

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

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STATE OF IOWA, ex rel. GARY R. ALLISON as County Attorney for Muscatine County, Iowa, Plaintiff,

CASE NO. EQCV018785. TOLLENAER CLERK OF DISTRICT COURT MUSCATINE CO IOWA

vs.

RULING ON MOTIONS FOR SUMMARY JUDGMENT

THOMAS J. VILSACK, Governor of the State of Iowa, Defendant.

Two motions for summary judgment were presented to the Court as contested matters by telephone conference call on August 31, 2005. Alan Ostorgren, Assistant County Attorney for Muscatine County, appeared for Plaintiff, and Deputy Attorney General Julie Pottorff and Attorney Gary Dickey appeared for Defendant. Present by telephone conference call but not participating orally in the hearing was the plaintiff, Gary Allison, Muscatine County Attorney, and the defendant, Thomas J. Vilsack, Governor of the State of Iowa. The facts that give rise to the summary judgment motions are largely undisputed and set out in a written statement of material facts that accompanies the written motions and briefs.

This action arises out of Executive Order No. 42 signed by Governor Vilsack on July 4, 2005. The executive order restored the citizenship rights of

all offenders that are completely discharged from criminal sentence, including any accompanying term of probation, parole or supervised release, as of July 4, 2005, but have not made an application pursuant to Iowa Code Chapter 914.

Plaintiff, County Attorney Gary Allison, asserting standing under Iowa Code Section 661.8¹ commenced this mandamus action contesting the Governor's right to restore the citizenship rights on a wholesale basis, without applications having been filed by any of them and without any of the requirements of Iowa Code chapter 914 being followed. The petition, which was filed June 30, 2005, requested a court order directing the Governor not to implement the executive order "... without full compliance with the limitations on his clemency powers" required by Iowa Code Chapters 914 and 915, and to order that the Governor's executive order is "void."

Mandamus is an action permitted by Iowa Code Section 661.1, defined as follows:

An action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station

The governor is the "the person" under the statute the plaintiff asks be commanded "to do or not to do an act..."; that is, not implement Executive Order No. 42. No judicial action intervened between the date plaintiff filed the mandamus action and the date that the Governor signed the order and it therefore became effective July 4, 2005. Because it has already become effective, the only relief available would now be to void the governor's executive order.

Limitations on mandamus actions are also set forth in Chapter 661. Under 661.2, while the Court can order a person to act, if the act is a discretionary one, the Court cannot dictate what the result of the person's exercise of discretion should be. Thus, in the present case, the court could presumably command the governor to consider a

¹ Sec. 661.8 provides in part: "The order of mandamus is granted on the petition of the state by the county attorney, when the public interest is concerned."

pardon request made by a convicted person under Iowa Code section 914.2, but the court could not tell the governor how to decide whether the pardon should be granted.

Plaintiff contends the procedure outlined in Chapter 914 is the exclusive procedure, and no other, for granting reprieves, pardons, commutations, remissions, and restoration of rights. The governor did not use this procedure in the "blanket" restoration of rights granted to all persons whose criminal sentence had been completely discharged as of July 4, 2005, but who had not made application for restoration of citizen rights. Defendant responds contending that there are two ways the restoration of rights can be accomplished, not one. The first is the statutory procedure contained in Chapter 914, but nothing in that code chapter prohibits the governor from doing what he did in this case, that is, to initiate the action on his own, distinct from the procedure set out in Chapter 914.

Plaintiff relies heavily on an Ohio case, Maurer v. Sheward, 644 N.E. 2d 369 (Ohio 1984). The case involved a declaratory judgment action filed by the Ohio Board of Corrections in which the defendants were several convicts who had applied for executive clemency from the governor, and one who had received an outright pardon from the governor, a few days before he left office. The Ohio Board of Corrections contended the governor had failed to follow statutory requirements in granting the commutations, and the pardon, so the governor's actions were void. That court held the legislature did have the right to impose rules on the governor's constitutional power to grant pardons and commutations, but the legislature had imposed rules only on the governor's pardoning power, and not on his commutation power, so the commutations were upheld and the pardon was found to be void. The case is instructive but does not

deal with mandamus nor is it similar on the facts to the present case. One of the most striking differences is that the restoration of citizenship rights decreed by the governor's Executive Order No. 42 is that it applies only to persons convicted of crimes who have completely discharged their sentences. There is no public policy concern here that those persons have somehow escaped punishment for their crimes. They have all served either their prison sentence or a period of suspended sentence, and been discharged from that sentence.

The clemency power of the governor is constitutionally protected. It cannot be diminished by legislative action, but it is "... subject to such regulations as may be provided by law." Chapter 914 of the Code does clearly provide a process to be followed when a person convicted of a criminal offense either makes an application to the board of parole for a recommendation or makes an application to the governor directly. Chapter 914, however, is completely silent regarding an action issuing *sua sponte* from the governor's own pen. The governor is not required to make an application under chapter 914 before he grants clemency of any sort to any person. His power is "subject to such regulations as may be provided by law"² but nowhere does Chapter 914 suggest that the governor must use the procedures when, on his own motion, he grants clemency to any one person or to a thousand as has been done by Executive Order 42. The language used in chapter 914 creates discretion in the governor to use the resources of the board of parole to review applications for clemency received by his office, and to receive recommendations from that board, but the statute does not require him to do so. As noted by the defendant, if the legislature had wanted that to be the case, it knew how to do so and it would have retained the statutory law

² Iowa Constitution, Article IV, Section 16

that existed prior to 1986 contained in section 248.6 that required the governor to obtain the advice of the board of parole before granting a pardon or commutation. That statute provided:

248.6 Conditions prerequisite to a pardon. After conviction for a felony, no pardon or commutation of sentence shall be granted by the governor until he shall have presented the matter to, and obtained the advice of, the board of parole.

This requirement was repealed by the legislature and replaced with the present requirements contained in chapter 914. More than a significant reorganization of the statutes relating to executive clemency, the repeal of section 248.6 by the legislature was a major departure from the previous law. Requiring that the governor present a proposed pardon or commutation of sentence to the parole board and wait for its advice has been abolished. It is interesting to note that the statutory law prior to the repeal of chapter 248 imposed the "inform and wait for advice" requirement on the governor only as it related to pardons and commutations. No similar requirement was imposed on the governor's power to restore rights of citizenship.³

If Chapter 914 contained a requirement that before the governor could grant restoration of rights to any convicted person the governor must first do some act or refer "the matter" to some board or agency for review and approval, then plaintiff's argument would be more persuasive, but the Court cannot read something into the statute that is not there. Chapter 914 does provide a uniform way of dealing with *applications* by convicted persons, does impose some requirements on the board of parole and the governor's responsibility to respond to parole boards recommendations, but it does not

³ 248.12. Restoration to rights of citizenship. The governor shall have the right to grant to any convict, whom he shall think worth thereof, a certificate of restoration to all his rights of citizenship. --

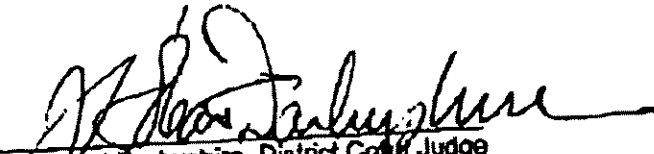
impose restrictions or preconditions on the governor's constitutional prerogative to restore rights of citizenship as he sees fit.

Iowa Code section 661.8 provides authority to the county attorney to file a petition for mandamus on behalf of the State "when the public interest is concerned" and State v. Allen, 569 N.W.2d 143 (Iowa 1997) confirms that authority. However, the public interest involved was one the county attorney in that case could clearly articulate since the county taxpayers would have to bear increased tax burden if the town of Mingo did not have hire a police force but instead relied only on the county sheriff to provide protection. While upholding the right to file the mandamus action, however, the court refused to grant it since the defendant, who was the mayor of Mingo, had no authority to decide whether to hire a police force. That duty, as the court pointed out, was a function of the city council, so the mandamus action was dismissed.

In the case present before the Court, the plaintiff also fails to articulate what "clear and established right or duty" the Governor has the duty to perform, suggesting only that the duty is implied. Clearly, the plaintiff does not think the Governor's executive order is appropriate, but a disagreement over the appropriateness of the order cannot be the basis of a mandamus action. Only if was clearly required by chapter 914 to follow the procedure set forth there and he did not follow that procedure, would mandamus be considered a possible course of action.

Courts should be very reluctant to issue a mandamus unless the public interest sought to be protected is clearly defined and present, which it is not in this case, and the person against whom the command to perform is sought has a clear duty to perform a specific act they are failing or refusing to perform.

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IT IS ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment is granted and Plaintiff's Cross-Motion for Summary Judgment is denied. Plaintiff's Petition for Mandamus is dismissed.


J. Hobart Darbyshire, District Court Judge
Seventh Judicial District, State of Iowa

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