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Tyler Ure
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***Witherow v. State, Bd. Of Parole Comm'rs*, 123 Nev. Adv. Op. No. 33
(September 20, 2007)¹**

CRIMINAL LAW-PAROLE

Summary

This case is an appeal from a district court order dismissing a complaint that challenged a parole board proceeding under Nevada's Open Meeting Law.

Disposition/Outcome

Affirmed. The Nevada Supreme Court affirmed the district court's order granting State of Nevada's Board of Parole Commissioners' motion to dismiss. The court concluded that parole board hearings were quasi-judicial proceedings and therefore exempt from the Nevada Open Meeting Law requirements.

Factual and Procedural History

Appellant John Witherow ("Witherow") filed a complaint against Respondent, the State of Nevada Board of Parole Commissioners ("the Board"), after Witherow was denied parole.

Witherow, an inmate in state prison, had applied for parole in 2002. The Board then sent notice to Witherow of his upcoming parole and also provided a general agenda for the hearing, which did not provide a time for public comment. Witherow's mother and sister traveled to Nevada to attend the parole hearing, but the Board did not allow them to comment.

In Witherow's complaint seeking declaratory and injunctive relief, he alleged that because the Board's agenda did not specify a period of public comment and the Board refused to allow public comment, the Board violated the public comment requirement of the Nevada Open Meeting Law.

The district court granted the Board's motion to dismiss after examining the Open Meeting Law's legislative history and concluding that it did not apply to parole board hearings because they were quasi-judicial in nature.

Discussion

When the district court considers matters outside of the pleadings, the Nevada Supreme Court reviews a dismissal order granting a NRCP 12(b)(5) motion to dismiss as if it were and order granting summary judgment.² Because the District Court considered matters outside of the pleadings, the Nevada Supreme Court reviewed the order de novo as if it were reviewing a motion for summary judgment.

¹ By Tyler Ure.

² *Coblentz v. Union Welfare Fund*, 925 P.2d 496, 499 (Nev. 1996).

The Open Meeting Law requires that public bodies give “clear notice of the topics to be discussed”³ and notice must provide an agenda denoting a period for public comment.⁴ However, judicial proceedings are exempt from the Open Meeting Law.⁵ The Court has concluded that “[a] quasi-judicial proceeding is sufficiently akin to a judicial proceeding to render it exempt from the open meeting law.”⁶

Nev. Rev. Stat. 213.130 governs parole board hearings and requires that hearings must be open to the public, victims must receive notice of upcoming hearing for relevant prisoners, and victims must be allowed to submit documents and testify at the parole hearings.⁷ However, neither Nev. Rev. Stat. 213.130 nor any provision of Nev. Rev. Stat. Chapter 241 expressly exempt parole hearings from the Open Meeting Law.

The Legislature passed S.B. 471 during the 2007 Legislative Session which amends Nev. Rev. Stat. 213.130 to provide that parole release hearings are quasi-judicial proceedings. Parole release hearings must remain open to the public, but S.B. 471 does not confer the same rights created by the Open Meeting Law to persons with respect to parole board hearings. Although S.B. 471 is not effective until October 1, 2007, it is evidence of the Legislature’s intent to exempt parole hearings from the Open Meeting Law.

Additionally, parole boards perform judicial functions when releasing prisoners. The parole board’s discretion in granting or denying parole is similar to the trial court’s decision to grant or deny probation. Therefore, because parole boards have traditionally performed quasi-judicial functions, parole board hearings are quasi-judicial procedures.

Concurrence/Dissenting Opinion

Justice Hardesty, with whom Chief Justice Maupin agreed, concurred in part and dissented in part. The concurrence/dissent agrees that parole hearings are exempt from the Open Meeting Law because they are quasi-judicial proceedings. However, the dissent proposes different criteria for determining what proceedings are quasi-judicial.

The Court ruled in *Stockmeier v. State, Department of Corrections*⁸ that quasi-judicial proceedings are those that provide “minimum” due process safeguards. Therefore, any public bodies could implement due process protections, which would change those proceedings into quasi-judicial proceedings, making them exempt from the Open Meeting Law. To avoid this result, the dissent recommends overturning *Stockmeier* to the extent that it relies on due process safeguards for determining if an entity is

³ Attorney General v. Board of Regents, 67 P.3d 902, 906 (Nev. 2003); NEV. REV. STAT. § 241.020(2).

⁴ NEV. REV. STAT. 241.020(2)(c)(3).

⁵ See Nev. Rev. Stat. 241.030(4)(a).

⁶ Stockmeier v. State, Dept’ of Corrections, 135 P.3d 220, 223 (Nev. 2006).

⁷ NEV. REV. STAT. 213.130.

⁸ 135 P.3d 220.

performing a quasi-judicial function and instead rely solely on a “judicial function” test. The “judicial function” test, already recognized by the Court,⁹ relies on whether the entity performs a judicial or quasi-judicial function to determine if a proceeding is quasi-judicial.

Conclusion

Parole hearings conducted by the Nevada Board of Parole Commissioners are exempt from the Open Meeting Law because they are quasi-judicial proceedings.

⁹ See *Ragio v. Campbell*, 395 P.2d 625, 627 (1964).