

SUPREME COURT OF NEW HAMPSHIRE

Lorenz v. New Hampshire Administrative Office of the Courts

151 N.H. 440 (2004) · Decided September 30, 2004

SUMMARY

The New Hampshire Supreme Court considered a motion to recuse its current and retired justices in a challenge by court stenographers to Administrative Order 2004-02 and alleged promises of continued employment. The court held that participation in issuing the challenged administrative order and the naming of the Supreme Court as a defendant did not independently require disqualification. It nevertheless conditionally granted recusal for certain justices because the appeal involved evaluating statements and conduct of current judicial colleagues who might become witnesses, while recognizing that the Rule of Necessity could require participation if substitutes were unavailable.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Per Curiam; Dalianis; Duggan; Galway
JURISDICTION	New Hampshire
DECIDED	September 30, 2004
DISPOSITION	other
PROCEDURAL POSTURE	Petitioners moved to recuse all current and retired New Hampshire Supreme Court justices from an appeal involving a challenge to Administrative Order 2004-02 and claims concerning alleged promises of lifetime employment. The Supreme Court conditionally granted the motion in part as to Justices Dalianis, Duggan, and Galway, recused itself from the appeal, and requested appointment of substitute justices.
STANDARD OF REVIEW	Recusal is evaluated under an objective standard: whether a reasonable, fully informed, disinterested observer would question the court's impartiality or entertain significant doubt that justice would be done.
PRECEDENTIAL VALUE	Published opinion; precedential
PARTIES	Lorenz and other court stenographers v. New Hampshire Administrative Office of the Courts, New Hampshire Supreme Court

TOPICS

appellate procedure

standard of review

administrative law

constitutional law

civil procedure

PRACTICE AREAS

judicial recusal

appellate procedure

administrative law

civil procedure

constitutional law

QUESTIONS PRESENTED

1. Whether a judge must recuse merely because the judge participated in issuing the administrative order challenged by the litigant.
2. Whether a judge must recuse merely because the litigant names the court as a party.
3. Whether the circumstances of the appeal created a reasonable question about the participating justices' impartiality.
4. Whether the Rule of Necessity could require the justices to participate if no substitute judge were available.

HOLDINGS

1. A judge is not disqualified merely because the judge participated in promulgating an administrative order whose validity is later challenged.
2. A judge is not disqualified merely because a litigant sues or threatens to sue the judge or names the court as a defendant, absent allegations of personal bias or interest.
3. Recusal is required when an objective, fully informed person might reasonably question the judge's impartiality.
4. If no substitute justice is available, the Rule of Necessity may require otherwise disqualified members of the court of last resort to participate so that the litigants receive a final adjudication.

KEY QUOTATIONS

“A court or judicial officer is often called upon to render an opinion of law on a matter on which the court or officer has formally rendered an opinion. Prior knowledge of a legal issue is not grounds to disqualify a judge.” (151 N.H. at 442)

“A judge cannot be disqualified merely because a litigant sues or threatens to sue him or her.” (151 N.H. at 443)

“If no judge can be found who possesses the requisite degree of impartiality in regard to a particular case, the rule of necessity dictates that the original judge assigned to the case need not be disqualified despite his or her partiality.” (151 N.H. at 444)

FACTUAL BACKGROUND

The petitioners were court stenographers whose employment was being terminated pursuant to Administrative Order 2004-02, issued by the New Hampshire Supreme Court in its administrative capacity. They alleged

reliance on written and oral promises of lifetime employment made by various chief justices and superior court justices, including two current Supreme Court colleagues. The superior court found the alleged promises unauthorized and beyond the officials' authority and found insufficient allegations that the Supreme Court or its chief justice had ratified them. If the petitioners prevailed, the two colleagues could become material witnesses at trial.

PROCEDURAL HISTORY

The petitioners, court stenographers, sought declaratory relief against the Administrative Office of the Courts and the New Hampshire Supreme Court, asserting equitable estoppel against termination except for good cause based on poor performance or misconduct. The superior court rejected their claims, ruling that alleged promises of lifetime employment were unauthorized and that the petitioners had not adequately alleged ratification by the chief justice or Supreme Court. During the resulting appeal, the petitioners moved to recuse the participating justices.

DISPOSITION

other

REMAND INSTRUCTIONS

The court conditionally recused itself and requested appointment of substitute justices under RSA 490:3. If no substitute judge is available, the Rule of Necessity may require the original justices to participate.

CASES CITED

- Douglas v. Douglas, 143 N.H. 419, 427-28 (1999)
- Kaufman v. Court of Appeal, 647 P.2d 1081, 1084-85 (Cal. 1982)
- In re Virginia Electric & Power Co., 539 F.2d 357, 364 (4th Cir. 1976)
- Directive No. 17 v. Vermont Supreme Court, 576 A.2d 127, 128-32 (Vt. 1990)
- State v. Criminal Defense Lawyers v. Kaye, 744 N.E.2d 123, 126-27 (N.Y. 2000)
- Kentucky Utilities v. South East Coal, 836 S.W.2d 407, 408 (Ky. 1992), cert. dismissed, 506 U.S. 1090 (1993)
- Office of Court Administrator v. Background Information Services, 994 P.2d 420, 425-26 (Colo. 1999)
- Berberian v. Kane, 425 A.2d 527, 527-28 (R.I. 1981)
- Morgenthau v. Cooke, 436 N.E.2d 461, 468-69 & n.3 (N.Y. 1982)
- State v. Bader, 148 N.H. 265, 268 (2002), cert. denied, 538 U.S. 1014 (2003)
- Taylor-Boren v. Isaac, 143 N.H. 261, 268 (1998)
- Cheney v. U.S. District Court for the District of Columbia, 124 S. Ct. 1391, 1394 (2004) (Scalia, J.)
- Grinnell v. State, 121 N.H. 823, 826 (1981)
- United States v. Will, 449 U.S. 200, 213-16 (1980)
- State Court Administrator v. Background Information Services, 994 P.2d 420, 426 (Colo. 1999)

OPINION

PER CURIAM.

*441MEMORANDUM OPINION

PER CURIAM.

The petitioners are court stenographers who seek a declaration that the respondents, the New Hampshire Administrative Office of the Courts and the New Hampshire Supreme Court, are equitably estopped from firing them except for good cause based only upon poor job performance or misconduct. They have moved to recuse all current and retired supreme court justices who participated in issuing Administrative Order 2004-02, which initiated the process of terminating the petitioners' employment.

The petitioners assert that disqualification is required because: (1) they challenge an administrative order in which the justices participated; and (2) their lawsuit names the New Hampshire Supreme Court "as a body... as a defendant." We hold that neither of these is a valid ground for disqualification.

We nonetheless believe it best to disqualify ourselves because this is a proceeding in which our impartiality might reasonably be questioned. See SUP. Ct. R. 38, Canons 2A, 3E(1). Accordingly, we conditionally grant the petitioner's motion as it pertains to Justices Dalianis, Duggan and Galway. Chief Justice Broderick and Justice Nadeau have already disqualified themselves for reasons unrelated to the petitioners' motion. We do not rule upon the petitioners' motion to disqualify retired members of the court. Each appellate judge must individually decide whether recusal is required. See *Douglas v. Douglas*, 143 N.H. 419, 427-28 (1999); see also *Kaufman v. Court of Appeal, Etc.*, 647 P.2d 1081, 1084-85 (Cal. 1982); *In re Virginia *442Elec. & Power Co.*, 539 F.2d 357, 364 (4th Cir. 1976) ("no one judge may, as a matter of discretion, disqualify others").

I

The court issued Administrative Order 2004-02 pursuant to its constitutional authority to administer the courts. See N.H. Const, pt. II, art. 73-a. The petitioners contend that the court is ethically barred from adjudicating a legal challenge to action it took pursuant to its constitutional duty to administer the courts. See *Directive No. 17 v. Vermont Supreme Court*, 576 A.2d 127, 129 (Vt. 1990). In essence, they assert that the court's dual roles as administrator and adjudicator compel disqualification. We disagree.

Nothing in the Code of Judicial Conduct requires our recusal on this basis. See *id.* Courts in other jurisdictions have routinely declined to recuse themselves merely because a litigant challenges a court directive. See, e.g., *id.* at 128-32; see also *State v. Criminal Defense Lawyers v. Kaye*, 744 N.E.2d 123, 126-27 (N.Y. 2000); *Kentucky Utilities v. South East Coal*, 836 S.W.2d 407, 408 (Ky. 1992), cert. dismissed, 506 U.S. 1090 (1993); *Office of Court Adm'r v. Background Info. Servs.*, 994 P.2d 420, 425-26 (Colo. 1999); *Berberian v. Kane*, 425 A.2d 527, 527-28 (R.I.1981).

In *Kaye*, for instance, the New York Court of Appeals ruled that the six judges who comprised the court when it issued the challenged order were not disqualified. *Kaye*, 744 N.E.2d at 126-27. The court reasoned that just as a court may reconsider its own rulings, so too may it rule upon the validity of its own administrative orders. *Id.* at 126-27; see also *Kentucky Utilities*, 836 S.W.2d at 408 (“A Justice is not disqualified from consideration of a case by participation in the promulgation of procedure regarding the administration of the Court... any more than a Justice who has voted on a case, thereby expressing an opinion on the merits, is barred from considering a petition for rehearing.”). As the Vermont Supreme Court has explained: “A court or judicial officer is often called upon to render an opinion of law on a matter on which the court or officer has formally rendered an opinion. Prior knowledge of a legal issue is not grounds to disqualify a judge.” Directive No. 17, 576 A.2d at 130.

Recusal on this ground is not required particularly because we have not yet opined as to whether Administrative Order 2004-02 is valid. “The fact is that our promulgation of the [administrative order] is not a prior determination that it is valid ____ That determination must await adjudication in this or a future case.” *Id.* If we “were required to determine *in vacuo* by a kind of advisory opinion and without the aid of *443 briefing and argument” that every administrative order we adopt “is valid from every standpoint,” administration of the court “as provided in the Constitution would effectively cease.” *Id.*

Nor is recusal required merely because the petitioners have named the court as a party. “A judge cannot be disqualified merely because a litigant sues or threatens to sue him or her.” *Id.* at 132. Recusal is particularly inappropriate on this basis where, as here, the court is named as a party solely because it issued the relevant administrative order, and the petitioners do not allege any personal bias or interest on the part of any individual court member. See *id.*

Moreover, we could not eliminate this ground for disqualification by appointing substitute judges to take our place. See *id.* If we were disqualified merely because the petitioners named the court as a defendant, substitute judges would be disqualified for the same reason; they would assume the institutional character of the court and be subject to the same disqualifications as the court currently composed. *Morgenthau v. Cooke*, 436 N.E.2d 461, 468-69, 469 n.3 (N.Y. 1982).

II

Canon 3E(1) of the Code of Judicial Conduct requires disqualification of a judge “in a proceeding in which the judge’s impartiality might reasonably be questioned.” SUP. Ct. R. 38, Canon 3E(1). “Whether an appearance of impropriety exists is determined under an objective standard, i.e., would a reasonable person, not the judge himself, question the impartiality of the court.” *State v. Bader*, 148 N.H. 265, 268 (2002) (quotation omitted), cert. denied, 538 U.S. 1014 (2003). “The test for the appearance of partiality is an objective one, that is, whether an objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case.” *Taylor-Boren v. Isaac*, 143 N.H. 261, 268 (1998) (quotation omitted).

We have no doubt that we could decide this matter fairly and impartially. The circumstances of

this appeal are unique, however. In their petition for declaratory relief, the petitioners allege “reliance on repeated promises and agreements, written and oral, by Defendants and/or their duly authorized agents including... chief justices of the New Hampshire Superior Court such as... Chief Justice Joseph P. Nadeau... and Supreme Court Chief Justice John T. Broderick.” In rejecting the petitioners’ claims, the superior court ruled that “the alleged promises of lifetime employment, made by various chief justices and justices of the superior court, were unauthorized and beyond the scope of their *444authority.” The superior court further ruled: “[T]he petitioners have failed to allege sufficient facts to support their claim that the chief justice of the supreme court or the supreme court ratified the alleged promises of lifetime employment.”

Nixon, Raiche, Manning, Casinghino & Leach, P.A, of Manchester CDavid L. Nixon and Leslie C. Nixon on the motion for recusal), for the petitioners; Kelly A Ayotte, attorney general (Laura E. B. Lombardi and Orville B. Fitch, II, assistant attorneys general, on the response to the motion for recusal), for the respondent Administrative Office of the Courts.

*444Resolution of this appeal thus requires us to interpret and evaluate the conduct and statements of two of our current colleagues. Should the petitioners prevail in this appeal, their litigation could proceed to trial and our two colleagues could be called as material witnesses. Under these unusual circumstances, although this is a close case, we believe that in the interests of justice it is better for us to resolve all doubts in favor of recusal. But see *Cheney v. U.S. Dist. Ct. Dist. of Columbia*, 124 S. Ct. 1391, 1394 (2004) (Scalia, J.) (denying motion to recuse). We conclude that an objective person, fully informed of these atypical facts, might reasonably doubt our impartiality. Accordingly, we recuse ourselves from this appeal and request that substitute justices be appointed under RSA 490:3 (1997).

Our recusal is conditioned, however, upon there being substitute judges available to sit on this case. In the event that no substitute judge is available, the Rule of Necessity might well compel our participation in this case. The Rule of Necessity provides that “[i]f no judge can be found who possesses the requisite degree of impartiality in regard to a particular case, the rule of necessity dictates that the original judge assigned to the case need not be disqualified despite his or her partiality.” *M. SHAMAN & a.*, *Judicial Conduct and Ethics* § 4.03, at 111-12 (3d ed. 2000). Under the Rule of Necessity, the actual disqualification of a member of a court of last resort “will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant’s constitutional right to have a question, properly presented to such court, adjudicated.” *Grinnell v. State*, 121 N.H. 823, 826 (1981) (quotations omitted); see also *United States v. Will*, 449 U.S. 200, 213-16 (1980). “If this court were to disqualify itself, there would be no other court to which the litigants could turn for a final answer.” *State Court Adm’r*, 994 P.2d at 426. Under the Rule of Necessity, we could not abrogate our responsibility to function as the court of last resort. *Id.*

Motion conditionally granted in part.

Dalianis, Duggan and Galway, JJ,, concurred..

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