

Who's Violating Whose Rights?

Written by

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On April 29, the Iowa Supreme Court heard oral arguments for the appeal of a nine-year-old Davenport Civil Rights Commission (DCRC) case, *Botsko v. Nabb*. Finally, much-needed clarity was brought to bear by attorney Tom Waterman, who presented on David Botsko's behalf. (A link to the 28-minute video is available [HERE](#).)

In 2000, ex-employee Inga Nabb brought a suit against ex-employer Botsko claiming national-origin, sex, and age discrimination, including sexual harassment. Administrative Law Judge (ALJ) Kevin Visser, who heard three days of testimony by 17 witnesses, ruled that Botsko was innocent of all charges.

The Davenport Civil Rights Commission reversed the ALJ's decision, declaring Botsko guilty and ordering him to pay more than \$60,000 in fines, part of which went to the DCRC itself.

The outrage that defines this case is the flagrant lack of due process for Botsko, inherent in the structure of the DCRC itself. It acts as prosecutor, judge, and jury. The DCRC is responsible for determining probable cause, for prosecuting its findings, and then, if it doesn't like the decision by a qualified administrative law judge, it can reject his/her decision and impose its own verdict.

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Visser listened to three days of testimony, had all supporting documentation (including detailed briefs from both sides detailing the case), and made an informed decision after weeks of deliberation, finding Botsko innocent, meaning he was not liable for any of the claims against him. (Links to our previous coverage can be found [H ERE](#).)

The DCRC, made up of seven laypeople, heard 10-minute presentations to inform its reversal of Visser's decision.

The debate is afoot whether the DCRC as a local entity is subject to the Open Meetings Act, which disallows closed meetings except under certain exceptions, none of which would apply for deliberations such as *Botsko v. Nabb*. The DCRC maintains it is not subject to the law, while Botsko argues it is. Where an individual's rights are concerned, any secrecy or limited access should be eliminated in favor of full disclosure.

According to the ordinances that govern the DCRC, its director cannot unduly influence commissioners during deliberations. This would indicate that Director Judith Morrell should not sit in on meetings while the DCRC's seven commissioners make decisions to accept or reject AJLs' rulings. The DCRC arguably violated this rule in the case of *Botsko v. Nabb*, in which Morrell was present during deliberations.

Botsko asked the court to find the DCRC in violation of his due-process rights but was told that he had the burden of proving bias on the DCRC's part. So he sued the DCRC for the tapes of the deliberations but was denied access. The Iowa Supreme Court even recognized this contradiction and the "impossible burden" of proof imposed on Botsko when the very information he needed to prove bias was not available to him.

During oral arguments, Waterman argued that Botsko should not have to prove bias - in other words whether Morrell influenced commissioners - because her mere presence in the room was violation enough to infer bias. This claim was further bolstered by her presence at Nabb's table during the trial.

Waterman likened Morrell's presence to that of the prosecuting attorney being present in the

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jury room during deliberations for a case. Whether jurors were influenced by his/her presence, or to what degree, is moot. His/her presence would be considered completely inappropriate and a violation of the defendant's due-process rights. As was the case with Botsko's due-process rights.

While the tapes of the DCRC's deliberation of *Botsko v. Nabb* would verify, one way or the other, whether Morrell participated in an influencing capacity, Waterman's point is well-taken: It shouldn't matter. Appearances alone and the "bright-line rule" (meaning the line not to cross should be clear and unambiguous) should apply relative to Botsko's due-process rights.

The DCRC is endowed with quasi-judicial powers, such as the right to subpoena documents, seize property and bank accounts, impose fines, etc. Therefore, it should be held to the same nonnegotiable standards of due process that any other judicial body with such profound power over our lives is held to.

Nabb's attorney, Dorothy O'Brien, absurdly argued that Morrell's capacity was not as a prosecutor, likening her instead to a law clerk that simply helped administratively with exhibits during the trial. By statute, the executive director is the prosecutor, and Morrell's signature on numerous legal briefs submitted to the courts by Nabb over the past nine years is a glaring indicator of her prosecutor's position, let alone bias.

Both attorneys asked for a final ruling by the Iowa Supreme Court. It is possible for it to be remanded back to the DCRC, for a third time, an outcome all parties would decry, especially Botsko because what about the DCRC has changed? Certainly not the bias against him. Even though some of the commissioners are new, Morrell is still in charge, and its processes remain substantively the same. (Except now, thanks to another departure from wisdom on the part of last year's Davenport City Council, the DCRC can go after attorney's fees from the respondent if the claimant wins, giving the DCRC even more incentive to prosecute cases and decide them in favor of claimants, overturning any adjudication that disagrees with its agenda because it also has a financial stake in the outcome.) A ruling is expected in the next several weeks.

Regardless of the ruling, Davenport needs to amend its civil-rights ordinance to reflect a fair process not open to corruption by its very structure, and stop the gaping wound that has characterized this organization through nearly two decades. The way it is currently structured, the DCRC is potentially one of the worst violators of civil rights. Every employer in Davenport

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would do well to review these oral arguments as a primer to the nightmare that could be their own, as well. Davenport owes a debt of gratitude to Botsko for persevering these nine years and exposing the hypocrisies of our current system.