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Summary of Carrigan v. Nevada Comm'n on Ethics, 129 Nev. Adv. Op. 95

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Carrigan v. Nevada Comm'n on Ethics, 129 Nev. Adv. Op. 95 (Nov. 27, 2013)[1]

LAWMAKER RECUSAL LAW: FAIR WARNING

Summary

Upon remand from the U.S. Supreme Court, the Supreme Court of Nevada reviewed *de novo* two issues regarding the Nevada Commission on Ethic's censure of a city councilmember: (1) whether a recusal provision in the Nevada Ethics in Government Act (NRS 281A.420[2]) was void for vagueness and (2) whether it violated public officers' constitutional right to associate[3].

Disposition

Nevada's Ethics in Government Act's recusal requirement, and its provision for advisory opinions from the Nevada Commission of Ethics, provides public officials with fair notice of the disqualifying commitments that would require them to abstain from voting on a particular matter.

The State of Nevada's interest in avoiding conflicts of interest and self-dealing by public officials is sufficient to overcome whatever scant burden NRS 281A.420 places on lawmakers' rights to associate.

Factual and Procedural History

In 1999, Michael Carrigan won election to the Sparks City Council. He subsequently won re-election and in 2005, was campaigning for a third term when he voted on a land use application for the Red Hawk Land Company's proposed development of the Lazy 8 hotel/casino. In each campaign, Mr. Carrigan retained his longtime professional and personal friend, Carlos Vasquez, as his campaign manager. Mr. Vasquez managed Mr. Carrigan's campaigns free of charge and placed media ads for him at cost. At the time of the vote in 2005, in addition to his work as Mr. Carrigan's campaign manager, Mr. Vasquez received a $10,000-per-month retainer to work as a consultant and lobby the Sparks City Council for approval of the Lazy 8 project.

Prior to the City Council's vote on the Lazy 8 land use application, Mr. Carrigan sought and received a legal opinion from Sparks' city attorney that he did not need to recuse himself because he did not stand to personally gain from the Lazy 8 project. Relying on this advice, Mr. Carrigan disclosed for the record that Mr. Vasquez was a personal friend and his campaign manager before casting his vote in favor of granting the application. He went on to note that he would not reap financial or personal gain from any action he might take on the Lazy 8 application. Mr. Carrigan was at all times aware of Nevada's Ethics Law, NRS. 281A.420, and that he could obtain a binding decision from the Nevada Commission of Ethics regarding his responsibilities under that law with regard to the Lazy 8 application. However, he did not.

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[1] By Edward Wynder.

[2] To maintain consistency with prior the opinions, all citations are to the 2007 version of the Nevada Ethics in Government Act. 2007 Nev. Stat. ch. 538. The Court noted that the Act was amended in 2009 and 2013, but such amendments are not relevant here.

[3] Mr. Carrigan's right of association argument is first raised here, on remand. Although arguments first raised on appeal generally do not receive consideration, here the Court departed from the rule because the issue "presents a constitutional question that can be resolved as a matter of law."

A few weeks later, the Nevada Commission of Ethics (the "Commission") received several complaints regarding a possible conflict of interest. After an investigation, the Commission issued a written decision censuring Mr. Carrigan for violating NRS 281A.420(2), by voting on the Lazy 8 application. The Commission found that Mr. Carrigan had a commitment in a private capacity to Mr. Vasquez which required him to abstain from the vote. Because Mr. Carrigan had relied on Sparks' city attorney's legal opinion, the Commission found that his violation of the ethics law was not "willful" and did not warrant a civil fine.

Mr. Carrigan filed a petition for judicial review. The district court denied the petition, rejecting Mr. Carrigan's First Amendment arguments and noting the State had a strong interest in having an ethical government.

On appeal, the Nevada Supreme Court reversed the district court and found that voting by a public officer was protected speech under the First Amendment and that NRS 281A.420(8)(e) (2007) failed under overbreadth analysis. However, the U.S. Supreme Court granted certiorari and found "the act of voting by an elected official" was not protected speech.

The Court now reconsiders Mr. Carrigan's appeal from the district court's ruling on remand.

Discussion

Nevada's Ethics in Government Act

Nevada's Ethics in Government Act (the "Ethics Law") states that "[a] public office is a public trust" and an elected public officer "must commit himself to avoid conflicts between his private interests and those of the general public."[4]

NRS 281A.420(2)(c) prohibits a public officer from voting on matters when he has a disqualifying conflict of interest. Such a conflict arises when the "independence of judgment of a reasonable person in [the elected official's] situation would be materially affected by" commitments the official has "in a private capacity to the interests of others." The statute enumerates four relationships which create such a commitment: members of the officer's household; relatives by blood, adoption, or marriage; persons who employ the officer or a member of the officer's household, or; persons with a substantial and continuing business relationship with the officer.[5] The statute goes on to provide a loophole-closing catchall which adds "[a]ny other commitment or relationship that is substantially similar" to those previously enumerated.[6]

The Ethics Law allows public officers to request and receive from the Commission, an advisory opinion whether a conflict exists that would require the officer to abstain from voting on a particular matter.[7] The request is confidential and the Commission's advisory opinion is final and authoritative.[8]

For the sole purpose of determining sanctions for a violation, the law distinguishes between willful and nonwillful violations. A willful violation is one where the officer knew or reasonably should have known that his conduct violated the law. However, where the officer can

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[4] NEV. REV. STAT. § 281A.020(1)(b) (2007).
[5] NEV. REV. STAT. §§ 281A.420(8)(a)-(d) (2007).
[6] NEV. REV. STAT. § 281A.420(8)(e) (2007).
[7] NEV. REV. STAT. §§ 281A.440(1), 281A.460 (2007).
[8] NEV. REV. STAT. § 281A.440(1), (5) (2007).

show by "sufficient evidence" that he "relied in good faith upon the advice of the legal counsel retained by the public body the officer represents" a violation is not willful.[9]

Action Taken by the Ethics Commission

The Commission censured Mr. Carrigan for failing to abstain from voting on the Lazy 8 hotel/casino land use application in violation of NRS 281A.420(2). The Commission found that Mr. Carrigan's relationship to Mr. Vasquez had for years been one of "a close personal friend, confidant and political advisor," that Mr. Carrigan "confides in Mr. Vasquez on matters where he would not confide in his own sibling," and that "[t]he sum total of their commitment and relationship equates to a 'substantially similar' relationship…including a close personal friendship, akin to a…family member, and a 'substantial and continuing business relationship.'"[10]

The Commission concluded that a "reasonable person" in Mr. Carrigan's situation "would not be able to remain objective on matters brought before the [City] Council by his close personal friend, confidant and campaign manager." However, the Commission found that Mr. Carrigan's violation was not willful because he had relied in good faith on the advice of Sparks' City Attorney.

II. *Vagueness*

The Court rejected Mr. Carrigan's claim that NRS 281A.420(2)(c)'s recusal provision is unconstitutionally vague. A provision is vague when it either (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) is so standardless that it authorizes or encouranges discriminatory enforcement.

The Court rejected his assertion that the "substantially similar" clause was "hopelessly vague," noting that he incorrectly read the clause in isolation. The Court approved of the clause stating that it closed potential loopholes while giving the Commission "flexibility to address relationships that technically fall outside the four enumerated categories yet implicate the same concerns and are substantially similar to them." The Court also found support in the Ethics Law's legislative history citing testimony before the Senate Governmental Affairs committee that "if the same person ran your campaign time, after time, after time, and you had a substantial and continuing relationship…you probably ought to disclose and abstain in cases involving that person."[11]

The Court went on to reference the U.S. Supreme Court's extensive review of the history of recusal rules, dating back to 1791.[12] The Nevada Supreme Court found the long history of recusal laws telling in light of the absence in the record of even one single judicial decision invalidating a generally applicable recusal rule. The Court continued, noting that conflict of interest law has long survived despite never producing a "one-size-fits-all definition."

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[9] NEV. REV. STAT. § 281A.170 (2007).
[10] *See* NEV. REV. STAT. § 281A.420(8)(e) (2007).
[11] *Hearing on S.B. 540 Before the S. Governmental Affairs Comm.*, 70th Leg. (Nev., March 30, 1999) (testimony of Scott Scherer, General Counsel to Governor Guinn, discussing S.B. 478).
[12] *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S __, __, 131 S. Ct. 2343, 2347-49 (2011).

Vagueness for Lack of Fair Notice

The Court rejected Mr. Carrigan's claim he did not have fair notice that he risked censure if he voted on the Lazy 8 project because Mr. Carrigan knew his relationship with Mr. Vasquez posed a problem, knew the Ethics Law allowed him to obtain an advisory opinion, had ample time to obtain an opinion, but chose not to.

Fair notice concerns "diminish when the regulated person has the ability to clarify the meaning of a regulation [through] an administrative process."[13]

In reviewing the record, the Court noted that before the vote, Mr. Carrigan recognized a problem with his relationship with Mr. Vasquez. Additionally, he testified before the Commission that he knew he could obtain an advisory opinion whether the law required him to abstain from voting on the Lazy 8 matter. Furthermore, six months before the vote, time the Court considered "ample" to obtain an opinion, Mr. Vasquez began working as Mr. Carrigan's campaign manager free of charge and placing media ads at cost. Concurrent with his work for Mr. Carrigan, Mr. Vasquez also worked as a lobbyist for the Lazy 8 project under a $10,000 per month retainer. Though aware of the problem and despite having ample time, Mr. Carrigan chose not to obtain an opinion from the Commission and instead sought private advice from the Sparks City Attorney, who told him he did not need to abstain. The Court held that on this record, Mr. Carrigan could not claim that he lacked fair notice.

Vagueness for Lack of Standards

The Court next rejected Mr. Carrigan's claim that the Ethics Law was so lacking in standards as to authorize or encourage discriminatory enforcement.

In doing so, the Court made two observations. First, that nothing in the record showed improper motive or failure to sanction others similarly situated. Notably, the Commission also censured another Sparks City Councilperson (who had voted no, to Mr. Carrigan's yes) for failing to abstain from voting on the same Lazy 8 matter at issue here because that councilperson also had a disqualifying commitment.

Second, that the Ethics Law uses common, objective legal terms such as "reasonable" and "substantially similar." The Court noted these terms are pervasive in law and not subject to "untethered subjective judgments" such as statutes prohibiting "annoying" or "indecent" conduct—terms invalidated by the U.S. Supreme Court as unconstitutionally vague.

B. *Right of Association*

Finally, the Court quickly dispatches Mr. Carrigan's right of association argument noting the statute does not penalize "simple association or assembly" while also furthering the State's important interest in avoiding conflicts of interest and self-dealing by public officials.

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[13] *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *see also U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973) (rejecting vagueness claim while noting the importance that an administrative source for advice about the validity of a proposed action "remove[s] any doubt as to the meaning of [a] regulation.").

Conclusion

The objective standards and availability of a binding advisory opinion in Nevada's Ethics in Government Law provides the standards and fair notice an elected official needs to know whether his conduct would violate the requirement to recuse himself from voting on a particular matter based on a disqualifying commitment in a private capacity to the interests of others. Thus, the Ethics Law is not void for vagueness and the district court's denial of Mr. Carrigan's petition for judicial review of his censure by the Commission is affirmed.