the Plaintiff with the fine to be assessed from his personal inmate account.

The district court was understandably disturbed by Witherow's tenacity for litigation. It stated that it "will no longer allow

³⁸See id.

³⁹Id. at 60-62, 110 P.3d at 42-44.

the Plaintiff to redundantly paper this court with frivolous law suits,” and that Witherow “has continuously and diversely challenged his parole revocations and denials.”

However, the district court’s failure to give Witherow adequate notice and an opportunity to be heard was an abuse of discretion.⁴⁰ Consequently, we reverse and remand this matter to the district court to give Witherow an opportunity to be heard and to allow him to explain why his right to litigate his grievances should not be limited due to the duplicitous and harassing nature of his claims. If the district court is still convinced that Witherow is a vexatious litigant after Witherow has been given an opportunity to be heard, it may enter an appropriate order to that effect.

CONCLUSION

In docket number 41832, we reverse the denial of Witherow’s petition for a writ of mandamus only as to his request for a copy of the parole regulations contained in the NAC, pursuant to NRS 233B.070(7), and remand for a determination as to whether the Board has money appropriated or authorized to provide copies of its parole regulations. We affirm the remainder of the district court’s order, including the district court’s grant of mandamus compelling the Board to provide Witherow with notice of the Board’s upcoming public meetings in accordance with NRS 233B.0603(1)(e).

⁴⁰We also note that any order restricting Witherow’s access must be narrowly tailored, and any ban on his proper person appearances cannot prevent him from proceeding in criminal cases and original civil actions that implicate fundamental rights. Jordan, 121 Nev. at 62, 110 P.3d at 43.


In docket number 42498, we affirm the district court's dismissal of Witherow's claim as to his right to review information reviewed by the Board in making its determination to grant or deny parole. In docket number 42500, we affirm the dismissal of Witherow's claims under the Open Meeting Law because the Open Meeting Law does not apply to parole hearings.

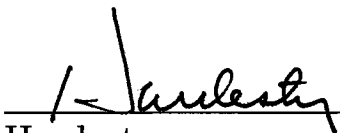
We reverse as to the finding that Witherow is a vexatious litigant, and remand this matter to the district court to give Witherow an opportunity to be heard.

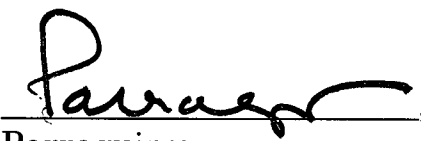
We affirm the dismissal and denial of all of Witherow's remaining claims and/or requests for relief.⁴¹ Accordingly, we

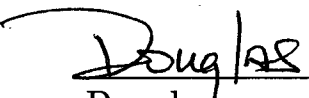
GRANT the petition for rehearing and ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

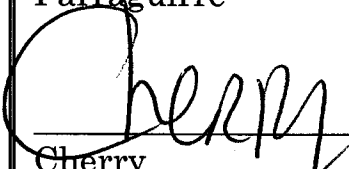

Maupin, C.J.



Gibbons, J.


Hardesty, J.


Parraguirre, J.


Douglas, J.


Cherry, J.


Saitta, J.

⁴¹We hold that Witherow's remaining requests for relief are without merit.

cc: First Judicial District Court Dept. 1, District Judge
Hon. William A. Maddox, District Judge
Donald York Evans
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk