

SUPREME COURT OF KENTUCKY

Ex Parte Leo G. Smith, Chief Public Defender, Louisville and Jefferson County Public Defender Corporation; and Elizabeth B. McMahon, Deputy Chief Public Defender, Louisville and Jefferson County Public Defender Corporation

2022-SC-0243-OA · No. 2022-SC-0243-OA · Decided October 20, 2022

SUMMARY

The Supreme Court of Kentucky denied a petition for a supervisory writ seeking interpretation of the Kentucky Rules of Professional Conduct concerning attorneys’ membership in a collective bargaining unit. The Court held that the petition presented speculative ethical issues, lacked well-defined and compelling circumstances, and did not involve matters of statewide importance. The Court expressly declined to reach the substantive ethical questions.

CASE DETAILS

COURT	Supreme Court of Kentucky
JURISDICTION	Kentucky
DECIDED	October 20, 2022
DOCKET	2022-SC-0243-OA
DISPOSITION	writ_denied
PROCEDURAL POSTURE	Petitioners sought a supervisory writ under Sections 109, 110, and 116 of the Kentucky Constitution to obtain an interpretation of the Kentucky Rules of Professional Conduct concerning attorneys' membership in collective bargaining units.
STANDARD OF REVIEW	A supervisory writ is an extraordinary remedy available only in well-defined and compelling circumstances; issuance depends on whether a majority of the Supreme Court believes the circumstances merit the writ.
PRECEDENTIAL VALUE	published
PARTIES	Leo G. Smith, Chief Public Defender, Louisville and Jefferson County Public Defender Corporation, Elizabeth B. McMahon, Deputy Chief Public Defender, Louisville and Jefferson County Public Defender Corporation

TOPICS

writ of certiorari

appellate procedure

ripeness

constitutional law

labor law

PRACTICE AREAS

appellate procedure

constitutional law

labor law

employment law

remedies

QUESTIONS PRESENTED

1. Whether Petitioners were entitled to a supervisory writ interpreting the Kentucky Rules of Professional Conduct to determine whether attorneys may belong to collective bargaining units.
2. Whether the alleged ethical issues were sufficiently concrete, compelling, and of statewide importance to justify issuance of an extraordinary supervisory writ.

HOLDINGS

1. The petition for a supervisory writ was denied because Petitioners failed to demonstrate well-defined and compelling circumstances warranting the extraordinary remedy.
2. The petition did not warrant a supervisory writ because the issues presented were limited to a relatively small number of attorneys in Jefferson County and did not demonstrate statewide impact.

KEY QUOTATIONS

“But a supervisory writ is an extraordinary remedy that should only be entertained in “well defined and compelling circumstances.”” (3)

“Resolving questions regarding potential ethical issues arising by attorneys joining a collective bargaining unit is a textbook example of an advisory opinion” (5)

“To be clear: we decline to issue the requested supervisory writ, but we take no position on the substantive issues raised by Petitioners.” (6)

FACTUAL BACKGROUND

Leo G. Smith and Elizabeth B. McMahon were supervisory attorneys in the Louisville and Jefferson County Public Defender Corporation. The International Brotherhood of Electrical Workers, Local 369, sought to represent nonsupervisory attorneys employed by the organization, and most nonsupervisory attorneys voted for union representation. Petitioners raised hypothetical ethical concerns about attorneys joining collective bargaining units, but neither the attorneys allegedly engaging in the conduct nor clients allegedly affected by it were parties to the proceeding.

PROCEDURAL HISTORY

After the National Labor Relations Board election concerning representation of nonsupervisory public defender attorneys, Petitioners sought a supervisory writ raising ethical concerns about unionization. The Court had previously directed that questions concerning interpretation of the Kentucky Rules of Professional Conduct should be presented through SCR 3.530. Petitioners then requested a formal ethics opinion from the Kentucky

Bar Association Ethics Committee, which declined to issue one, and Petitioners filed the present petition. The Supreme Court of Kentucky denied the petition and related motions without reaching the substantive ethical questions.

DISPOSITION

writ_denied

CASES CITED

- Seadler v. International Brotherhood of Electrical Workers, Local 369, 642 S.W.3d 712, 714 (Ky. 2022)
- Commonwealth v. Carman, 455 S.W.3d 916, 923 (Ky. 2015)
- Abernathy v. Nicholson, 899 S.W.2d 85, 88 (Ky. 1995)
- Nordike v. Nordike, 231 S.W.3d 733, 739 (Ky. 2007)

OPINION

PER CURIAM.

RENDERED: OCTOBER 20, 2022 TO BE PUBLISHED Supreme Court of Kentucky 2022-SC-0243-OA IN THE SUPREME COURT EX PARTE LEO G. SMITH, CHIEF PUBLIC PETITIONERS DEFENDER, LOUISVILLE AND JEFFERSON COUNTY PUBLIC DEFENDER CORPORATION; AND ELIZABETH B. MCMAHON, DEPUTY CHIEF PUBLIC DEFENDER, LOUISVILLE AND JEFFERSON COUNTY PUBLIC DEFENDER CORPORATION OPINION AND ORDER Under Sections 109, 110, and 116 of the Kentucky Constitution, Petitioners Leo G. Smith and Elizabeth B. McMahon move for a supervisory writ interpreting the Rules of the Supreme Court, including the Rules of Professional Conduct, to determine whether those Rules permit attorneys to be members of a collective bargaining unit.

Because Petitioners have failed to demonstrate entitlement to a supervisory writ, we deny their Petition. I. FACTUAL AND PROCEDURAL BACKGROUND Smith and McMahon are supervisory attorneys in the Louisville and Jefferson County Public Defender Corporation (“the Public Defender’s Officer”).

The Public Defender’s Officer is a non-profit organization rendering legal services to indigent persons accused of crimes and status offenses in Jefferson County. On November 5, 2021, a petition was filed with the National Labor Relations Board (“NLRB”) by the International Brotherhood of Electrical Workers (“IBEW”), Local 369, to represent non-supervisory attorneys employed by the Public Defender’s Officer.

But on December 2, 2021, Sheila Seadler, a non-supervisory staff attorney in the Public Defender’s Office filed a petition for a supervisory writ in this Court raising ethical concerns regarding the effects of unionization on public defender practice.¹ The Public Defender’s Office,

acting through Chief Public Defender Leo G. Smith and Deputy Chief Public Defender Elizabeth B. McMahon, filed a motion to intervene in that action.

In the meantime, the NLRB proceeded with an election. Most non-supervisory attorneys employed by the Public Defender Office voted to be represented by IBEW, Local 369, for the purpose of collective bargaining over terms and conditions of their employment. Then, on March 24, 2022, this Court rendered a decision in *Seadler v. International Brotherhood of Electrical Workers, Local 369*.² In *Seadler*, we held that “a supervisory writ [was] inappropriate because SCR 3.530 provide[d] the proper procedural mechanism to place before this Court a question relating to the interpretation of the Kentucky Rules of Professional Conduct.”³ *1 Seadler* is not a party to this case.

Moreover, IBEW, Local 369, has moved to file a response to the Petition in this action but is similarly not a party to the action. At present, only Petitioners Smith and McMahon are parties in this ex parte proceeding. ² 642 S.W.3d 712 (Ky. 2022). ³ Id. at 714. ² In response, Petitioners requested a formal ethics opinion from the Kentucky Bar Association’s Ethics Committee.

The Committee declined to issue a formal opinion in response to Petitioners’ letter. First, the Committee stated that Petitioners’ letter raised issues—including an individual’s right to assembly and free speech—that were beyond the purview of the Committee’s review.

Second, the Committee declined to issue an advisory opinion based on speculative conduct. Third, the Committee concluded that the ethical issues raised in Petitioners’ letter were confined to the Louisville and Jefferson Public Defender’s Office and did not raise issues requiring statewide attention. Now, Petitioners ask this Court to interpret the Kentucky Rules of Professional Conduct to address whether attorneys may become members of a collective bargaining unit.

II. ANALYSIS “Under [Kentucky Constitution] Section 110(2)(a), this Court has the power to issue writs necessary to ‘exercise control of the Court of Justice.’”⁴ Supervisory writs are only available in the Supreme Court and seek to address “this Court’s control over the proper functioning of our courts.”⁵ The standard “is very simply whether a majority of this Court believes the circumstances merit a supervisory writ.”⁶ But a supervisory writ is an extraordinary remedy ⁴ Id. at 713 (quoting Ky. Const. § 110).

⁵ Id. (quoting *Commonwealth v. Carman*, 455 S.W.3d 916, 923 (Ky. 2015)). ⁶ Id. (quoting *Carman*, 455 S.W.3d at 923). ³ that should only be entertained in “well defined and compelling circumstances.”⁷ We deny Petitioners’ request for a supervisory writ for two reasons.

First, Petitioners’ request does not present well defined and compelling circumstances justifying issuance of an extraordinary writ. Second, the ethical issues raised by Petitioners are not of statewide importance. The Petition raises speculative ethical issues that attorneys may face if they become members of a collective bargaining unit. Importantly, the two Petitioners involved in this

case are supervisory attorneys in the Public Defenders Office, not non-supervisory staff attorneys who may join a collective bargaining unit.

As such, Petitioners have failed to raise an active ethical controversy that is appropriate for resolution by this Court. Of course, the ethical issues raised by Petitioners may be compelling in the sense that they raise interesting, complex, and novel legal issues of first impression for this Court. But the Petition is based on potential, unspecified unethical conduct that may arise sometime in the future.

As such, Petitioners have not advanced compelling claims simply because it is unclear that the unethical conduct complained of will occur. In fact, the breadth of the issues raised by Petitioners cautions against issuance of a supervisory writ. Petitioners' arguments are not limited to attorneys practicing as public defenders or in the context of criminal defense.

7 Id. (quoting *Abernathy v. Nicholson*, 899 S.W.2d 85, 88 (Ky. 1995)). 4 Instead, Petitioners contend that it is unethical for any attorney in the Commonwealth to join a collective bargaining unit. True, Petitioners cite some rules that may be violated by an attorney's membership in a collective bargaining unit. Still, Petitioners do not provide any active unethical situation; instead, petitioners only advance claims about future or potential ethical issues caused by attorneys unionizing.

To our knowledge, none of the attorneys that are unionizing and thus potentially engaging in the allegedly unethical conduct are parties to this action. And no clients of such attorneys, including criminal defendants, are alleging unethical conduct resulting from an attorney's membership in a union. At bottom, answering the expansive legal questions raised by Petitioners would require this Court to imagine and then resolve several hypothetical ethical situations.

We understand that this result may seem inequitable since Petitioners followed our direction in *Seadler* by first seeking an ethics opinion from the Kentucky Bar Association Ethics Committee. But a supervisory writ is an extraordinary remedy, to be granted only in limited situations. And this Court does not issue advisory opinions.⁸ Resolving questions regarding potential ethical issues arising by attorneys joining a collective bargaining unit is a textbook example of an advisory opinion, especially when none of the attorneys ⁸ See *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky.

2007) ("It is a fundamental tenet of Kentucky jurisprudence that courts cannot decide matters that have not yet ripened into concrete disputes. Courts are not permitted to render advisory opinions.") (citations omitted). 5 who may engage in the alleged unethical conduct and no clients affected by potentially unethical conduct are parties to the action. Petitioners expressly ask, "when the Ethics Committee... chooses not to issue an informal opinion addressing an attorney's concerns, what is an attorney to do?" For one, any individual attorney concerned about the potential ethical

implications of joining or continuing membership in a collective bargaining unit may seek an opinion from the Kentucky Bar Association Ethics Committee.

While the Ethics Committee declined to issue an opinion in response to Petitioners' request, the Committee's response to Petitioners left open the possibility that the Committee would address ethical concerns raised by individual attorneys regarding union membership. Additionally, the KBA Ethics Hotline is a resource for attorneys to seek prompt and personal ethical advice.

The issues raised by Petitioners also do not have statewide impact. In the case at hand, the issues related to attorney membership in collective bargaining units are limited to a small number of attorneys in Jefferson County.

As such, we are reluctant to render a decision of statewide impact when the underlying issues only involve a relatively small number of attorneys practicing in the Commonwealth. Ultimately, the circumstances in this case are not sufficiently well defined and compelling to warrant the issuance of a supervisory writ.

To be clear: we decline to issue the requested supervisory writ, but we take no position on the substantive issues raised by Petitioners. 6 Accordingly, the Court ORDERS that: 1. The Petition for a supervisory writ under Sections 109, 110, and 116 of the Kentucky Constitution is DENIED; 2. International Brotherhood of Electrical Workers, Local 369's motion for leave to file a response is DENIED; 3.

Petitioner's motion for leave to file a reply to International Brotherhood of Electrical Workers, Local 369's, response is DENIED; and 4. International Brotherhood of Electrical Workers, Local 369's, motion for leave to file sur-reply is DENIED. All sitting. All concur. ENTERED: October 20, 2022 CHIEF JUSTICE 7