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No. 201,872-6

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

JOHN R. MUENSTER,
Petitioner/Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION,
Respondent.

APPEAL FROM PROCEEDINGS INSTITUTED BY
RESPONDENT AGAINST PETITIONER IN
CONNECTION WITH WSBA NO. 16#00008

PETITIONER/APPELLANT'S OPENING BRIEF

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Petitioner/Appellant

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MUSIC

The Eagles, *Hotel California*
Songwriters: Don Felder / Don Henley / Glenn Frey
Hotel California lyrics © Universal Music Publishing Group

NOTES

I. INTRODUCTION

Via letters to the Chief Justice and to respondent Washington State Bar Association (“WSBA”) dated November 18, 2018, Petitioner cancelled and terminated his membership in the Washington bar.

Petitioner notified the Western and Eastern District Courts of Washington of his departure from the state bar. He cancelled and withdrew from his membership in the bar of those courts. In response, the federal courts entered orders acknowledging receipt, updating their records to reflect the cancellation, and closing petitioner’s file. This Court should follow suit (no pun intended).¹

¹ Respondent WSBA contends that Petitioner cannot quit without its permission. The WSBA is in conflict with this Court’s prior decisions, recent United States Supreme Court jurisprudence, and the First, Thirteenth and Fourteenth Amendments. To the best of Petitioner’s knowledge, no other state bar association has taken such a divisive path.

The WSBA seems be claiming some lyrics of the Eagles’ classic song *Hotel California* for its own:

“You can check out any time you like,
But you can never leave!”

Songwriters: Don Felder / Don Henley / Glenn Frey
Hotel California lyrics © Universal Music Publishing Group

This case can be resolved via the entry of an order like the federal court orders referenced above. A proposed order is included in the Appendix for the Court's convenience.

II. ASSIGNMENT OF ERROR:

Respondent WSBA and its disciplinary board erred by failing to dismiss WSBA case no. 16#00008 and failing to close Petitioner's file after he cancelled and terminated his bar membership and closed his practice in November, 2018.

Issues Pertaining to the Assignment of Error:

(a) **Mootness.** Whether WSBA case no. 16#00008 should be dismissed as moot because Petitioner cancelled and terminated his bar membership in 2018.

(b) **Lack of jurisdiction.** Whether WSBA case no. 16#00008 should be dismissed for lack of jurisdiction because Petitioner cancelled and terminated his bar membership in 2018.

(c) **Forced 2019 dues payment.** Whether the WSBA can force Petitioner, who quit the profession in 2018, to pay 2019 dues to the WSBA.

(d) **Suspension for non-payment of 2019 dues.** Whether the Court can suspend Petitioner, who quit the profession in 2018, for non-payment of 2019 dues to the

WSBA.

(e) **Forced membership.** Whether the WSBA can force Petitioner, who quit the profession in 2018, to stay in the WSBA.

(f) **WSBA Lack of Standing.** Whether the WSBA has standing to oppose Petitioner's departure from the profession.

(g) **Mootness/lack of jurisdiction re payment of costs.** Whether the WSBA can force Petitioner to pay "costs" it imposed in July, 2019, eight months after Petitioner cancelled and terminated his bar membership in November, 2018.

III. STATEMENT OF THE CASE

A. Petitioner's notice of cancellation of membership to Supreme Court, 11-18-2018.

(1) Via letter to the Chief Justice dated November 18, 2018, petitioner closed his practice, exited the profession and cancelled his membership in the Washington State Bar Association ("WSBA"). CP 94-97.²

² "CP" refers to the Clerk's Papers petitioner designated, which were numbered and filed with this Court on August 12, 2019.

B. Notice of cancellation of membership to bar association, 11-18-2019.

(2) Via letter to the Status Changes section of the WSBA dated 11-18-2018, Petitioner cancelled his membership. CP 120-121. Petitioner enclosed a copy of his 11-18-2018 letter to the Chief Justice. *Ibid.* He requested a refund of his 2018 dues on a *pro rata* basis. *Ibid.*

(3) In a letter dated 11-21-2018, the WSBA stated that Petitioner's "request to resign" had been "denied". Supp. CP 3.³ The letter cited "WSBA Bylaws, Sec. III.H". *Ibid.*

(4) Via reply to the WSBA dated 11-25-2018, Petitioner reiterated that he had closed his practice and exited the profession. He did not "request" to "resign". CP 124-125. Petitioner reiterated his request for a pro rata dues refund. CP 125. Further, he noted that he had the right to quit, that the "bylaw" cited by the WSBA letter did not apply, and that the WSBA could not prohibit Petitioner from exiting the organization as he had done. CP 125.

(5) In a response dated 11-26-2018, the WSBA advised that Petitioner's "profile" had been updated to reflect

³ "Supp. CP" refers to the Supplemental Clerk's Papers petitioner designated, which were numbered and filed with this Court on or about August 28, 2019.

his disavowal of membership. CP 158. His request for a pro rata refund was denied. *Ibid.*

(6) Via letters dated 11-18 and 11-21-2018, Petitioner advised the hearing officer in WSBA case no. 16#00008 as follows:

(a) that he had closed his practice, exited the profession, and disavowed his membership, CP 148-154;

(b) that ELC 9.3 (which requires a confession from a lawyer as a condition of “resignation”) and bylaws section 3(H) do not apply, CP 151-152;

(c) that the WSBA as currently structured is illegal, CP 148-149, 152; and

(d) that the WSBA lacks jurisdiction in this matter and dismissal is required, CP 149.

C. Petitioner’s memorandum urging dismissal, 12-26-2018

(7) By way of follow-up on his letters to Chief Justice Fairhurst and the hearing officer, petitioner filed a memorandum urging dismissal of the matter, with exhibits. CP 98-128.

D. Petitioner’s Notice of Appeal to the disciplinary board, 12-28-2018.

(8) On December 28th, 2018, Petitioner timely filed and served a notice of appeal to the disciplinary board (“board”) from the ruling of the hearing officer in this matter. CP 211-221. In Petitioner’s notice of appeal, petitioner sought dismissal of the proceeding for lack of jurisdiction. Petitioner is not a WSBA member. His previously-filed memorandum for dismissal for lack of jurisdiction, attached to his notice of appeal, served as his briefing before the board. *See* CP 129-130; CP 214-221, CP 236-239.

E. Petitioner’s renewed notice of lack of WSBA jurisdiction, 4-12-2019.

(9) On April 12, 2019, Petitioner filed and served on the board a Renewed Notice of Lack of WSBA Jurisdiction, with exhibits. CP 223-235.

The notice included another copy of Petitioner’s notice of appeal to the Board and another copy of his memorandum/brief in support of dismissal. CP 226-235. In his transmittal email of the notice to the WSBA clerk, CP 223, Petitioner requested that the renewed notice, the notice of appeal and his memorandum/brief be forwarded to the members of the board. CP 223.

F. Petitioner's notice re briefing, lack of WSBA jurisdiction.

(10) Also on April 12, Petitioner served and filed his Designation of Clerk's Papers and Notice re Briefing, Lack of WSBA Jurisdiction. CP 129-130. This document designated the previously filed briefing (docket nos. 117.00, 118.00 and the Renewed Notice of Lack of Jurisdiction) as Petitioner's briefing for the board to review. CP 236-239.

G. Suspension for non-payment of 2019 bar dues after petitioner quit the bar in 2018.

(11) On 1-22-2019, respondent WSBA sent Petitioner an email requesting payment of 2019 bar dues. Supplemental Clerk's Papers ("SCP") 19-20.

(12) On 1-29-2019, Petitioner replied and advised that he had closed his practice and terminated his membership via email on 11-18-2018. SCP 22. Petitioner advised that he was not renewing his previously terminated membership. *Ibid.* He requested that the WSBA correct its records. *Ibid.*

(13) On March 19th and 21st, 2019, respondent emailed petitioner threatening suspension if he did not pay 2019 dues (\$618.90) and submit other 2019 membership renewal documents by May 7, 2019. SCP 24-25, SCP 27-28.

(14) As noted above, Petitioner had previously terminated his membership in the bar in his November 2018 letters. CP 94-97; CP 121. Petitioner had previously advised the bar that he was not renewing his membership for 2019. SCP 17, 22. Accordingly, he did not send in the renewal fees or documents.

(15) On April 7th, 2019, Petitioner wrote to the Chief Justice requesting a letter or memo from the Court/Clerk's Office stating that since petitioner quit the profession, he was not required to renew his membership or pay 2019 dues. SCP 7-9. The letter included six pertinent documents, Exhibits A through F, as well as case authority. SCP 10-28.⁴

(16) The WSBA requested that Petitioner be suspended for non-payment of the 2019 dues and non-filing of the 2019 renewal documents. Even though Petitioner had already quit the profession in 2018, this Court "administratively suspended" Petitioner on May 8th, 2019, along with many other lawyers. *See Excerpt of Order*, Supreme Court no. 201,854-8, SCP 29-31.

⁴ Respondent WSBA was cc'ed on the letter.

H. Federal court orders acknowledging Petitioner’s cancellation of his membership and closing his file.

(17) In a June 28, 2019 filing, Petitioner advised the U.S. District Court for the Western District of Washington that he had permanently cancelled his membership to the practice of law in the state of Washington. The Court entered an order directing the Clerk to update Petitioner’s bar status to show that he had permanently resigned. *See Order, In re John Muenster*, Case No. 2:19-rd-00015 (W.D.Wash), SCP 36-37.

(18) In a July 5, 2019 filing, Petitioner advised the U.S. District Court for the Eastern District of Washington that he had closed his practice and exited the profession. The Court entered an Order Accepting Resignation. The Court directed the Clerk to close the file. *See Order, In re John Muenster*, Case No. 2:19-MC-0015-TOR (E.D.Wash), SCP 38-39.

I. Entry of “order assessing costs” in July 2019, after Petitioner’s termination of membership in November, 2018.

As noted above, Petitioner terminated his membership in the bar via letters dated 11-18-2018. Petitioner filed his notice of appeal on May 30, 2019. *See* CP 197ff. On July 16, 2019, the disciplinary board entered an order assessing costs

and expenses. SCP 33. Petitioner timely filed a notice of appeal to this Court from that order. The Clerk advised by letter that a separate notice of appeal is not necessary and that argument as to the costs order may be raised in this brief.

IV. ARGUMENT

A. The Standard of Review.

This is a documents case. The appeal presents issues of law. Issues of law are reviewed *de novo*.

The issue of jurisdiction was repeatedly raised during this proceeding in the documents discussed above. Further, Petitioner's objection to the WSBA's jurisdiction may be raised at any time. *See, e.g., Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wash.2d 542, 556, 958 P.2d 962 (1998); RAP 2.5(a)(1). Review is *de novo*.

B. Mootness. WSBA Case No. 16#00008 Should Be Dismissed As Moot Because Petitioner Cancelled And Terminated His Bar Membership In 2018.

This Court has long recognized the right to quit. *See, e.g., Domandich v. Doratich*, 165 Wash 315, 317, 5 P.2d 310 (1931) (acknowledging the right to quit in fishing employment case); *St. Germain v. Bakery and Confectionary Workers Union*, 97 Wash. 282, 288-89, 166 P. 665 (1917) (acknowledging the right to quit in union picketing case).

Petitioner closed his practice. He exercised his right to quit when he sent his cancellation and termination letters dated November 18, 2018 to the Chief Justice and to the WSBA. At that point, the proceedings in WSBA case no.16#00008 became moot.

The case against petitioner is moot because he no longer holds the position which is the subject of the proceeding. *In re Recall Charges Against Seattle Sch. Dist. No. 1 Dirs. Butler-Wall*, 162 Wn.2d 501, 505, 173 P.3d 265 (2007) (action challenging recall petition moot because school board members to be recalled would no longer be in office when petition put to vote).

The WSBA proceeding here seeks removal of petitioner from his office as an attorney. Petitioner is no longer in office. He has permanently cancelled his membership in the bar. The proceeding is moot and should be dismissed.

C. Lack of jurisdiction. WSBA case no. 16#00008 should be dismissed for lack of jurisdiction because petitioner cancelled and terminated his bar membership in 2018.

Respondent WSBA is a state agency created by the Legislature. RCW 2.48.010. Respondent cannot exercise

jurisdiction over persons beyond that granted by the state bar act (“act”).⁵

No provision of the act prohibited petitioner from quitting his membership last November. He was entitled to quit at any time. The act does not give the agency any jurisdiction over petitioner after he closed his practice and quit his membership in 2018. No provision of the act says that the WSBA can pursue petitioner now in case no. 16#00008. The matter should be dismissed for lack of jurisdiction.

D.(1) Forced 2019 dues payment. The WSBA cannot force petitioner, who quit the profession in 2018, to pay 2019 bar dues to the agency.

D.(2) Suspension for non-payment of 2019 dues. The Court cannot suspend petitioner, who quit the profession in 2018, for non-payment of 2019 dues to the WSBA.

The state bar act grants authority to respondent WSBA to set and collect bar dues on an annual basis. RCW 2.48.130. Under the act, bar membership is not permanent—it must be renewed every year. A lawyer loses his membership if he

⁵ In the 2019 spring session, both houses of the Legislature voted to repeal the state bar act. See ESHB 1788.

does not pay the annual dues. RCW 2.48.160.

The act does not allow the bar to collect 2019 dues from petitioner. Petitioner is not practicing law. He declined to renew his membership for 2019. He permanently quit the profession in 2018.

The First and Fourteenth Amendments to the Constitution of the United States prohibit the collection of 2019 bar dues from petitioner. *Janus v. AFSCME, Council 31*, 583 U.S.--, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018). *Janus* tells us the following:

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern. . . .

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. §315/6(e). No form of employee consent is required.

This procedure violates the *First Amendment* and cannot continue.

Janus v. AFSCME, 138 S. Ct at 2459-60, 2486, 201 L.Ed.2d at 934, 963-64.

Petitioner's facts on this issue are stronger than *Janus*. Petitioner quit the WSBA in November, 2018. Both the respondent and the Court received immediate written notice of Petitioner's termination and cancellation of his membership. Nonetheless, over petitioner's written objections, the WSBA demanded the 2019 dues payment and the Court suspended petitioner for non-payment of 2019 dues—even though petitioner quit the bar in 2018. *See* SCP 5-31.

These actions violated the First and Fourteenth Amendments. The remedy is to follow the example set by the federal courts in this case: (a) vacate the suspension, (b) acknowledge that petitioner has terminated and permanently cancelled his bar membership, and (c) close petitioner's file. *See* SCP 34-39.

E. Forced membership. The WSBA cannot force petitioner, who quit the profession in 2018, to stay in the WSBA.

The WSBA cannot force petitioner to stay in the

WSBA. The case is moot. The WSBA lacks jurisdiction. The WSBA cannot force petitioner to pay 2019 dues. The contents of Sections IV.B, IV.C and IV.D of this brief are incorporated herein by reference as though fully set forth.

In addition to the foregoing, petitioner challenges jurisdiction because Washington's mandatory bar association laws⁶ are unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States. A challenge to the constitutionality of North Dakota's mandatory bar association laws was recently considered by the United States Supreme Court. *See Fleck v. Wetch (North Dakota State Bar Association)*, --U.S.--, 139 S. Ct. 590, 202 L.Ed.2d 423 (2018) (petition for certiorari challenging mandatory bar membership requirement; *cert. granted and case remanded* for consideration under *Janus*). The petition for certiorari in *Fleck* may be found at:

https://www.supremecourt.gov > 0171215163209925_Fleck Petition. Should the United States Supreme Court hold mandatory bar associations unconstitutional, petitioner seeks to apply the ruling in this case.

Finally, forcing petitioner to pay bar fees and remain a bar member after he has quit would appear to run afoul of the Thirteenth Amendment. The Amendment prohibits slavery

⁶ See RCW 2.48 et.seq., RCW 2.48.170.

and “involuntary servitude”. For purposes of constitutional law, the Amendment codifies the right to quit. One federal statute that was enacted to enforce the Amendment is the Trafficking Victims Protection Act (“TVPA”), Title 18, United States Code , Section 1595.

The statute prohibits obtaining labor via threats of financial harm. *See United States v. Dann*, 652 F.3d 1160, 1163-66 (9th Cir. 2011). “Congress in 2000 ‘intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion.’ ” *Dann*, 652 F3d at 1169; *Tanedo v. East Baton Rouge School Board*, 2012 U.S. Dist. LEXIS 157725, *8-10 (C.D.Calif 2012). In *Tanedo*, the defendants recruited Filipino nationals to work as teachers in Louisiana schools. The defendants required the teachers to pay fees in order to obtain visas and get U.S. employment. After arrival in Louisiana, the Filipino teachers were required to pay more fees in order to hold their jobs and avoid deportation. In the ensuing class action, the California federal court held that this conduct fell within the scope of the TVPA prohibition against non-violent servitude. *See Tanedo*, 2012 U.S. Dist. LEXIS 157725, *7-*16.

Petitioner has not located another case in which a state bar association sought to force a lawyer to remain on the rolls

and pay dues after he quit the profession. Perhaps the WSBA is the only bar association in the country to attempt this.

The WSBA cannot force petitioner to remain a member after he quit. The Court should acknowledge petitioner's cancellation and termination of his membership, dismiss case no. 16#00008, and close the file.

F. WSBA Lack of Standing. The WSBA lacks standing to oppose petitioner's departure from the profession.

When petitioner quit his membership, respondent sent a letter purporting to "deny" what it termed a "request to resign", citing a WSBA Bylaw, Sec. III.H. SCP 3. That provision attempts to prohibit a "voluntary resignation" if a disciplinary matter is pending. The bylaw does not apply because petitioner did not submit a "written request for voluntary resignation". Instead, Petitioner terminated and cancelled his membership as he had the right to do. His letter to the bar was a notification, not a request.

Nothing in the state bar act authorized this bylaw. Nothing in the act says a "written request for voluntary resignation" is a mandatory condition precedent to quitting the profession. The act does not give the WSBA the capacity to pursue the petitioner, who had quit the organization. No

right of action for the WSBA was created. Neither the act nor the bylaw give the WSBA standing to pursue a non-member who terminated and cancelled his membership in 2018.⁷

G. Mootness/lack of jurisdiction re payment of costs. Respondent WSBA cannot force petitioner to pay “costs” it imposed in July, 2019, eight months after petitioner cancelled and terminated his bar membership in November, 2018.

Respondent disciplinary board entered an “order assessing costs and expenses” in July 2019. SCP 33. Petitioner timely filed a notice of appeal from the order. The Clerk of this Court advised in a letter that a separate notice of appeal was not necessary. The Clerk advised that petitioner could raise challenges to the order in this brief.

The order is void due to mootness and lack of jurisdiction. There is no authority in the state bar act for the entry of a “costs and expenses” order against a non-member who terminated and cancelled his membership in 2018. The discussion in Sections IV.B and IV.C of this brief is incorporated herein by reference as though fully set forth.

⁷ The discussion in Section IV.C of this brief is incorporated by reference.

In addition, the order violates the First and Fourteenth Amendments under the analysis set forth in *Janus v. AFSCME, supra*. The discussion in Section IV.D of this brief is incorporated herein by reference. The order should be vacated.

V. CONCLUSION

The Court should acknowledge petitioner's cancellation and termination of his bar membership, dismiss case no. 16#00008, vacate the "costs and expenses" order and close the file. A proposed order is provided in the Appendix for the Court's convenience.

DATED this the 28th day of August, 2019.

Respectfully submitted,
S/ John R. Muenster
JOHN R. MUENSTER
Petitioner/Appellant

Appendix—Proposed Order

Supreme Court No. 201,872-6

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

JOHN R. MUENSTER, Petitioner-Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION,
Respondent

PETITIONER-APPELLANT'S

PROPOSED ORDER

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Petitioner-Appellant

PER CURIAM:

THIS MATTER came on regularly for entry of a dispositional order by this Court. The Court has reviewed the records and files herein and is fully advised.

Via letters to the Chief Justice and to respondent Washington State Bar Association (“WSBA”) dated November 18, 2018, Petitioner permanently cancelled and terminated his membership in the Washington bar. CP 94-97; CP 120-121.

Petitioner notified the Western and Eastern District Courts of Washington of his departure from the state bar. He permanently cancelled and withdrew from his membership in the bar of those courts. In response, the federal courts entered orders acknowledging receipt, updating their records to reflect the cancellation, and closing petitioner’s file. CP 36-39.

The Court acknowledges petitioner’s permanent cancellation and termination of his membership in the Washington bar. WSBA case no. 16#00008 is dismissed. The costs and expenses order, SCP 33, is vacated. In view of petitioner’s permanent termination of his membership, the previous administrative suspension of petitioner, *see* SCP 29-31, is vacated. Petitioner’s file is closed.

DATED this ____day of August, 2019.

FOR THE COURT:

Justice of the Supreme Court

CERTIFICATE OF SERVICE

I certify that on or about the date set forth below, I filed the foregoing document with the Clerk of the Court via online filing. On or about the same date, I served counsel for the respondent via online filing and email.

DATED this the 28th day of August, 2019.

S/ John R. Muenster

John R. Muenster

MUENSTER & KOENIG

August 28, 2019 - 3:28 PM

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