

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
Mar 17 2016 09:14 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' RESPONSE IN OPPOSITION TO
APPELLANT'S MOTION TO STRIKE**

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RESPONSE

Pursuant to NRAP 27(a)(3), Respondents Assemblymen Ira Hansen and Jim Wheeler (the Assemblymen) hereby file this response in opposition to the motion to strike filed by Appellant Commission on Ethics (Commission) asking the Court to strike: (1) the Assemblymen's motion to dismiss the appeal for lack of appellate jurisdiction, etc.; (2) their reply in support of the motion to dismiss; and (3) their supplemental exhibits to the motion to dismiss.

BACKGROUND

On October 29, 2015, the Commission filed a notice of appeal. However, before filing the notice of appeal, the Commission did not make its decision or take "action" to appeal the district court's order in a public meeting that complied with the Open Meeting Law (OML) codified in NRS Chapter 241.¹ Although the Commission is the public body which actually holds the power to determine whether to appeal, the Commission admits it did not, as a body, make the decision to appeal. Instead, the Commission contends because "direction" to appeal was given to its 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.

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.

On December 1, 2015, the Assemblymen filed an OML complaint against the Commission in the district court under NRS 241.037(2) alleging that the Commission violated the OML when the Commission filed a notice of appeal in this case without first making its decision or taking action to appeal the district court's order in a public meeting that complied with the OML. In addition, on December 7, 2015, the Assemblymen filed a motion in this Court 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 pending OML complaint. The Assemblymen contend the appeal should be dismissed because the Commission did not legally file a valid notice of appeal during the jurisdictional appeal period and thereby lost the right to appeal in this case.

After the Assemblymen filed their motion to dismiss the appeal, the Commission held a meeting on December 16, 2015, at which it attempted to take corrective action under NRS 241.0365 to ratify the void notice of appeal to make it effective retrospectively during the jurisdictional appeal period. On January 15, 2016, in its response to the motion to dismiss, the Commission raised its attempted ratification at the Dec. 16 meeting as a defense for the first time.

On February 9, 2016, the Assemblymen submitted their reply in support of the motion to dismiss along with a motion to exceed the page limit for the reply. In their reply, the Assemblymen contend the attempted ratification is legally

ineffective and cannot give retrospective effect to the void notice of appeal because NRS 241.0365(5) expressly states any corrective action “is effective prospectively.”² The Assemblymen also contend the attempted ratification is void because the Commission violated the OML by failing to satisfy NRS 241.033’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 underlying ethics complaints that are the subject of the appeal.

On February 16, 2016, to preserve the Assemblymen’s rights under the OML in the event the Court stays this appeal and remands to the district court for resolution of the pending OML complaint to void the notice of appeal, the Assemblymen filed a second OML complaint in the district court alleging that the Commission violated the OML at the Dec. 16 meeting for the reasons stated above and asking the district court to void the actions taken at the Dec. 16 meeting. Also on February 16, 2016, to keep the Court fully informed of the district court cases, the Assemblymen submitted, for informational purposes only, supplemental

² See also Mayes v. City of De Leon, 922 S.W.2d 200, 204 (Tex.App.1996) (“A prior action taken in violation of the Open Meetings Act may not be retroactively ratified.”); Webster Cnty. Bd. of Educ. v. Franklin, 392 S.W.3d 431, 435 (Ky.App.2013) (holding that a board violated the state’s OML by failing to take action in an open meeting authorizing its counsel to file a lawsuit challenging a referendum and it could not retrospectively ratify its void action in an open meeting after the jurisdictional filing period had expired).

exhibits consisting of the second OML complaint and proof of service thereof. Finally, on March 8, 2016, the Commission filed the motion to strike the Assemblymen's motion to dismiss, reply and supplemental exhibits.

ARGUMENT

I. The Assemblymen's motion to dismiss properly challenges the lack of appellate jurisdiction based on the void notice of appeal, and the Assemblymen's reply properly challenges the Commission's legally ineffective attempt to ratify the void notice of appeal at the Dec. 16 meeting.

The Commission claims the motion to dismiss and reply raise new theories on appeal and rely on matters outside the appellate record and therefore the legal issues raised by the motion to dismiss and reply must be decided first by the district court to protect the Commission's due process rights. This is wrong as a matter of law because the legal issues raised by the motion to dismiss and reply concern this Court's appellate jurisdiction and require this Court to decide pure questions of law which involve issues of statutory construction and which this Court may decide de novo without any deference to the district court. See Sandoval v. Bd. of Regents, 119 Nev. 148, 153 (2003) ("The construction of [the OML] is a question of law that we review de novo."); Dewey v. Redev. Agency, 119 Nev. 87, 93-94 (2003) (same).

In particular, only this Court may decide as a matter of law whether it lacks appellate jurisdiction because the Commission did not legally file a valid notice of appeal during the jurisdictional appeal period and thereby lost the right to appeal in

this case. To decide whether it has appellate jurisdiction, this Court may decide as a matter of law whether the Commission violated the OML when it filed a notice of appeal without first making its decision to appeal in a public meeting that complied with the OML. This Court also may decide as a matter of law whether the attempted ratification at the Dec. 16 meeting is legally ineffective and cannot give retrospective effect to the void notice of appeal because the OML expressly states any corrective action “is effective prospectively.” This Court also may decide as a matter of law whether 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.

Because the legal questions raised by the motion to dismiss and reply concern this Court’s appellate jurisdiction, those legal questions may be raised at any time on appeal. See Swan v. Swan, 106 Nev. 464, 469 (1990) (“A court’s lack of subject matter jurisdiction can be raised for the first time on appeal.”). Further, because this Court is the final arbiter on all legal questions raised by the motion to dismiss and reply, this Court may decide those legal questions regardless of whether they have been litigated before or decided by the district court. See Quisano v. State, ___ P.3d ___, 132 Nev.Adv.Op. 9 n.8 (Feb. 18, 2016) (“this court also has discretion to consider issues raised for the first time on appeal that involve recurring questions of law.”). Finally, this Court does not presume that it

has appellate jurisdiction; rather, it places the burden of establishing appellate jurisdiction entirely on the party seeking the appeal:

Since this court is one of limited, appellate jurisdiction, we may not presume that we have jurisdiction over a docketed appeal. Rather, the burden rests squarely upon the shoulders of a party seeking to invoke our jurisdiction to establish, to our satisfaction, that this court does in fact have jurisdiction.

Moran v. Bonneville Square Assoc., 117 Nev. 525, 527 (2001) (footnote omitted).

Because the issue of whether this Court has appellate jurisdiction may be raised at any time on appeal, the appellate rules provide that “[i]f respondent believes there is a jurisdictional defect, respondent should file a motion to dismiss.” NRAP 14(f). Accordingly, the Assemblymen properly filed a motion to dismiss based on their belief that this Court lacks appellate jurisdiction because the Commission did not legally file a valid notice of appeal during the jurisdictional appeal period. Therefore, the Commission’s motion to strike the Assemblymen’s motion to dismiss has no merit and should be denied.

Similarly, the Commission’s motion to strike the Assemblymen’s reply also has no merit and should be denied because the reply properly challenges the Commission’s legally ineffective attempt to ratify the void notice of appeal at the Dec. 16 meeting. The Commission ignores the fact that its attempt to ratify the void notice of appeal at the Dec. 16 meeting occurred *after* the Assemblymen had already filed their motion to dismiss the appeal. As a result, it is untenable for the

Commission to claim the Assemblymen are improperly using their reply to challenge the validity of the Commission's actions at the Dec. 16 meeting when the Commission, for the first time in its response, raised its actions at the Dec. 16 meeting as a defense. Therefore, because the Assemblymen's reply provided them with the first opportunity in this appeal to challenge the validity of the Commission's actions at the Dec. 16 meeting, the Assemblymen properly raised such a challenge for the first time in their reply because the Commission raised the defense for the first time in its response. See NRAP 27(a)(4) (providing that the reply must present only matters that relate to the response).

The Commission also claims the reply should be stricken because it now has no other opportunity before this Court to respond to the Assemblymen's challenge to the validity of its actions at the Dec. 16 meeting. However, it is presumed the Commission knows the appellate rules, and when the Commission raised its actions at the Dec. 16 meeting as a defense for the first time in its response, it is presumed the Commission knew the appellate rules would allow the Assemblymen to challenge the validity of that defense in their reply and would not allow the Commission to respond any further without approval of this Court to file a surreply. See NRAP 27(a); NRAP 2 (allowing this Court to suspend any provision of the appellate rules under certain circumstances). Instead of seeking such approval from this Court, the Commission is improperly using the motion to strike

as an illicit surreply to respond to the Assemblymen's challenge to the validity of its actions at the Dec. 16 meeting. This Court should not countenance such illicit conduct and should deny the motion to strike for that reason as well.

Because the Commission is improperly using the motion to strike as an illicit surreply, it is not necessary for the Assemblymen to respond to the Commission's legally incorrect arguments that NRS 241.033's personal notice and proof-of-service requirements did not apply to its actions at the Dec. 16 meeting. It is sufficient to say that the Commission's arguments are wrong as a matter of law and that its attempted ratification at the Dec. 16 meeting is void because the Commission violated the OML by failing to satisfy NRS 241.033's personal notice and proof-of-service requirements for that meeting.

II. The Assemblymen properly and timely submitted the supplemental exhibits because they were submitted for informational purposes only in order to keep the Court fully informed of the district court cases.

The Commission claims the Assemblymen, after submitting their reply, improperly and untimely submitted supplemental exhibits consisting of the second OML complaint in the district court and proof of service thereof. First, the supplemental exhibits were not untimely because they were submitted to this Court immediately after they were filed with the district court. Second, as explained in the submission, the supplemental exhibits were submitted to this Court for informational purposes only in order to keep the Court fully informed of the

district court cases. There is nothing improper in such a submission. Therefore, the Commission's motion to strike the Assemblymen's supplemental exhibits has no merit and should be denied.

CONCLUSION

The Assemblymen respectfully ask the Court to deny the Commission's motion to strike the Assemblymen's motion to dismiss the appeal for lack of appellate jurisdiction, etc., their reply in support of the motion to dismiss and their supplemental exhibits to the motion to dismiss.

DATED: This **16th** day of March, 2016.

Respectfully submitted,

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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 **16th** day of March, 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' Response in Opposition to Appellant's Motion to Strike, by electronic means to registered users of the Nevada Supreme Court's electronic filing system and by electronic mail, directed to the following:

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