

**IN THE COURT OF APPEALS OF IOWA**

No. 2-300 / 11-1281  
Filed June 13, 2012

**JOHN W. BERNAU,**  
Plaintiff-Appellant,

**vs.**

**DUBUQUE COUNTY MAGISTRATE  
NOMINATING COMMISSION,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Dubuque County, Todd A. Geer,  
Judge.

Unsuccessful applicant for a district associate judge position appeals the  
district court's dismissal of his petition for writ of certiorari. **APPEAL  
DISMISSED.**

John W. Bernau, Manchester, pro se.

Thomas J. Miller, Attorney General, and Pamela J. Griebel and Meghan  
Gavin, Assistant Attorneys General, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ. Bower,  
J., takes no part.

**EISENHAUER, C.J.**

On July 14, 2011, the Dubuque County Magistrate Nominating Commission convened to interview the fourteen applicants for a vacant district associate judge position in judicial election district 1A. The commission nominated three attorneys to fill the vacancy. Applicant/attorney John W. Bernau was not a nominee. Subsequently, the district court judges selected nominee Robert Richter as the district associate judge.

On July 26, 2011, Bernau filed a petition for issuance of writ of certiorari alleging the commission acted illegally and seeking a stay of the commission's decision. On July 28, Bernau filed a motion requesting the clerk of court present the petition to a district court judge.

We note, “[a] writ of certiorari lies where an inferior tribunal, board, or official, exercising judicial functions, has exceeded its proper jurisdiction or otherwise acted illegally.” *Stream v. Gordy*, 716 N.W.2d 187, 190 (Iowa 2006) (quoting *Waddell v. Brooke*, 684 N.W.2d 185, 189 (Iowa 2004)). “Relief through certiorari is strictly limited to questions of jurisdiction or illegality of the challenged acts.” *French v. Iowa Dist. Ct.*, 546 N.W.2d 911, 913 (Iowa 1996).

On August 1, the district court conducted a hearing on Bernau's petition. Bernau argued for issuance of the writ. No one appeared on behalf of the commission. On August 4, the court dismissed Bernau's petition, ruling the commission “was not engaged in a judicial function in selecting the three nominees.” Alternatively, the court ruled, assuming the performance of a judicial function, “the court finds no basis for a determination that the commission acted illegally in selecting the three nominees.”

Bernau appealed. On August 17, 2011, he filed an application for stay requesting the Iowa Supreme Court stay the August 19, 2011 investiture of Judge Richter until Bernau's appeal was resolved. On August 18, the court denied his request for a stay.

In this appeal, Bernau initially requested we reverse the district court, void the judicial appointment, and (1) remand "with instructions for re-nomination and appointment" or (2) remand "with authorization and direction to proceed with a three-for-one magistrates for district associate judge swap with instructions that nominations shall come out of the previous pool."<sup>1</sup>

However, Bernau's subsequent reply brief states newly-appointed Judge Richter has held his position for approximately six months and none of the alleged illegal actions of the commission "can or should be attributed to Judge Richter. He simply sought the position, and was successful." Accordingly, Bernau modified his request for relief: "To possibly unseat him now, while legally appropriate, would run afoul of [petitioner's] personal morals. Therefore, [petitioner] no longer seeks a remand with re-nomination" and "now takes the position that the appropriate relief is remand as an advisory opinion with guidance and instruction."

Specifically, Bernau requests we advise, guide, and instruct:

(1) [T]he issuance of a writ of certiorari is an appropriate action to challenge any alleged illegalities committed by a judicial nominating commission . . . ; (2) the term "current business partner" encompasses persons employed by an entire [county] . . . ; and

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<sup>1</sup> Certiorari actions are tried at law and reviewed for the correction of errors at law. *State Pub. Defender v. Iowa Dist. Ct.*, 731 N.W.2d 680, 683 (Iowa 2007). The court's factual findings are binding if well supported. *State Pub. Defender v. Iowa Dist. Ct.*, 644 N.W.2d 354, 356 (Iowa 2002).

(3) the phrase “at the time of appointment” relating to judicial residency means at investiture, the final step in appointment . . . .

On February 21, 2012, the commission filed a motion to dismiss based on Bernau’s request for “remand as an advisory opinion.” Bernau resisted. On February 23, the Iowa Supreme Court determined “it would be appropriate to submit the motion with the appeal.”

We first address the commission’s motion to dismiss. Iowa courts have repeatedly held we have no “duty nor the authority to render advisory opinions.” *Stream*, 716 N.W.2d at 193 (quoting *Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997)); see *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 826 (1994) (recognizing “review proceedings will not be allowed for the purpose of settling merely abstract questions”); *State ex rel. Turner v. Midwest Dev. Corp.*, 210 N.W.2d 525, 526 (Iowa 1973) (holding no duty nor authority to issue advisory opinions); *Blizek v. Eagle Signal Co.*, 164 N.W.2d 84, 87 (Iowa 1969) (declining to issue advisory opinion setting future guidelines on fees and expenses for district court); *Nitta v. Kuda*, 89 N.W.2d 149, 152 (Iowa 1958).

Based on Bernau’s most recently-requested relief, we conclude there is no actual, present controversy with respect to the legality of the commission’s actions. See *State v. Sluyter*, 763 N.W.2d 575, 580 n.4 (Iowa 2009) (denying relief where there is no present controversy and opinion would be merely advisory) (citing *Wickey v. Muscatine Cnty.*, 46 N.W.2d 32, 39-40 (Iowa 1950)). Accordingly, we decline Bernau’s request to issue an advisory opinion and dismiss his appeal.

**APPEAL DISMISSED.**