

NO. 28183

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

KURT MAUSERT, Petitioner,

vs.

OFFICE OF DISCIPLINARY COUNSEL, Respondent

K. HAMAKAHOA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2006 OCT 31 AM 9:20

FILED

ORIGINAL PROCEEDING

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

(By Moon, C.J.; Levinson, Nakayama, Acoba, and Duffy, JJ.)

Petitioner Kurt Mausert wrote to ask that we "examine the conduct (or lack thereof) by [Disciplinary Counsel] and her office." In sum, Petitioner seeks review of Disciplinary Counsel's refusal to investigate and prosecute Petitioner's grievances about the Office of the Prosecuting Attorney for the City and County of Honolulu and the Office of the Attorney General for the State of Hawai'i with regard to the extradition and prosecution of a person charged with killing Petitioner's brother, Eric Mausert, in 1979.

Because Petitioner is clearly seeking our review of Disciplinary Counsel's actions and has no standing under Rule 2 of the Rules of the Supreme Court of the State of Hawai'i (RSCH) to seek Review of Disciplinary Counsel's decisions, Petitioner's request is reviewed as a petition for a writ of mandamus. See In re Disciplinary Board of Hawai'i Supreme Court, 91 Hawai'i 363, 368, 984 P.2d 688, 693 (1999).

A writ of mandamus and/or prohibition will not issue unless a petitioner demonstrates a clear and indisputable right to relief and a lack of other means to redress adequately the alleged wrong

or obtain the requested action. . . .
Mandamus relief is available to compel an official to perform a duty allegedly owed to an individual only if the individual's claim is clear and certain, the official's duty is ministerial and so plainly prescribed as to be free from doubt, and no other remedy is available. . . . Barnett v. Broderick, 84 Hawai'i 109, 111, 929 P.2d 1359, 1361 (1996).

Id., at 368, 984 P.2d at 693.

. . . Duties imposed by Rule 2 upon ODC and the Disciplinary Board are duties owed to this court. In furtherance of those duties and in recognition of the limited resources available and the difficulties inherent in prosecuting any accusation of unethical behavior, our rules grant to ODC and the reviewing Disciplinary Board members the discretion to determine whether pursuit of particular disciplinary allegations is warranted. . . .

Id. at 369, 984 P.2d at 694. We review Disciplinary Counsel's actions with regard to disciplinary investigations and prosecutions in light of the mandamus standard and the considerable discretion granted by our rules with regard to the investigation and prosecution of disciplinary accusations. We will not disturb the exercise of Disciplinary Counsel's discretion except upon evidence that Counsel has abused or acted in excess of that discretion. See, e.g., Breiner v. Sunderland, No. 27889, slip op. (Haw. Sept. 22, 2006).

In sum, Petitioner has alleged that Disciplinary Counsel:

- a. failed to question or investigate Honolulu prosecutors about:
 - i. whether the prosecutors previously employed an extradition treaty against individuals other than the individual accused of killing Petitioner's brother in 1979;
 - ii. why the extradition treaty was not used to extradite the accused person from the Philippines;
 - iii. why, in 1998 and 2000, the prosecutor's staff told Petitioner there was no extradition treaty;
 - iv. why a prosecutor's office employee "allowed" the accused person to be released without bond, charges, or steps to ensure the accused person stayed within reach of the prosecutor's office;
 - v. why the accused person was not tried in absentia; and
- b. failed to investigate Petitioner's allegations that the Attorney General's Office
 - i. covered up corruption or incompetence in the Honolulu prosecutor's office; and
 - ii. facilitated the accused person's flight from justice by not taking action to extradite the accused person after the existence of the extradition treaty and the location of the accused person were known.

As a "creature[] of [the supreme] court, created pursuant to the court's inherent and constitutional authority to regulate the practice of law," In re Disciplinary Board, 91 Hawai'i at 368, 984 P.2d at 673, Disciplinary Counsel has only the authority granted by RSCH 2. See RSCH 2.6. The authority granted to Disciplinary Counsel does not include, per se, the authority to question either prosecutors or the Attorney General about most of the subjects for which Petitioner demanded investigation (e.g., whether prosecutors previously employed the extradition treaty against other individuals, why the extradition treaty was not used to extradite the accused person, why a prosecutor's office employee "allowed" the accused person to be released without bond, charges, or steps to ensure the accused person stayed within reach of the prosecutor's office, or why the accused person was not tried in absentia). Such subjects are squarely within the prosecutor's executive discretion. Cf. Naluai v. Naluai, 99 Hawai'i 363, 368, 55 P.3d 856, 861 (App. 2002) ("[t]he prosecutor not only has complete discretion as to whether to charge, he also has complete discretion as to when charges will be filed, what charges will be filed, how many charges will be filed, and under what statutes the charges will be made").

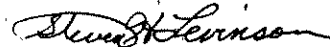
Petitioner's contention that an employee of the prosecutor's office misrepresented the existence of an extradition treaty implies a violation of Rule 4.1 of the Hawai'i Rules of Professional Conduct (HRPC), but the statements of the employee, the fact of the treaty, and the conditions of HRPC 5.3 would have to be proven to the satisfaction of a hearing

officer or committee and the Disciplinary Board. "[I]n recognition of the limited resources available and the difficulties inherent in prosecuting any accusation of unethical behavior," In re Disciplinary Bd., 91 Hawai'i at 369, 984 P.2d at 694, we cannot conclude Disciplinary Counsel abused her discretion in refusing to pursue that contention. Petitioner's other contentions are not subjects for disciplinary proceedings. Petitioner has not alleged facts that would require an answer to the petition from Disciplinary Counsel. Therefore,

IT IS HEREBY ORDERED, in accordance with Rule 21(c) of the Hawai'i Rules of Appellate Procedure, that the Petition for a Writ of Mandamus is denied.

DATED: Honolulu, Hawai'i, October 31, 2006.

Kurt Mausert,
petitioner pro se,
on the petition



Pamela E. Dublasi, Sr.