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IN THE SUPREME COURT FOR THE STATE OF IDAHO

RICHARD H. LEAVITT,)
)
 Plaintiff,)
)
 vs.)
)
 OLIVIA CRAVEN, in her official)
 capacity as Executive Director of the State)
 of Idaho Commission of Pardons and)
 Parole, and MARK FUNAIOLE, JANIE)
 DRESSEN, NORMAN LANGAREK II,)
 MIKE H. MATTHEWS, and BILL)
 YOUNG, in their official capacities as)
 Commissioners of the State of Idaho)
 Commission of Pardons and Parole,)
)
 Defendants.)
)

**BRIEF IN SUPPORT OF
 PETITION FOR WRIT OF MANDAMUS
 AND ALTERNATIVE WRIT**

Petitioner RICHARD H. LEAVITT, by and through his attorneys of record, hereby submits the following brief in support of his Petition for Writ of Mandamus And Alternative



Writ seeking an order mandating that Respondents OLIVIA CRAVEN, MARK FUNAIOLE, JANIE DRESSEN, NORMAN LANGAREK II, MIKE H. MATTHEWS and BILL YOUNG (hereafter “Commission”) conduct a full hearing in open session on Mr. Leavitt’s commutation petition; that notice of the time and place of that hearing, including any hearing wherein a final decision by the Commission is rendered, be published in a newspaper of general circulation at least once a week for four weeks prior to the hearing(s).

PROCEDURAL HISTORY

1. On May 17, 2012, the State in an ex parte proceeding obtained a death warrant for Mr. Leavitt setting an execution date of June 12, 2012. A copy of the warrant is attached hereto to the Complaint as Exhibit A.

2. On May 25, 2012, Petitioner Richard Leavitt sent a letter to the Commission of Pardons and Parole in conjunction with his Petition for Commutation requesting a full hearing in open session on his commutation petition; that notice of the time and place of all hearings concerning Mr. Leavitt’s commutation petition be published in a newspaper of general circulation at least once a week for four weeks prior to the hearing(s); and that the June 12, 2012 execution date be stayed by the Commission so that these rights could be satisfied. A copy of the letter is attached to the Complaint as Exhibit B.

3. That on June 5, 2012, in an executive session, and failing to comply with the Idaho Constitution, laws, and administrative rules, denied Mr. Leavitt’s commutation petition.

4. The June 12, 2012 execution date has not been stayed and remains in effect.

STANDARD FOR ISSUANCE OF WRIT

The writ of mandate is an extraordinary remedy requiring extraordinary circumstances.

Idaho Falls Redevelopment Agency v. Countryman, 118 Idaho 43, 43, 794 P.2d 632, 632 (1990).

The writ will not issue when an adequate remedy at law or equity exists. *Edwards v. Industrial Commission*, 130 Idaho 457, 459-60, 943 P.2d 47, 49-50 (1997). If the act sought to be compelled of the public officer is ministerial, the Court must find the party seeking the writ has a clear legal right to have the act performed and the officer has a clear duty to perform the act.

Kolp v. Board of Tr. of Butte County Joint Sch. Dist. No. 111, 102 Idaho 320, 323, 629 P.2d 1153, 1156 (1981). If the act is discretionary, mandamus will not lie unless it appears the board acted arbitrarily, unjustly and in abuse of its discretion. *Id.* To be an abuse of discretion the Board must have “so far departed from the line of [its] duty under the law that it can be said [it] has in fact neglected or refused to exercise any discretion.” *Id.* at n. 1.

LAW AND ARGUMENT

1. The Commission Has a Clear Legal Duty to Perform the Act Requested and Petitioner Has a Clear Legal Right to the Act Sought

Under Idaho law, the Commission is required to give advance notice publicizing the time and date of the hearing in a newspaper of general circulation, once a week for four weeks, of any hearing wherein it renders a final decision on a commutation petition. Legal authority for this duty is found in the following bodies of law:

The constitutional authority for Idaho’s creation of the Commission of Pardons and Parole arises from Article IV section 7,¹ which gives the legislature the authority to create a

¹Article IV section 7 provides in pertinent part:

Said board as may hereafter be created or provided by the legislative enactment shall constitute a board to be known as the board of pardons. Said board, or a majority thereof, shall have power to remit fines and forfeitures, and, only as provided by statute, to grant commutations and pardons after conviction and

board of pardons: “Said board [of pardons] . . . , shall have power . . . to grant commutations and pardons after conviction and judgment, either absolutely or upon such conditions as they may impose in all cases of offenses against the state except treason or conviction on impeachment.”

Thus, under Idaho law, the Commission of Pardons and Parole is a “public agency” subject to the Open Meeting laws governing such entities, *see* I.C. § 67-2341(4) [public agency means “any state board, commission, . . . , or other state agency which is created by or pursuant to statute,”], and “all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting . . . , and no decision at a meeting of a governing body of a public agency shall be made by secret ballot.”² I.C. § 67-2342(1).

The exception of an “executive session at which members of the public are excluded” is allowed, but only for the purposes and only in the manner set forth in § 67-2345, and these exceptions are narrowly construed.³ I.C. § 67-2345(1). Subsection (g) of 67-2345(1) allows for

judgment, either absolutely or upon such conditions as they may impose in all cases of offenses against the state except treason or conviction on impeachment. The legislature shall by law prescribe the sessions of said board in the manner in which application shall be made, and regulated proceedings thereon, but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except by the decision of a majority of said board, after a full hearing in open session, and until previous notice of the time and place of such hearing and the release applied for shall have been given publication in some newspaper of general circulation at least once a week for four weeks. The proceedings and decision of the board shall be reduced to writing and with their reasons for their action . . . , and the dissent of any member who may disagree, signed by him, and filed with all papers used upon the hearing, in the office of the secretary of the state.

²The code defines “meeting” as “the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.” I.C. § 67-2341(6).

³Exceptions to the open meetings law are narrowly construed: “The exceptions to the general policy in favor of open meetings stated in this section shall be narrowly construed. It shall be a violation of this act to change the subject within the executive session to one not

executive sessions “[b]y the commission of pardons and parole, as provided by law.” However, “[n]o executive session may be held for the purpose of *taking any final action or making any final decision.*” I.C. 67-2345(4) [emphasis added].

A “decision” means

any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body⁴ is required, at any meeting at which a quorum is present, but shall not include those ministerial or administrative actions necessary to carry out a decision previously adopted in a meeting held in compliance with sections 67-2342 through 67-2346, Idaho Code.

I.C. 67-2341(1)

While the constitution gave the legislature the authority to create a board of pardons, it limited the legislature’s power to determine the processes by which an application for commutation or pardon could be made by stating that “no commutation or pardon [shall be granted], except by the decision of a majority of said board, after a full hearing in open session, and until previous notice of the time and place of such hearing and the release applied for shall have been given publication in some newspaper of general circulation at least once a week for four weeks.” Art. IV, § 7.

This limitation on the commission’s commutation process is echoed in both the Idaho Code and the commission’s own rules:

The Idaho Code states:

identified within the motion to enter the executive session or to any topic for which an executive session is not provided.” I.C. 67-2345(3).

⁴A “governing body” means “the members of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.” I.C. §67-2341(5)

The commission shall meet at such times and places as it may prescribe, but not less than quarterly. If applications for pardon or commutation are scheduled to be considered at such *meeting*, notice shall be published in some newspaper of general circulation at Boise, Idaho, at least once a week for four (4) consecutive weeks, immediately prior thereto. Such notices shall list the names of all persons making application for pardon or commutation and a copy of such notice shall immediately, upon the first publication thereof, be mailed to each prosecuting attorney of any county from which any such person was committed to the penitentiary, and provided further that the commission may in its discretion consider but one (1) application for pardon or commutation from any one (1) person in any twelve (12) month period.

I.C. §20-213 [emphasis added.].

And the Rules of the Commission of Pardons and Parole state:

450. COMMUTATION

Commutation is a process whereby clemency may be considered and granted to modify a sentence imposed by the sentencing jurisdiction.

.....

02. Hearing. The scheduling of a hearing is at the complete discretion of the Commission; if a commutation hearing is scheduled, the Commission will determine the date of the hearing. (3-23-98)

a. Notice of a commutation hearing will be published in a newspaper of general circulation at Boise, Idaho at least once a week for four (4) consecutive weeks immediately prior to the hearing. (3-23-98)

IDAPA 50.01.01., Rule 450.02.a.

2. The Act Sought is Not Discretionary

While Mr. Leavitt does not dispute that the Commission's "scheduling" of hearings⁵ may be discretionary, the decision *not to grant* a hearing as well as the hearing itself must itself

⁵A "hearing" is defined by the Commission's rules as "A proceeding in which evidence, including file material, letters, and/or testimony, is considered for use in decision making. (3-23-98)" IDAPA 50.01.01, rule 010.17.

comply with the process prescribed by the Idaho Constitution, the Idaho Code and the Commission's own rules. Because the Commission's decision to deny a commutation hearing is a defacto final decision denying the commutation petition,⁶ and because, pursuant to Idaho Code section 67-2345(4), "[n]o executive session may be held for the purpose of taking any final action or making any final decision,"⁷ a decision by the Commission denying a commutation hearing must be reached and rendered in a full hearing in open session which has been properly noticed under Article IV, section 7 and IDAPA 50.01.01, rule 450.02.a. Under the law set forth above, the act sought to be compelled by this petition for writ of mandamus is ministerial and not discretionary, and the Commission has a clear duty to perform the act. *Kolp v. Board of Tr. of Butte County Joint Sch. Dist. No. 111*, 102 Idaho at 323, 629 P.2d at 1156.

3. **The Commission Violated Mr. Leavitt's Due Process Right.**

By ignoring these mandates, the Commission has violated Mr. Leavitt's right to due

⁶"[N]o commutation or pardon [may] be granted, except by the decision of a majority of said board, after a full hearing in open session." Idaho Constitution, Art. IV, § 7.

⁷Idaho Code section 20-213A provides that all meetings of the commission of pardons and parole be "held in accordance with the open meeting law as provided in chapter 23, title 67, Idaho Code." Subsection (a) of that section provides that "[d]eliberations and decisions concerning the granting or denying of pardons or commutations may be made in executive session . . ." Mr. Leavitt contends that this provision must be read in the context of the other statutes, Article IV section 7, IDAPA 50.01.01, rule 450.02.a, so that while the Commission has the ability to meet in executive session to consider or deliberate, it must still comply with subsection (g) when denying a petition.

Mr. Leavitt's position is supported by the opinion of the Idaho Attorney General Lawrence Wasden. See *Idaho Open Meeting Law Manual*, Office of the Attorney General, November 2011, p. 20 ["It should be noted that the Open Meeting Law establishes circumstances where executive sessions are permissible. In other words, the act authorizes, but does not require, closed meetings. In addition, even though certain enumerated matters may be 'considered' in executive session, it must be emphasized that: "[N]o executive session may be held for the purpose off taking any final action or making any final decision." (Citing I.C. § 67-2345(4) and Attorney General Opinion No. 77-44; Attorney General Opinion No. 81-15.)

process as guaranteed by the Fourteenth Amendment to the U.S. Constitution. *See, Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288-290 (1998) (O'Connor, J.).

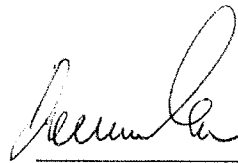
4. No Other Remedy Exists

Mr. Leavitt has exhausted his state court appeal rights and post-conviction remedies and his conviction and sentence of death are final. I.C. § 19-2719. Mr. Leavitt has no other speedy and adequate remedy in the courts of the State of Idaho to challenge the unlawful actions of the Commission. Mr. Leavitt has no other remedy but by way of this writ to compel the Commission to perform the duties which are clearly required by the laws of Idaho, and which Mr. Leavitt is clearly entitled to have performed on his behalf.

CONCLUSION

For the foregoing reasons, this Court should issue a writ compelling the Commission to comply with the proper hearing and notice requirements of the Idaho Constitution, Idaho Code §§ 67-2345, et seq.; 20-213; IDAPA 50.01.01, and rule 450.02.a., and issue a stay of execution until the Commission acts according to these provisions.

Dated this 6th day of June, 2012.



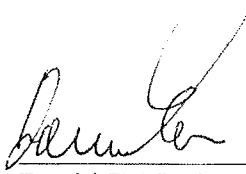
David Z. Nevin
Andrew Parnes
Attorney for Richard A. Leavitt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of June, 2012, I served the foregoing document on:

Mark Kubinski
Krista Howard
Deputy Attorneys General
Department of Corrections
Statehouse Mail
PO Box 83720
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