

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA DEPARTMENT OF PUBLIC
SAFETY, DIVISION OF PAROLE AND
PROBATION,

Appellant,

vs.

KENNETH SCOTT COLEY AKA KING
COLEY,

Respondent.

CASE NO. 67864

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**ANSWERING BRIEF OF RESPONDENT
KENNETH SCOTT COLEY**

Appeal from the Eighth Judicial District Court's Order Granting the
Petition for Writ of Mandamus
The Honorable Kathleen E. Delaney, District Court Judge
District Court Case No. 96C137946
(Consolidated with Case No. 96C137870)

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

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I.

ISSUE PRESENTED FOR REVIEW

Whether the District Court abused its discretion by granting Kenneth Scott Coley's ("Ken") Petition for Writ of Mandamus, where clear and convincing evidence showed that the Nevada Department of Public Safety, Division of Parole and Probation (the "Division") acted arbitrarily and capriciously in denying Ken's application to change his probation discharge status from dishonorable to honorable.

II.

STATEMENT OF THE CASE

On February 5, 2015, Ken filed a Petition for Writ of Mandamus (the "Petition") seeking to compel the Division to comply with Section 16 of Chapter 476 of the 2005 Statutes of Nevada ("Section 16") and the corresponding Nevada Administrative Code ("NAC") NAC 213.720 – NAC 213.790, and pursuant to its terms, grant his application for a request of change of probation discharge status from dishonorable to honorable. (Respondent Kenneth Scott Coley's Appendix¹ "RAP" RAP000001 - 000078). The Petition followed lengthy informal discussions with the Division regarding its utilization of the review process established by

¹ Respondent Kenneth Scott Coley's Appendix is comprised of the Petition for Writ of Mandamus filed in the District Court on December 31, 2014. The Petition for Writ of Mandamus included in Appellant's appendix erroneously contains a Declaration of Paola M. Armeni which is not part of the record in this matter.

Section 16, and its then stated reason for declining Ken's application, which was that he failed to complete community service. (RAP000011 – RAP000014).

On February 11, 2015, when the Division filed its opposition to the Petition, it abruptly and without explanation changed its position regarding Ken's eligibility for a change in discharge status, from his failure to complete community service, to a wholesale repudiation of the process established by Section 16 as having previously expired. (Appellant's Appendix "APP" APP0080 – APP0101). Ken replied on February 12, 2015, arguing that there was clear and convincing evidence the Division continued to make available the process for requesting a change in probation discharge status from dishonorable to honorable through and including the present day, and that it arbitrarily and capriciously exercised its discretion in denying Ken the opportunity to obtain this change. (APP0102 – APP0113).

On February 23, 2015, following oral argument, the District Court granted the Petition. The Honorable Kathleen E. Delaney found that although Section 16 was not still in effect, the Division engaged in the discretionary function of continuing to process requests for a change in discharge status based on the provisions of Section 16 and the corresponding NAC 213.720 – NAC 213.790 after July 1, 2008. (APP116 – APP118). Judge Delaney specifically found the Division granted at least two requests for a change of discharge status subsequent to Ken's application and forwarded recommendations to the respective sentencing

courts. (APP117 at ¶ 3). Judge Delaney further concluded that the Division acted arbitrarily and capriciously in denying Ken's 2014 application on the basis of disqualifying factors not found in Section 16 or NAC 213.720 – NAC 213.790. (APP117 at ¶ 4).

Accordingly, the District Court ordered the Division to (1) allow Ken to proceed with his original application for a change in discharge status from dishonorable to honorable; (2) afford Ken the opportunity to satisfy his outstanding financial obligation to the Division or to demonstrate a good faith effort toward making the required payments; and (3) if he satisfies his financial obligation or demonstrates a good faith effort to do so, make a recommendation to the Court to change his discharge from dishonorable to honorable. (APP118 at 5-12).

III.

STATEMENT OF RELEVANT FACTS

At all times relevant to the instant appeal, the Division operated a program by which a person could apply to have their probation discharge status changed from dishonorable to honorable. It had information available on its website regarding the program, it had a form application a person could obtain and submit to apply for the program, and it had active regulations implementing the program. It denied Ken's application for the program however, on grounds other than those for which he could properly be disqualified. These facts are set forth in detail in

the paragraphs below, they are not in dispute, and they clearly establish why the District Court did not abuse its discretion and should be affirmed.

During the 2005 Legislative session, lawmakers established the process by which persons who received a dishonorable discharge from probation could apply to the Division to obtain an honorable discharge when certain criteria were met. (RAP000016 – RAP000032). Section 16 of Senate Bill 282 provided in pertinent part:

1. Notwithstanding any other provision of law, except as otherwise provided in subsection 2, a person who was dishonorably discharged from probation or parole before the effective date of this section, until July 1, 2008, may apply to the Division of Parole and Probation of the Department of Public Safety, in accordance with the regulations adopted by the Division pursuant to the provisions of this section, to request that his dishonorable discharge from probation or parole be changed to an honorable discharge from probation or parole.

2. A person who was dishonorably discharged from probation or parole may not apply to change his discharge to an honorable discharge pursuant to this section if his dishonorable discharge was based, in whole or in part, upon:

(a) The fact that he committed a new crime, other than a violation of a traffic law for which he was issued a citation, during the period of his probation or parole;

(b) The fact that his whereabouts were unknown at the time of his discharge from probation or parole; or

(c) Any incident involving his commission of a violent act or an act that threatened public safety during the period of his probation or parole.

(RAP000030 – RAP000031).

Section 16, subsection 3 required the Division to adopt regulations establishing guidelines and procedures used to carry out the provisions of Section 16. (RAP000032). As set forth in subsection 3, the procedures were to include a mechanism for applicants who had outstanding financial obligations, in the form of unpaid restitution and/or supervision fees, to make a good faith effort to satisfy those obligations. (*Id.*). Significantly, nowhere does it limit the opportunity to change probation discharge status to only those persons with outstanding financial obligations to the Division. In 2006, the Division adopted the required regulations, later codified in NAC 213.720 through 213.790. (RAP000034 – RAP000035).

In 2008, in compliance with Section 16, subsection 5, the Division submitted a report to the Nevada Legislature detailing (a) the number of persons who applied for a change of discharge status pursuant to the provisions of Section 16; (b) the number of applications granted and denied and the reasons for the denials; (c) the amount of restitution and fees paid as a result of Section 16; and (d) recommendations and conclusions concerning the desirability of extending the application of the provisions of Section 16 beyond the July 1, 2008 expiration date. (RAP000037 – RAP000038). In the report, the Division concluded, “This regulation, with the possibility of receiving additional restitution due to victims or fees due to the Division, *should be continued.*” (RAP000038) (emphasis added).

...

Indeed, in practice, the Division continued to consider and approve requests for a change of discharge status through and including 2015, with at least two requests subsequent to Ken's, which were forwarded to the respective sentencing courts for review. (APP0141 at 13-20). During oral argument on the Petition before the District Court, Deputy Attorney General Adam Honey conceded that the instructions for a change in discharge status were available on the Division's website, the application was provided promptly to Ken at his request, the application was processed and denied, and thereafter, the Division processed and approved additional applications for other unnamed individuals and forwarded recommendations for a change in discharge status to their respective sentencing courts. (APP134 – APP138 and APP141). Mr. Honey argued that “nobody [at the Division] ever used the statute” after July 1, 2008; he never argued that a process to change a dishonorable discharge to an honorable discharge did not exist. (APP134 at 8-10).

In early 2014, Ken began the process of trying to change his discharge status, after discovering that his dishonorable discharge from probation was a barrier to sealing his criminal records from the 1990's. (RAP000012). On February 27, 2014, a representative of the law firm of Gordon Silver² contacted the

² Ms. Armeni represented Ken while she was a partner at Gordon Silver, in conjunction with the Legal Aid Center of Southern Nevada Pro Bono project. Upon Ms. Armeni's departure from Gordon Silver, Ken opted to continue with Ms. Armeni as his pro bono counsel at her new firm, Gentile Cristalli Miller Armeni & Savarese.

Division on Ken's behalf to inquire about the process for applying for a change of discharge status. (*Id.*). The next day, the Division faxed to Gordon Silver instructions entitled "Applying to have your Dishonorable Discharge changed to an Honorable Discharge providing fiscal obligations are met," and an application entitled "Application for Change of Discharge Per SB 282." (RAP000059 and RAPP000074).

In accordance with the instructions and application, on May 5, 2014, Ken's counsel, Paola M. Armeni, Esq., submitted a letter to the Division along with the Application for Change of Discharge Per SB 282, requesting his discharge status in District Court Case Nos. C137870 and C137946 be changed from dishonorable to honorable. (RAP000067 – RAP000078). The application included Ken's financial information and an offer to make monthly payments to satisfy his financial obligations to the Division. (*Id.*). In response, on May 8, 2014, Ms. Armeni received a phone call from Lt. Robert Geraldo with the Division, who requested the courtesy of a few weeks to process Ken's request. (RAP000012 – RAP000013). Thereafter, in a letter dated June 17, 2014, the Division denied Ken's request for a change of discharge status citing the same reason he was dishonorably discharged in the first place, the failure to complete community service. (RAP000055).

...

Following the denial of Ken's application, a revised version of the Division's written instructions for a change of discharge status appeared on its website, where it remains today. (RAP000061). Noticing the change to the website and upon receipt of the above-referenced letter, which stated reasons for rejecting Ken's request that did not comport with the Division's instructions or application, Ms. Armeni inquired on Ken's behalf regarding the apparent misapplication of the process. (RAP000012 – RAP000013). In response, the Division offered that Section 16 is "history" of S.B. 282, as opposed to applicable law. (RAP000057). Further, Ms. Konvicka expressed it was the Division's opinion that only offenders who were dishonorably discharged for unpaid supervision fees and restitution qualify for a change of status. (*Id.*).

At no time, prior to the filing of the Petition, did anyone at the Division and/or the Attorney General's Office express that the Division no longer maintained a process by which persons could apply to obtain a change in probation discharge status. Indeed, the undisputed facts before the District Court evidenced that the Division engaged in the discretionary function of continuing to process applications for a change in discharge status at all times relevant to this appeal.

IV.

SUMMARY OF ARGUMENT

The District Court correctly found clear and convincing evidence that the

Division continued, up to and through this year, to make available a program to change probation discharge status from dishonorable to honorable, but that it arbitrarily and capriciously exercised its discretion in denying Ken the opportunity to obtain this change. The undisputed facts considered by the District Court evidence that the Division had information available on its website regarding the program, had instructions and a form application for the program, and had active regulations³ implementing the program. And in fact, such information was relied upon by not only Ken but other members of the public that the program was available if they qualified based on the criteria contained in the instructions and application. Indeed, upon the Division's own admission, they considered and processed at least three applications. Ken's application for a change of discharge status was processed and denied. The two additional applications subsequent to Ken's, were processed and forwarded to their respective sentencing courts for review of the change of discharge status. The Division denied Ken's application however, on grounds other than those for which he could properly be disqualified.

Inexplicably, the Division largely ignores the findings of the District Court based on these uncontested facts, and instead insists the Division's continued operation of this program was merely in error, and as such, mandamus relief is

³ Pursuant to NRS 233B.062, it is the policy of the State of Nevada that every regulation adopted by a State agency be made easily accessible to the public and expressed in clear and concise language. Further, the Nevada Administrative Code contains all permanent regulations of state agencies adopted under NRS Chapter 233B.

inappropriate absent a legal duty to provide the opportunity for a change in discharge status. The Division's position however misapprehends the large body of Nevada case law which permits extraordinary relief to control an arbitrary and capricious abuse of discretion, as was present in the instant matter. The Division acknowledges and the District Court correctly found that the Division engaged in the discretionary function of operating the program, to change discharge status but did so in an arbitrary and capricious manner. For all of these reasons, as set forth in more detail below, this Court should affirm the decision of the District Court.

V.

ARGUMENT

A. STANDARD OF REVIEW

This Court reviews a district court's decision regarding a petition for writ of mandamus for an abuse of discretion. *Veil v. Bennett*, 131 Nev. Adv. Op. 22, 348 P.3d 684, 686 (2015). A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, *or to control an arbitrary and capricious exercise of discretion*. NRS 34.160; *see also Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (emphasis added). "An arbitrary and capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason,' (defining 'arbitrary'), or 'contrary to the evidence or established rules of law'

(defining ‘capricious’).” *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 780 (2011) (quoting *Black's Law Dictionary* 119, 239 (9th ed.2009)).

B. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN GRANTING KEN’S PETITION.

1. The District Court Correctly Found It Was Uncontested That the Division Exercised Its Discretion to Continue a Discharge Status Program.

The Division argues that although it continued to process applications for a change of discharge status up to and including this year pursuant to the provisions contained in Section 16 and/or NAC 213.720 – 213.790, it had no legal duty to do so based on the expiration of Section 16 in July of 2008. This argument however, fails entirely to address the findings of the District Court, which concluded that mandamus relief was appropriate in Ken’s case based on an arbitrary and capricious abuse of discretion. Specifically, the District Court found the Division engaged in the discretionary function of continuing the program beyond July 1, 2008 and effectuated the continuation, in part, based on specific guidance it promulgated in the Administrative Code (NAC 213.720 – NAC 213.790), but it deviated from its own process with respect to Ken.

It is undisputed that the Chief of the Division has the discretion, pursuant to statute, to develop and implement policies and procedures. NRS 213.1095(8). Further, in carrying out those policies, assistant parole and probation officers are

required by law to keep detailed records of their work. NRS 213.1096(5). The Division stops short of acknowledging the existence of a program to change probation discharge status, suggesting instead that it had not processed any requests for a change in discharge status from July of 2008 until Ms. Armeni inquired in March of 2014. (Appellant's Opening Brief p. 3 at 2-4). However, during oral argument before the District Court, Mr. Honey qualified that statement and admitted, "[t]here's hundreds of people that work for P&P. I can't possibly know what any one person dealt with." (APP0134 at 5-10). And, the Division failed to provide the District Court with a declaration or any other evidence in support of the actual number of applications processed during the relevant time period. Such information should be readily available given the duty required of Division employees to keep detailed records of their work, and its absence is further justification to defer to the District Court's discretion. Further, the Division ultimately admitted it considered and approved at least two applications for a change in discharge status after Ken's application in March of 2014. (APP0142 at 2-9).

Further evidence of the Division's exercise of discretion is found in its report to lawmakers, wherein the Chief of the Division recommended that the program be continued based on its potential for collecting revenue due to victims and the Division. (RAP000037 – RAP000038). And indeed, Ken's experience

confirms that the program's continuation was not a result of further legislative action, but a result of the Chief's exercise of discretionary authority to carry out Division policies and practices. Information regarding the program was and is available on the Division's website. (RAP000012 – RAP000061). Upon request, an application for a change in discharge status was promptly provided to Ken the next day, along with written instructions for its completion. (RAP000012, RAP000059, and RAP000074). Ken's application was in fact processed and denied. (RAP000055). And subsequently, the Division processed and approved at least two additional applications for a change in discharge status and forwarded recommendations to the respective sentencing courts for review. (APP141 at 12-20). These facts are not in dispute, and the Division has provided no evidence to the contrary in support of its appeal. Accordingly, the District Court's determination that clear and convincing evidence showed the Division exercised its discretion in continuing the program to obtain a change in probation discharge status should not be disturbed upon review.

2. The District Court Correctly Found the Division's Denial of Ken's Application for a Change of Discharge Status Was Arbitrary and Capricious.

The Division wholly fails to address the finding of the District Court that the Division acted in an arbitrary and capricious manner in denying Ken's application for a change in discharge status. It relies instead on the sole argument

that Section 16 expired, which Ken does not dispute. In doing so, Appellant ignores the body of Nevada case law which provides mandamus relief for an arbitrary and capricious abuse of discretion, such as that experienced by Ken. *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 780 (2011) (providing that a writ of mandamus is available to control a manifest abuse, or an arbitrary and capricious exercise of discretion) (emphasis added); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (same); *Brewery Arts Ctr. v. State Bd. Of Examiners*, 108 Nev. 1050, 1053, 843 P.2d 369, 372 (1992) (same); *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-604, 637 P.2d 534, 536 (1981) (same).

Here, Ken was denied a change of his discharge status from dishonorable to honorable, not based on the appropriate disqualifying factors set forth in the Division's instructions and application, but instead, on his long ago failure to complete community service. (RAP000055). The letter notifying Ken of the Division's decision states, "[b]ased on the Nevada Administrative Regulations, he (Ken) does not qualify for consideration." (*Id.*). It further lists the three disqualifying factors originally found in Section 16, noting that none apply to Ken, i.e. his whereabouts were known at the time of his discharge from probation in 1996, he did not commit a new crime, and he was not involved in the commission of a violent act or an act that threatened public safety, but the Division denied his

application based on an arbitrary fourth disqualifying factor not found in any program communication or NAC 213.720 – NAC 213.790. (*Id.*). And, while not the gravamen of Ken's argument to the District Court or in this appeal, it must be noted that the Division's own correspondence regarding Ken evidences its ongoing reliance on guidance from both Section 16 and the Administrative Code, and its arbitrary and capricious deviation from it. (*Id.*).

The failure to complete community service is also not identified as a disqualifying factor on the instruction sheet or application provided by the Division initially to Ken. (RAP000059 and RAP000074). Further, during Ms. Armeni's lengthy informal discussions with the Division regarding the denial of Ken's application, the Division defended its decision, not based on any reliance on Section 16 or the Administrative Code, as stated in Ken's rejection letter, but on its belief that both were legislative history, and thus could be disregarded in favor of the Division's arbitrary and capricious review process. (RAP000057). Indeed, the Division expressed to Ms. Armeni that it limited applications for a change in discharge status to those persons who were dishonorably discharged for unpaid restitution and/or supervision fees. (*Id.*).

Accordingly, the District Court's determination that clear and convincing evidence showed the Division arbitrarily and capriciously denied Ken's application for a change in discharge status should not be disturbed upon review.

VI.

CONCLUSION

Based on the foregoing, Respondent Kenneth Scott Coley respectfully requests this Honorable Court affirm the District Court's decision granting the Petition for Writ of Mandamus.

DATED this 23rd day of September, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this answering brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This answering brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman style, and a 14 font size.

I further certify that this answering brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

Proportionally spaced, has a typeface of 14 points or more, and contains 3,780 words, and does not exceed the 30 page limit.

Finally, I hereby certify that I have read this answering brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of September, 2015.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action.

On September 23, 2015, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF**, by the method indicated:

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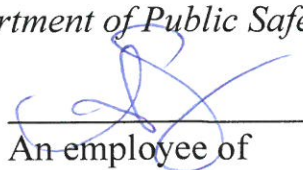
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