

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE COMMISSION ON ETHICS OF
THE STATE OF NEVADA,

Appellant,

vs.

IRA HANSEN, IN HIS OFFICIAL
CAPACITY AS NEVADA STATE
ASSEMBLYMAN FOR ASSEMBLY
DISTRICT NO. 32; AND JIM
WHEELER, IN HIS OFFICIAL
CAPACITY AS NEVADA STATE
ASSEMBLYMAN FOR ASSEMBLY
DISTRICT NO. 39,

Respondents.

Electronically Filed
Feb 10 2016 08:57 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court Case No. 69100

Appeal from First Judicial District
Court, Carson City, Nevada,
Case No. 15 OC 00076 1B

**RESPONDENTS' MOTION TO EXCEED PAGE LIMIT FOR
RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS
APPEAL FOR LACK OF APPELLATE JURISDICTION**

OR, IN THE ALTERNATIVE,

**MOTION TO STAY APPEAL AND REMAND TO DISTRICT COURT
FOR RESOLUTION OF RESPONDENTS' COMPLAINT TO VOID
NOTICE OF APPEAL FILED BY COMMISSION ON ETHICS AS
ACTION TAKEN IN VIOLATION OF OPEN MEETING LAW**

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MOTION

Pursuant to NRAP 27(a) and 27(d)(2), Respondents Ira Hansen, in his official capacity as Nevada State Assemblyman for Assembly District No. 32, and Jim Wheeler, in his official capacity as Nevada State Assemblyman for Assembly District No. 39 (the Assemblymen), by and through their counsel the Legal Division of the Legislative Counsel Bureau (LCB), hereby file this motion to exceed the page limit for their reply in support of their motion to: (1) dismiss the appeal for lack of appellate jurisdiction; or (2) in the alternative, stay the appeal and remand to the district court for resolution of the Assemblymen's complaint under NRS 241.037(2) to void the notice of appeal filed by Appellant Commission on Ethics (Commission) as action taken by the Commission in violation of the Open Meeting Law (OML) codified in NRS Chapter 241.¹ This motion is being filed with a copy of the proposed reply, and this motion is based upon the following declaration of counsel stating in detail the reasons for the motion to exceed the page limit.

DECLARATION OF REASONS FOR THE MOTION

On December 7, 2015, the Assemblymen submitted their 36-page motion to dismiss the appeal along with a motion to exceed the page limit. On December 21,

¹ All OML citations are to the law as amended in 2015 by SB70, 2015 Nev.Stat., ch.226, §§2-7, at 1054-62, and SB158, 2015 Nev.Stat., ch.84, §2, at 329-32.

2015, the Court entered an order (Doc. 15-38941) granting the Assemblymen's motion to exceed the page limit for their motion to dismiss. The Court also authorized the Commission to file an 18-page response. The Assemblymen are now asking the Court for permission to file an 18-page reply to properly address the multitude of arguments raised by the Commission in its response, including arguments based on actions undertaken by the Commission after the motion to dismiss was filed.

In particular, the Commission argues the Assemblymen are not "persons" who have standing under NRS 241.037(2) to bring an OML complaint because: (1) they filed the complaint in their official governmental capacities, not as "private persons"; and (2) they were not denied a right conferred by the OML. To respond properly to the Commission's argument, the Assemblymen provide cogent argument and citation to relevant authority regarding the doctrine of standing as applied to rights conferred by the OML. For example, to address the Commission's arguments regarding the meaning of the term "person," the Assemblymen explain the meaning of that term in the context of the OML versus the meaning of that term in the context of the general definition of "person" set forth in NRS 0.039, which is part of the preliminary chapter of NRS. In addition, to address the Commission's arguments that the Assemblymen were not denied any rights conferred by the OML, the Assemblymen explain how they were denied numerous

OML rights by the Commission's failure to make the decision to appeal in a public meeting that complied with the OML.

The Commission also argues it did not violate the OML because it never held a meeting to provide "direction" to counsel to file the appeal. Instead, the Commission argues because "direction" to appeal was given to counsel by the Commission's chair and executive director, the Commission, as a body, was not required to make the decision to appeal in a public meeting under the OML. To respond properly to the Commission's argument, the Assemblymen provide cogent argument and citation to relevant authority regarding the fundamental principles of decision-making by public bodies. For example, the Assemblymen explain that because the Commission, as a body, had the power to determine whether to appeal, the Commission, as a body, was required to make the decision to appeal in a public meeting under the OML, and the Commission was not allowed to delegate its power to any other person or group in the absence of express statutory authority. The Assemblymen also explain that even if the Commission, as a body, had authority to delegate its power to determine whether to appeal to its chair, executive director or counsel, the Commission, as a body, could have validly made such a delegation only in a public meeting under the OML.

The Commission also argues its decision to appeal is completely exempt from the OML under NRS 241.016(3) and NRS 281A.440(16). To respond properly to

the Commission's argument, the Assemblymen provide cogent argument and citation to relevant authority regarding how the Legislature intended only *sub. 2* of NRS 241.016 to create complete OML exemptions and how it intended for each of the specific statutes listed in *sub. 3*—such as NRS 281A.440(16)—to create limited OML exceptions. The Assemblymen also explain how the Commission's claim for a complete OML exemption is contrary to its decades-long interpretation of NRS 281A.440(16), which it has interpreted as a limited OML exception.

After the Assemblymen filed their motion to dismiss, the Commission held a meeting on December 16, 2015, and attempted to take corrective action to ratify the void notice of appeal and make it effective retrospectively during the jurisdictional appeal period. The Commission argues it cured any OML violation by taking this corrective action under NRS 241.0365 to ratify counsel's filing of the notice of appeal. To respond properly to the Commission's argument, the Assemblymen provide cogent argument and citation to relevant authority regarding how the Commission cannot take any corrective action under NRS 241.0365(5) to ratify the void notice of appeal to make it effective retrospectively during the jurisdictional appeal period. The Assemblymen also explain how the attempted ratification is void because the Commission violated the OML by failing to satisfy the OML's personal notice and proof-of-service requirements for the Dec. 16 meeting given that the attempted ratification necessarily involved consideration of

the Assemblymen's character, alleged misconduct or professional competence as assailed in the RFOs.

Finally, the Assemblymen's counsel want to stress that they take no pleasure in asking the Court for permission to exceed the page limits or in preparing briefs that exceed the page limits. Nevertheless, the Assemblymen's counsel believe they have a professional obligation to their clients and this Court to respond to all arguments raised by the Commission and to address those arguments "with high standards of diligence, professionalism, and competence." Barry v. Lindner, 119 Nev. 661, 671 (2003); Polk v. State, 126 Nev. 180, 184 (2010). The Assemblymen's counsel also believe this duty requires them to avoid inadequate appellate practices, such as discussing issues without including "cogent argument and citation to relevant authority." Berkson v. Lepome, 126 Nev. 492, 501-02 (2010) ("It is well established that this court need not consider issues not supported by cogent argument and citation to relevant authority."). Therefore, the additional pages are the direct result of thoroughly discussing all of the important issues of statewide concern and first impression raised by this case in a cogent manner with comprehensive citation to "adequate supporting law," including relevant caselaw from other jurisdictions. Barry, 119 Nev. at 672.

Therefore, for the foregoing reasons, the Assemblymen respectfully ask the Court to grant their motion to exceed the page limit for their reply to their motion

to: (1) dismiss the appeal for lack of appellate jurisdiction; or (2) in the alternative, stay the appeal and remand to the district court for resolution of the Assemblymen's pending OML complaint filed in the district court under NRS 241.037(2) to void the Commission's notice of appeal as action taken by the Commission in violation of the OML.

DATED: This 9th day of February, 2016.

Respectfully submitted,

BRENDA J. ERDOES
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By: /s/ Kevin C. Powers

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **9th** day of February, 2016, pursuant to NRAP 25, NEFCR 8 and 9 and the parties' stipulation and consent to service by electronic means, I filed and served a true and correct copy of Respondents' Motion to Exceed the Page Limit for their Reply in Support of their Motion to Dismiss Appeal for Lack of Appellate Jurisdiction, Etc., by electronic means to registered users of the Nevada Supreme Court's electronic filing system and by electronic mail, directed to the following:

Tracy L. Chase, Esq.
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/s/ Kevin C. Powers
An Employee of the Legislative Counsel Bureau