

Matter of Halverson, 123 Nev. Adv. Op. No. 48 (2007).¹

LEGAL ETHICS — JUDICIAL DISCIPLINE

Summary

Judge Elizabeth Halverson was elected to the position of Eighth Judicial District Court Judge for Clark County and took the bench in Department 23 in January, 2007. Four months later, the General Counsel for the Nevada Commission on Judicial Discipline (“Commission”) prepared an informal written complaint against Judge Halverson relating to her judicial performance and treatment of staff. On May 10, 2007, the Commission filed a written suspension order based on six grounds.

Upon receipt of the notice of suspension, Judge Halverson then requested a hearing (“Hearing”), at which, both the Commission and Judge Halverson presented witnesses. Judge Halverson also requested certain subpoenas duces tecum issue for production of documentation of all personal grievances against all Nevada Judges since January 1, 2004. Judge Halverson’s request was denied because, as later explained by Sixth Judicial District Court Judge Richard Wagner, the requests were “overbroad, unduly burdensome, and requested information that was irrelevant to the proceedings.”

Additionally, at the Hearing, the Commission allotted the special prosecutor, who had the burden of demonstrating by a preponderance of the evidence that an interim suspension was warranted, three and a half hours to present his case while only allowing Judge Halverson two and a half hours. Following the Hearing, the commission found that four of the original bases for the interim suspension had been proven by a preponderance of the evidence. The four grounds for suspension are: (1) inability to conduct criminal trials; (2) failure to treat staff and litigants with respect; (3) falling asleep on the bench; and (4) not cooperating with court administration.² These grounds led the Commission to conclude that Judge Halverson posed a substantial threat of serious harm to the public and to the administration of justice. Therefore, pursuant to NRS §1.4675 (“Statute”), the Commission imposed an interim suspension on Judge Halverson.

Judge Halverson appealed the Commission’s decision to the Nevada Supreme Court (“Court”), arguing both that the Statute is unconstitutional on its face and that the interim suspension proceedings themselves violated due process because of the refusal of the subpoenas duces tecum, the allotment of extra time to the special prosecutor at the Hearing, and finally, because the Commission had already made its

¹ By Charles R. Peterson.

² For the purposes of this commentary, I have not included the specific evidence presented in support of these four grounds although the Court does analyze in the evidence in some depth and whether or not the evidence supports the Commission’s findings. Suffice it to say the Court felt the evidence presented supported a suspension by a preponderance of the evidence. Of course, the real issue was whether or not preponderance of the evidence was the correct legal standard.

decision before the Hearing..

Issue and Disposition

Issue

What is the constitutional and statutory authority of the Commission to temporarily suspend a judge, before a formal hearing, when the Commission determines that the judge poses a substantial threat of serious harm to the public or to the administration of justice? Specifically³:

- (1) What is the interplay between confidentiality of Commission proceedings and the public nature of proceedings before the Court?
- (2) What procedural issues arise from the Nevada legislative provisions governing the interim suspension of judges?
 - (a) What standard of review must the Court apply to appeals from temporary suspension orders?
 - (b) What standard of proof must the Commission use in temporary suspension proceedings?
 - (c) What is the appropriate scope of Commission suspension proceedings?
 - (d) What tests should be applied when determining whether an interim suspension is warranted?
- (3) Does the Commission have the authority to impose an interim suspension before a formal statement of charges is filed?
- (4) Is the interim suspension statute void for vagueness?
- (5) Did the Commission violate Judge Halverson's right to due process by refusing to issue the subpoenas, predetermining the outcome of the case before the Hearing, and allocating more time for the special prosecutor to present his case than Judge Halverson to present hers?

Disposition

The Court rejected almost all of Judge Halverson's arguments. Specifically, the Court decided:

- (1) Appeals from confidential judicial discipline matters considered by the Court are not confidential unless a compelling interest in support

³ For the purposes of this commentary, I have assigned numbers to each issue. Please note that the number assignments are mine and not the Court's.

of sealing is proffered.

- (2)(a) Issues regarding standard of proof to be used by commission are to be reviewed on appeal de novo. Decisions by the Commission to suspend judges are, by statute, discretionary, and therefore are only subject to an abuse of discretion standard of review.
- (2)(b) Preponderance of the evidence standard is the correct standard of proof for judicial interim suspension proceedings.
- (2)(c) Scope of interim suspension proceedings allows the Commission to take into account the totality of the circumstances, including past behavior.
- (2)(d) Interim suspensions are “warranted only to protect against anticipated future harm, including harm to the public’s perception of the judicial system, and not merely to redress past misconduct; such a suspension is appropriate when the ‘exigencies of the circumstances presented’ would not be adequately met by formal proceedings.”
- (3) The Commission does have authority to impose an interim suspension.
- (4) The interim suspension statute is not void for vagueness.
- (5) The interim suspension procedure used thus far in this case had not violated due process; however, if the Commission, now that an interim suspension is in place, unreasonably delays its investigation, the proceedings may then violate due process.

Commentary

State of the Law Before *Halverson*

Most of the issues in this case are questions of first impression, although some of the issues do have some Nevada precedent.

- (1) In *Attorney General v. Steffen*⁴, the Court held that confidentiality in judicial discipline proceedings only applied to proceedings before the Commission, and not before the Court. Although the Nevada Constitution was amended after *Steffan*⁵, and a new statute was enacted⁶, no changes were made in regards to confidentiality before the Court.

(2)(a)-(d) Although the Nevada Constitution, the Statute, and

⁴ 112 Nev. 369 (1996).

⁵ NEV. CONST. art. VI, § 21.

⁶ NRS 1.4683 (1997).

Commission on Judicial Discipline Rule 9 all provide the Commission with the authority to impose an interim suspension, a case involving an appeal of the Commission's interim suspension order had not been brought before the Court since the revision of the judicial discipline scheme in 1997. Therefore, many procedural issues had to be decided in this case for which there was no Nevada case law.

- (3) On the issue of interpretation of the Statute, the term “proceeding”, and whether the Statute gives the Commission authority to temporarily suspend a judge before a formal complaint is filed is one of first impression in Nevada.
- (4) While the issue of whether the Statute is unconstitutionally vague, the Court held in *Silvar v. Dist. Ct.*⁷ that “A statute is unconstitutionally vague and subject to facial attack if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited, and (2) lacks specific standards. . .”⁸
- (5) Because this is the first judicial interim suspension case brought before the Court, the issue of whether the procedures actually used in this case violate due process are of first impression, even though this issue is largely fact-dependent.

Other Jurisdictions

In *Halverson*, the Court recognized law from other jurisdictions on issue (2)(c), regarding the scope of the Commission's suspension proceedings. West Virginia⁹ and Michigan¹⁰ courts have listed factors relevant to a temporary suspension determination. These factors include: whether the alleged misconduct: (1) is directly related to the administration of justice or to the public's perception of such administration, (2) is entirely personal in nature or involves the judge's public persona, (3) involves violence or callous disregard for the justice system, (4) is criminal in nature, (5) is part of a pattern or practice, (6) occurred on the bench, (7) is prejudicial to the actual administration of justice, and (8) is premeditated. Some mitigating factors include remorse, the judge's record, and the judge's efforts to improve.

Effect of *Halverson* on current law

Halverson did not overturn or call into question any existing law. Instead it has mostly taken existing legal principles and applied them to the specific cases of

⁷ 122 Nev. 289 (2006).

⁸ *Id.* At 293.

⁹ *In re Cruickshanks*, 648 S.E.2d 19, 23 (W. Va. 2007).

¹⁰ *In re Chrzanowski*, 636 N.W.2d 758, 764 n.8, 765 n.11 (Mich. 2001).

judicial interim suspensions imposed by the Commission. *Halverson* has interpreted the Statute broadly, giving the Commission wide discretion in imposing an interim suspension on judges.

First, the Court ruled that unless a compelling reason to seal is given, appeals from suspension decisions before the Court will be matters of public record. This could have the possible affect of discouraging appeals from interim suspension decisions out of fear that the public would be given access to a laundry list of alleged offenses. This is an especially relevant concern in a state with elected judges.

The procedural decisions of *Halverson* also give the Commission wide discretion in a decision to temporarily suspend. Although any rulings on questions of law will be reviewed de novo by the Court upon appeal, their decision as to whether the facts support a suspension will only be reviewed for abuse of discretion. For an interim suspension, only a preponderance of the evidence is required to support a suspension, in contrast to a clear and convincing standard used in most other judicial discipline proceedings. In deciding interim suspension cases, the Commission can review the totality of the circumstances, including testimony concerning past events.

The Court has now confirmed that the Statute both gives the Commission the power to impose an interim suspension and is not unconstitutional for vagueness, and finally, it has confirmed that at least up to this point in time, the Commission's exercise of power under the Statute has been constitutional in that due process has not been violated. The Court did give one warning: should the Commission unreasonably delay proceedings once the interim suspension has been issued, there may be a violation of due process.

Unanswered Questions

The Court, while warning that the Commission's delay of post-interim suspension proceedings may violate due process, did not give any guidelines as to what would constitute a delay that violated due process. The Court only intimated that an "undue" or unreasonable" delay would result in an increased private interest for the affected judge and therefore more procedural safeguards would be needed. It is foreseeable that this issue will come up again at some point as the Court, through its dicta, has essentially extended an invitation to appeal on these grounds. That said, given the tone of the decision, the Court has given great deference to the Commission, and they will likely do so in the future.

Conclusion

Halverson has given the Commission broad discretion in imposing interim suspensions and made it more difficult to appeal such suspensions; however, the Court will not allow an the interim suspension procedure to be a "fast track" method of imposing a permanent suspension, and after imposing an interim suspension, the Commission will have to act with reasonable speed in its subsequent investigation and formal proceedings.