

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004650

04/18/2022

HONORABLE STEPHEN M. HOPKINS

CLERK OF THE COURT

C. Avena

Deputy

CLARENCE WAYNE DIXON

JOSHUA SPEARS

v.

ARIZONA BOARD OF EXECUTIVE
CLEMENCY, et al.

JUDGE HOPKINS

MINUTE ENTRY

The Court has reviewed and considered Petitioner's Petition for Special Action. The Court rules without oral argument in accordance with Rule 7.1 of the Arizona Rules of Civil Procedure. The Court rules on an expedited basis so that Petitioner may seek further review of this matter on a timely basis pursuant to Rule 8 of the Arizona Rules of Procedure for Special Action.

This Court must first determine whether Special Action jurisdiction is appropriate. As the Rules of Procedure for Special Action provide, special action jurisdiction is appropriate where there is no equally plain, speedy, and adequate remedy via appeal, and in cases in which there are matters of statewide importance that involve legal issues likely to arise again. *See State ex rel. Adel v. Hannah*, 250 Ariz. 426, 480 P.3d 1243 (App. 2020).

In this case the Petition alleges that the Arizona Board of Clemency will be exceeding in excess of their legal authority at the scheduled April 28, 2022 meeting. Petitioner is scheduled for execution on May 11, 2022. Petitioner argues that the current membership of the Board of Clemency is in violation of law, and therefore denies his due process rights. Under these circumstances special action jurisdiction is appropriate. *See State ex rel. Arizona State Board of Pardons & Paroles v. Superior Court*, 12 Ariz. App. 228, 467 P.2d 917 (1970). The Court therefore accepts jurisdiction and addresses Petitioner's claim on the merits.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004650

04/18/2022

As a preliminary matter, the Court notes that the issue presented here is one of statutory construction. One of the primary tenants of statutory construction is that a court will give effect to the plain language of a statute. *State v. Reynolds*, 170 Ariz. 233, 234, 823 P.2d 681, 682 (1992) (“If a statute’s language is clear and unambiguous the court will give it effect without resorting to other rules of statutory construction.”). However, if ambiguity exists, “the court may examine a variety of factors including the language used, the context, the subject matter, the effects and consequences, and the spirit and purpose of the law.” *Id.*

Since the Court is able to decide the issue based upon the verbiage of the statute, the Court does not consider as relevant the argument regarding the legislative history of the statute (Petition, pages 7-12). Likewise, the Court does not consider purported pronouncements of others with respect to “concern” over professional diversity (Petition pages 14-15).

With that predicate, the Court turns to Petitioner’s argument, based upon the language of A.R.S. § 31-401. This statute provides as follows:

- A.** The board of executive clemency is established consisting of five members who are appointed by the governor pursuant to this subsection and § 38-211.
- B.** The members of the board shall serve on a full-time basis and receive compensation as determined pursuant to § 38-611, subsection A. Beginning from and after December 31, 2013, members of the board are eligible for any benefits that are provided to state employees pursuant to § 38-651. Each member shall be appointed on the basis of broad professional or educational qualifications and experience and shall have demonstrated an interest in the state's correctional program. No more than two members from the same professional discipline shall be members of the board at the same time.
- C.** Each member appointed to the board shall complete a four-week course relating to the duties and activities of the board. The course shall be designed and administered by the chairman of the board and shall be conducted by the office of the board of executive clemency and the office of the attorney general. The course shall include training in all statutes that pertain to the board and participation in a decision making workshop.
- D.** Members shall be appointed for a term of five years to expire on the third Monday in January of the appropriate year.
- E.** A member of the board may be removed by the governor for cause.
- F.** The governor shall select a member of the board as chairman. The chairman shall select other officers as are advisable. The term of the chairman is two years, except that the chairman may be removed as chairman at the pleasure of the governor. If a board member's term expires while the member is serving as chairman, the chair shall be deemed vacant and a new chairman shall be selected.
- G.** The board may adopt rules, not inconsistent with law, as it deems proper for the conduct of its business. The board may from time to time amend or change the rules and publish and distribute the rules as provided by the administrative procedures act.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004650

04/18/2022

H. The board shall meet at least once a month at the state prison and at other times or places as the board deems necessary.

I. The presence of three members of the board constitutes a quorum, except that the chairman may designate that the presence of two members of the board constitutes a quorum.

J. If two members of the board constitute a quorum pursuant to subsection I of this section and the two members do not concur on the action under consideration, the chairman of the board, if the chairman is not one of the members who constituted the quorum and after reviewing the information considered by the two members, shall cast the deciding vote. If the chairman of the board is one of the two members constituting a quorum at a hearing under subsection I of this section, and there is not concurrence on the action under consideration, the action fails.

K. The board shall employ an executive director whose compensation shall be determined pursuant to § 38-611. The executive director serves at the pleasure of the board and reports to the board through the chairman of the board.

Petitioner argues that more than two members of the Board have a law enforcement background. Per Petitioner, since more than two members are “from the same professional discipline” the Board may not lawfully act on April 28.

This argument appears to be one of first impression with respect to reported Opinions, but the same argument was addressed in passing in *Merrick v. Arizona Board of Executive Clemency*, 2020 WL 6040638 (filed 10/13/20). However, *Merrick* did not address the meaning of “professional discipline,” but rather decided the case based upon lack of evidence on the composition of the Board.

Historically, "professions" or "professionals" denoted doctors, lawyers, or the clergy as these were the only people that could read and write in Latin. Perks, R.W., Accounting and Society (Chapman & Hall 1993); BC Medical Journal, vol. 58, no. 5 (June 2016). That term has been broadened over the years. But it still typically denotes highly specialized work, advanced degrees, licensure, and adherence to a known and recognized set of standards. In other words, a profession is "a special type of occupation . . . (possessing) corporate solidarity . . . prolonged specialized training in a body of abstract knowledge, and a collectivity of service orientation . . . a vocational sub-culture which comprises implicit codes of behavior, generates an esprit de corps among members of the same profession, and ensures them certain occupational advantages . . . (also) bureaucratic structures and monopolistic privileges to perform certain types of work." Turner, C. and Hodge, M.N., Occupations and Professions (1970).

Consistent with the rather restrictive definition of professional, a professional corporation or limited liability company is limited to those occupations also commonly known as professions. "Examples of professional service providers are: attorneys, doctors; and certified

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004650

04/18/2022

public accountants. Each professional discipline may have its own ethical rules and limitations that restrict the business entity form in which a particular business entity may practice. Additionally, each professional discipline may have specific rules regarding who may own a professional business entity as well as whether or not the professional entity may (sic) operate using a trade name." 9 Ariz. Prac., Business Law Deskbook § 1.8 (2021-22 Ed.).

The Court also notes that the legislature did not use the word "employment" or "vocation" or "job" in connection with the statute. Of course, if the legislature intended to say "no more than two members of the Board may have prior law enforcement experience" it could have easily done so.

Historically, law enforcement has not been thought of as a "profession." It is not regulated as other professions are, and has little of the characteristics of what is typically considered a profession.

Moreover, Petitioner's definition of professional discipline is extremely broad. A person who worked for one week as a volunteer 9-1-1 operator is, under Petitioner's definition, the equivalent of a forty year homicide detective. However, "discipline" is a limiting word, and denotes a more restrictive limitation within a profession. For example, a general surgeon is a different "discipline" than is a vascular surgeon. *See* Rule 26 (b) (4) (D) ("Where an issue cuts across several professional disciplines, the court should be liberal in allowing expansion of the limitation upon experts established in the rule."). Petitioner has failed to demonstrate that of the people on the Board more than two are from the same "discipline."¹

Law enforcement is not a "profession." Petitioner has failed to establish that the Board members in question are from the same "discipline." That alone resolves the Petition.² However, the Court also addresses the second issue relating to due process. The Court finds that even if the statute is interpreted as Petitioner contends there is no due process violation.

¹ In simplistic terms, one member worked for Phoenix Police Department primarily as a homicide investigator and was then an employee of a security firm and later a city council member. One member was a Phoenix Police Department employee, as officer, detective, and supervisor in various assignments. One member was an ATF and DEA agent, and upon retirement was an educator at Glendale Community College. To the extent law enforcement may be considered a "profession" the Court finds from the information presented that each of these three members represent a different "discipline" within the large rubric of law enforcement based upon their employment histories.

² The Court also notes that the requirement that Board members "shall have demonstrated an interest in the state's correctional program" would imply members with a background in law enforcement jobs.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004650

04/18/2022

This issue was addressed at least in passing by our Court of Appeals in *Merrick*: “Because Merrick failed to show the Board was improperly constituted, Merrick has also failed to show a violation of due process. *See Wigglesworth v. Mauldin*, 195 Ariz. 432, 435, ¶ 6 (App. 1999) (“An inmate's interest in commutation ... does not by itself trigger due process protections because there is no entitlement to reduction of a valid sentence. ... However, if state statutes mandate commutation or parole via specified criteria, an interest protected by the Due Process Clause may arise.”) (citations omitted). The court did not err by rejecting Merrick's due process claim.”

Petitioner here has failed to provide any “specified criteria” that would mandate commutation of Petitioner’s sentence. Nor can this Court indulge in the assumption that one’s job, without any other evidence, means someone cannot follow the law and reach an equitable conclusion based upon the evidence. As stated in The Law of Probation and Parole, § 4.2:

Several states by statute have sought to ensure diversity among board members. For example, in Minnesota, the nine members must be representative of law enforcement, prosecution, the judiciary, education, corrections, ethnic minorities, social services, and the lay citizen. In Montana, each board member must have knowledge of American Indian culture and problems gained through training as required by rules adopted by the board. And in Rhode Island, of five board members, one must be a physician qualified in psychiatry or neurology, one a member of the state bar, and one a person trained in a correctional or related field. Another approach is to have the board members selected from a panel recommended by a highly representative group.

The failure to have a representative board make the parole decision in an individual case does not constitute a due process violation if the members were unbiased. In one illustrative case, the defendant, convicted of killing his girlfriend, unsuccessfully complained that all members of the parole board who were present at his hearing were women. The court rejected the due process allegation because there was nothing in the record that showed the female parole board members were biased against the prisoner.

(emphasis added).

To be sure, courts have recognized due process rights in connections with boards of parole, pardon, or clemency. *See generally* Chapter Three, The Law of Probation and Parole. However, to the Court’s knowledge no case anywhere has recognized a due process right in the particular makeup of such a board.

IT IS THEREFORE ORDERED denying Petitioner’s requested relief, and dismissing Petitioner’s Petition.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-004650

04/18/2022

IT IS FURTHER ORDERED signing this Minute Entry ruling as a formal Judgment of the Court pursuant to Rule 6 of the Arizona Rules of Procedure for Special Actions.

The Court finds that no further matters remain pending, and this Judgment is entered pursuant to Rule 54 (c) of the Arizona Rules of Civil Procedure.

/s/ Stephen Hopkins

HONORABLE STEPHEN HOPKINS
JUDGE OF THE SUPERIOR COURT
MARICOPA COUNTY