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Nevada ex. rel Bd. of Parole Comm'rs v. Morrow, 127 Nev. Adv. Op. No. 61 (May 26, 2011)¹

CRIMINAL LAW AND PROCEDURE – ADMINISTRATIVE LAW

Summary

An appeal from a district court order clarifying a judgment granting a writ of mandamus, and a proper person appeal from a district court order granting a motion to dismiss

Disposition/Outcome

The appeal from the district order clarifying a judgment granting a writ of mandamus was reversed and the order granting the motion to dismiss was affirmed.

Factual and Procedural History

Morrow Appeal

The Nevada Board of Parole (the “Parole Board”) denied Morrow’s parole. Morrow challenged the Parole Board’s procedure by filing a writ of mandamus in the district court seeking a new parole hearing.² The district court granted the writ and ordered that the Parole Board: (1) give Morrow a new hearing; (2) provide him with proper notice of the hearing; (3) give him the opportunity to speak or have a representative speak on his behalf at the hearing; and (4) provide him with a copy of his risk assessment file. Morrow received a new hearing, but the Parole Board did not provide him notice of the new hearing and Morrow was once again denied parole. Morrow sought a district court order to show cause why the Parole Board should not be in contempt. The district court denied the order to show cause, but directed the Parole Board to turn over every document it considered when it denied Morrow Parole.

¹ By Danielle Woodrum.

² Morrow argued his due process rights were violated because the board did not notify him of the hearing and denied him access to the documents it relied on.

Kamedula Appeal

Kamedula was also denied parole. He argued that the Parole Board violated Nevada's Open Meeting Law and denied him certain due process rights including the ability to present certain evidence and the ability to cross examine witnesses during the hearing.

Discussion

Justice Hardesty, writing for a unanimous three-justice panel of the Supreme Court of Nevada held that despite recent Nevada case law recognizing the Parole Board as a quasi-judicial body³ and discussing the due process protections afforded in quasi-judicial proceedings,⁴ constitutional due process rights do not attach to parole release hearings because no liberty interest is at stake.⁵

The Court held that Due Process rights do not apply to parole release hearings in Nevada. The Court stated that due process protections apply only when government action deprives a person of liberty or property and that a conviction extinguishes one's liberty right to be released before the expiration of a valid sentence.⁶ However, the court noted that a state may create an "expectancy of release . . . entitled to some measure of constitutional protection."⁷ However, the Court reasoned that Nevada's parole statute⁸ "only gives rise to a 'hope' of release on parole" and does not create any liberty or property interest sufficient to create a cause of action against

³ *Witherow v. State Bd. of Parole Comm'rs*, 123 Nev. 305, 311-12, 167 P.3d 408, 412 (2007).

⁴ *Stockmeier v. State Dep't of Corrections*, 122 Nev. 385, 135 P.3d 220 (2006), *abrogated on other grounds by* *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 270, 672 n.6 (2008).

⁵ *Id.* In *Stockmeier*, the Court held that Psychological Review Panel hearings were quasi-judicial hearings and therefore exempt from Nevada's Open Meeting Law. *Id.*

⁶ *Greenholtz v. Nebraska Penal Inmates*, 443 U.S. 1, 7 (1979).

⁷ *Id.*

⁸ NEV. REV. STAT. § 213.10705

the State.⁹ Thus, the Court concluded that Nevada's statutes on parole hearings do not create a liberty interest sufficient to afford due process protections.

The Court also reviewed its decision in *Stockmeier* concerning whether administrative proceedings have a "judicial character." The Court focused on whether such proceedings maintained trial-like attributes.¹⁰ However, the Court held that "[i]nasmuch as *Stockmeier* has caused some confusion about the nature of quasi-judicial proceedings in Nevada, we take this opportunity to expressly adopt and clarify the application of the judicial function test in this state."

The Court noted that a judicial function test determines the nature of an administrative hearing by examining the administrative entity's functions.¹¹ The Court expressly adopted the judicial function test for determining whether entities act in a quasi-judicial manner when performing their administrative duties. Thus, the Court clarified that due process protections afforded during a proceeding do not, alone, determine whether a proceeding is quasi-judicial. The Court held that procedural protections go to the ability of the hearing entity to hear witnesses and make decisions affecting property rights and is only one consideration in determining whether the hearing entity is performing a judicial function.

⁹ *Weakland v. Bd. of Parole Comm'rs* 100 Nev. 218, 220 (1984).

¹⁰ *Stockmeier* at 391-92, 135 P.3d at 224. The Court linked quasi-judicial proceedings to four due process rights: (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. *Id.* Based on those considerations the Court held that Psychological Review Panel hearings did not afford each of those due process rights and were therefore not quasi-judicial. *Id.*

¹¹ *Wetherow v. State Bd. of Parole Comm'rs*, 123 Nev. 305, 312, 167 P.3d 408, 412 (2007). The Court noted the factors other jurisdictions look at for the judicial function test are the hearings authority's ability to: exercise judgment and discretion; hear and determine facts; make binding orders and judgments; affect the personal property rights of private persons; examine witnesses and hear the litigation of the issues on a hearing; and enforce decisions or impose penalties. *Craig v. Stafford Const.*, 856 A.3d 372, 377 (Conn. 2004).

Conclusion

Nevada's parole release statute does not create a liberty interest sufficient to invoke due process protections, therefore inmates are not entitled to constitutional due process protections regarding discretionary parole release. The judicial function test is explicitly adopted to determine if an administrative hearing is quasi-judicial.