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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

Samuel V. Lopez, Petitioner, v. Janice K. Brewer, et. al., Respondents, and State of Arizona, Respondent – Real Party in Interest.	No. LC2012-000264-001 DT Reply to Response to Petition for Writ of Mandamus and Petition for Special Action

CAPITAL CASE

EXECUTION SCHEDULED MAY 16, 2012

Respondents first argue that, once confirmed, the appointments of the three reputed Board members are unchallengeable. Response to Petition for Writ of Mandamus and Special Action, at 4. ("Second Response" or "2nd Resp."). The cases cited by Respondents, however, do not support their arguments. In *McBride v. Osborn*, 59 Ariz. 321, 127 P.2d 134 (1942), the Supreme Court determined that a governor's power to rescind an appointment terminates once the Senate confirms that appointee. That has no bearing in a case such as this, where the law was violated in selecting and appointing unqualified members of a board.

Respondents also rely on *Bd of Educ of Coyle Co v. McChesney*, 32 S.W.2d 26 (Ky.Ct.App. 1930), to argue that Mr. Lopez was required to challenge the nomination process "before the political appointment process becomes final." 2nd Resp., at 4. Respondents misrepresent the holding of *McChesney*. There, as in *McBride*, the question was whether an appointing authority could change its mind about the appointment after action had been taken to make it final. The Kentucky court also answered in the negative. This is a logical conclusion because, as in the Arizona case, the appointment was not at the pleasure of the appointing authority. Rather, once appointed, removal could only be for cause. *McChesney*, *supra*, at 29.

The circumstances in this case are much more analogous to a removal for cause, because the selections and appointments were made in violation of the law and, as to at least two of the reputed members, the appointees lacked the mandatory qualifications for the position. All members lacked the training required to participate in Mr. Lopez's hearing.[1] Although the standard for removal is different than the one this Court should apply, the existence of that procedure debunks Respondents' notion that, once installed, board members are untouchable.

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[1]This final problem, of course, could not have been raised prior to the confirmations because the mandatory training occurs after the board members take office.

By no stretch did Mr. Lopez "wait[ ]" to challenge the three board members, as Respondents contend. 2nd Resp., at 5. As explained in the first reply, his clemency counsel first learned of the possibility of their participation in the hearing on April 19, the very day of their confirmation, and promptly requested information regarding their intention to sit on the board for Mr. Lopez's hearing. Ex. E, at 3, n.1. She was never provided that information[2] and did not know who the board members would be until May 7, when the hearing was set to begin. Two days later, this action was filed. Mr. Lopez has not delayed at all.

Respondents next take the position that submitting five names to the governor fulfilled the statutory requirement of selecting three applicants per vacant position. 2nd Resp., at 5. This violates the letter and spirit of the law. Respondents imply that the lists were submitted "sequentially" and, as a result, there were three names available for each position. The vacancies were not sequential, however. All three positions were vacant at the same time, interviews were conducted and recommendations made as one group, and the appointments were made within a day of each other.

The selection and appointment process is not meant to be a shell game used for political advantage. That is a game that the public can only lose. Rather, the process is intended to identify qualified candidates for public service. If it is to function in that manner, its procedures must be vigilantly protected. Respondents' point that other selection committees might be involved in the same manipulation is all the more reason to fully address the issues raised here, not a reason to ignore the practice. *See* 2nd Resp., at 6, n.1.

Respondents misstate Mr Lopez's argument, claiming he suggested it was improper for the three term-expired board members to not be interviewed, selected, or re-appointed. 2nd Resp., at 6. On the contrary, Mr. Lopez has no interest in any particular

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[2]Even as late as May 6, the Board's website did not list Hernandez, Livingston or Melvin as members of the Board.

individual serving on the board and has made no legal claim regarding the outcome of the process. What he does allege throughout his petition are facts which should lead this Court to have serious questions about the procedural mechanism that led to the appointments of Hernandez, Livingston and Thomas. Mr. Lopez does not, and cannot, claim that Belcher, Stenson, or Wilkens should have been three of the board members present to hear his case on May 7. What he does allege is that a process, conducted in secret and in violation of the law, which excludes qualified candidates and promotes unqualified candidates, warrants closer examination. The facts raise red flags that should not be ignored. *See* Bob Ortega, *Clemency Board Faces Legal Hurdles* (visited May 12, 2012) <http://www.azcentral.com/news/articles/2012/05/06/20120506arizona-prison-clemency-brewer.html>. Ortega reports that:

> Joe Sciarrotta, and. . .Scott Smith, made it clear a few months ago that the governor was unhappy with [Belcher's] vote to grant convicted murderer William Macumber clemency in 2009. He voted again for clemency for Macumber earlier this year.
>
> Wilkens said that during her re-appointment interview, "it was expressed clearly that there was dissatisfaction with my vote on a particular issue, and that I had not voted the way they wished that I would have voted."
>
> Unlike Belcher and Stenson, Wilkens didn't support Macumber's application; she wouldn't say which clemency grant was at issue in her case. But a person familiar with the board said that the governor was upset about the board's unanimous Jan. 26 decision to recommend a reduction to five years in prison and lifetime supervision for Robert Flibotte, 74, a Payson real-estate agent sentenced to 90 years for possession of child pornography. Flibotte has many supporters in Payson who are pushing for clemency.

Id; *see also* Gary Grado, *3 New Appointees on Clemency Board; Long-time Chief Out*, ARIZONA CAPITOL TIMES, Apr. 20, 2012, at 7 (Ellen Stensom "questioned during her interview with a selection committee whether she still stands by her 2009 vote to recommend commutation for. . .Bill Macumber[.]" There is sufficient evidence to move this Court to allow Petitioner's action to proceed.

Respondents speculate that Petitioner's claim that two of the board members have not demonstrated an interest in the state's correctional system is based on their

employment history and that Petitioner is unsatisfied because those individuals have not worked in corrections. 2nd Resp., at 7. Nothing could be further from the truth. Indeed, appointing three individuals who had worked in corrections would violate the provision of law prohibiting more than two members from the same background. A.R.S. § 31-401(B)("No more than two members from the same professional discipline shall be members of the board at the same time.") Rather, there are many ways in which such interest could be demonstrated: an advocate for prisoner's rights, an attorney who had represented inmates, a teacher who taught relevant subject matters, a chaplain who had ministered to prisoners, a health care worker who had worked with prisoners, an author or journalist who had written on the subject. Yet, none of these areas of interest appeared in the publicly-available information on Hernandez or Livingston.[3]

Respondents' argument, in note 3 on page 7, that Ellen Stenson may not have been qualified for her position at the time of her initial appointment is irrelevant. By the time of this application, she had served on the board for five years, demonstrating a strong interest in the state's corrections system. Even if Respondents are correct, they fail to explain how that lessens the violations claimed in this action. As explained above, Mr. Lopez does not "argu[e] that former Board member Ellen Stenson should be reappointed. . .." If a prior board member was illegally appointed, that again only strengthens the case for this Court's full consideration of the issues. Respondents' position that applying, interviewing for, and accepting the position satisfies the "demonstrated interest" requirement is nonsense. 2nd Resp., at 7. Such an exception would obliterate the rule.

Respondents next argue that Mr. Lopez does not have standing to bring the open meetings law violations before this Court. 2nd Resp., at 8. As an inmate appearing before the Board, however, Mr. Lopez's standing is well established. *See e.g.*, *Ethridge v. Arizona State Bd. of Nursing*, 165 Ariz. 97, 107, 796 P.2d 899, 909 (App.II

[3]Granted, further information could have been available during the interview process, but Respondents chose to hide that information from the public so Petitioner can hardly be faulted for not knowing it.

1989)(considering open meeting violation claim in suit brought by nurses licensed by board); *Porta House, Inc. v. Scottsdale Auto Lease, Inc.,* 120 Ariz. 115, 119, 584 P.2d 579, 583 (App.I 1978)(considering import of open meeting law violation in suit between manufacturer and dealer in prefabricated building components where school district was party as lessee of building). Although it appears Arizona has not addressed the question head-on, there is general agreement that any member of the public, and certainly one who may be affected by a decision of the public body, has standing to raise a violation of the open meetings law. AmJur AdminLaw § 90 (citing cases from Texas, Oregon, Ohio, Kansas, Wisconsin, Tennesee, and Pennsylvania). This is logical given that the laws are intended to protect all members of the public and the public as a whole.

Respondents' note 4, at 9, is indicative of the disingenuous arguments throughout the Second Response: Mr. Lopez cannot prove what occurred in the executive session because he was excluded from them and therefore he cannot show he (and the rest of the public) were improperly excluded. This only points out the need for this Court's *in camera* review of the minutes, recordings, and notes of those sessions; it does not conclusively settle their legality. This is especially so because facts exist which raise red flags regarding those sessions. For example, it seems unlikely anything could have necessitated, or any law justified, an executive session to decide *what questions to ask* the interviewees. It seems highly improbable that the Board had no discussions in the May 7 executive sessions. Mr. Lopez does not dispute their right to obtain advice from legal counsel. What he does allege is that this session contained something more than just legal advice and may well have included consultation with others outside the room because it lasted an hour and twenty minutes and because absolutely no discussion was held among the board members following it.[4]

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[4]The Second Response implicitly concedes that the content of the executive sessions is critical to a determination of Mr. Lopez's claims, maintaining that the sessions were proper because of their content. 2nd Resp., at 10 ("The Committee met and interviewed each prospective appointee in executive session to ascertain their qualifications for a position on

Respondents claim that any violations of the open meetings law were technical in nature and any decisions were ratified at subsequent, future meetings. 2nd Resp., at 9-10. As to the first point, again, a determination of that matter requires review of the records of those meetings. If those records demonstrate that the Committee used the selection process to influence the outcome of future clemency hearings, the violations were far from technical. They also are not technical violations because they resulted in a Board which consisted of two members not qualified to serve on it. Further, additional evidence of the open meetings law violations came to light this week, when Ellen Stenson confirmed publicly that she also did not receive notice that she would be interviewed in executive session and was not given an opportunity to object. Bob Ortega, *Arizona Prisoners Rarely Granted Clemency*, (visited 5/13/2012) <http://www.azcentral.com/arizonarepublic/news/articles/2012/04/12/20120412arizona-prison-clemency.html>.

As to the second point, ratification requires "a description of the action to be ratified, a clear statement that the public body proposes to ratify a prior action and information on how the public may obtain a detailed written description of the action to be ratified." § 38-431.05. There also must be made publicly available "a detailed written description of the action to be ratified and all deliberations, consultations and decisions by members of the public body that preceded and related to such action" which "shall also be included as part of the minutes of the meeting at which ratification is taken." *Id.* This must be made available at least seventy-two hours prior to the ratification meeting. *Id.* Respondents have not demonstrated that any of these requirements were met.

Respondents dispute that Brian Livingston's recent employment as executive director of the Arizona Police Association and his employment by the Phoenix Police Department in 1986, when the crime in this case occurred and was investigated, do not

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the Board."). Unless this Court is privy to that content, there is simply no way to know whether that is the case.

create a conflict of interest. Providing no evidence in support, Respondents summarily state that "Livingston was not employed by the Phoenix Police Department" at that time. 2nd Resp., at 12. Livingston's resume submitted with his application for the Board position states in his employment history "Police Officer–City of Phoenix (1986-2000)." Ex. F, attached. The crime in this case occurred on October 29, 1986. Just as it would be improper for a member of an investigating agency to serve as a juror on Mr. Lopez's case, it would be improper for that person to decide whether to grant him clemency. *See State v. Eddington*, 228 Ariz. 361, 363-364, ¶ 11, 266 P.3d 1057, 1059-1060 (2011)(explaining that "officers of the agency that conducted the investigation work closely with the prosecution and are often considered part of the prosecution team[,]" with whom they have a shared interest). Mr. Lopez has alleged Livingston's appearance of bias and prejudice. At best, Respondents have raised a disputed issue of fact this Court should resolve after taking evidence.

Respondents next attempt to sidestep the statutory requirement of the four-week training period. 2nd Resp., at 12-13. They argue first that the training need not occur before Board members begin to hear and decide cases. *Id*., at 13. Not only does common sense not support this position[5], but the statute does not help Respondents either. The training provision is included in the sections of the statute entitled "qualifications," following directly after subsections A and B, which also contain qualifications for the board members. By the plain language of the statute, Board members must complete the training to be qualified. A.R.S. § 31-401(C).

Respondents then argue that perhaps the statute might be satisfied by "accelerated training," but do not explain what that might be. Instead, they point out that the new board members "have in fact received significant training[,]" relying on the declaration of the Board's attorney that she has "given [them] extensive materials" to read and that she

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[5]Former Chair Belcher did not allow new members to vote on cases until the training period was complete. Grado, *supra*.

spent one day with each of them. Respondents have provided no evidence of what "extensive" means and how it accomplished four weeks of training in only two weeks.[6] Contrary to Mr. Lopez asking this Court to "add language to the statute," 2nd Resp, at 13, it is Respondents who ask this Court to help them skirt it. This Court should decline to do so.

Respondents argue the lack of training does not meet the "shock the conscience" test of *Woratzeck v. Ariz. Bd. of Exec. Clemency*, 117 F.3d 400, 404 (9th Cir. 1997). 2nd Resp., at 13. We disagree. In any event, as explained in the petition, state law is much broader in due process requirements in clemency and this Court is thus not limited by the *Woratzeck* standard. In any event, this Court is not looking solely at a lack of mandatory training for board members charged with making one of the most important decisions of their lives. Rather, before this Court is a string of violations of state law that ended with Mr. Lopez having no access to a duly-constituted, legally-established clemency board because political maneuvering was elevated above a full and fair clemency process. That does indeed shock the conscience.

Finally, Respondents claim they have responded to Mr. Lopez's public records request. They do not address Petitioner's argument that they failed to do so in a timely fashion, denying access when Mr. Lopez's clemency attorney presented the request in person on May 2. Ex. G. They do not address that they delayed until after the date set for Mr. Lopez's hearing. *Id*. Importantly, their public records response, provided after the hearing, demonstrates that they violated the law. *Id*. The notices appear to have only been faxed to the Committee's members. Respondents still have provided no evidence that the meetings were ever publicly noticed. Further, they admit the failure to provide notice to the appointees. As above, at best the Second Response creates a dispute about

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[6]Compounding the problem is that, by state law, Livingston and Thomas are prohibited from working for the Board for more than 30 hours per week. Laws 2010, 7th S.S., Ch. 6, § 33. Thus, their four weeks of training would actually take more than five weeks to accomplish.

the facts alleged by the petition. This Court should request a stay from the Arizona Supreme Court to allow discovery and a hearing at which Mr. Lopez may prove his claims.

Respectfully submitted this 14th day of May, 2012.

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Copy of the foregoing e-mailed this
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