

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.

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No. 69100

REPLY IN SUPPORT OF APPELLANT'S MOTION TO STRIKE

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MEMORANDUM OF POINTS AND AUTHORITIES

Appellant, the Nevada Commission on Ethics (“Commission”), by and through its counsel, Tracy L. Chase, Esq., files this Reply in support of its Motion to Strike and in response to Respondents Assemblyman Ira Hansen’s (“Hansen”) and Assemblyman Jim Wheeler’s (“Wheeler”)(collectively “Assemblymen”), Response in Opposition to Appellant’s Motion to Strike (“Opposition”).

ARGUMENT

I. INTRODUCTION

Respondents’ Opposition is without merit. As explained previously, Respondents’ Motion to Dismiss, Reply and Supplemental Exhibits (the “Improper Pleadings”) should be stricken because they seek to incorporate un-litigated cases and contested contentions set forth in the First OML Case and Second OML Case into this duly perfected appeal in violation of the Nevada Rules of Appellate Procedure (“NRAP”). This conduct exceeds the boundaries of appellate process established to review matters based upon the official record of proceedings and severely inhibits the Commission’s due process rights to defend the OML Cases. As such, the Appellant’s Motion to Strike should be granted.

Respondents’ improperly contend that their filing of the Improper Pleadings are appropriate because: 1) the Motion to Dismiss challenges appellate jurisdiction; and 2) the Supplemental Exhibits were submitted for informational purposes only.

A. The Motion to Dismiss Does not Properly Challenge the Jurisdiction of the Supreme Court in this Appeal

The Supreme Court has undisputed authority to determine its subject matter jurisdiction on appellate matters. Here, however, neither OML complaint nor the Improper Pleadings juxtaposed into this appeal are properly before the Court. The Supreme Court timely received the Commission’s Notice of Appeal establishing the Court’s jurisdiction under NRAP 4(a) and consistent with NRS 233B.150.

The Assemblymen are manufacturing issues where none exist. Commission Counsel properly and timely filed the Notice of Appeal under direction of the

Chair and Executive Director to protect her client's interests pursuant to the authority provided to Commission Counsel under NRS 281A.260 and as the duly appointed legal counsel to the Commission, and pursuant to the duties to her client established under Rules 1.2, 1.3, 1.13, and 1.16 of the Rules of Professional Conduct. Furthermore, a quorum of the Commission did not take action with respect to the Notice of Appeal prior to its filing, which meeting is required to support a violation of the OML given Nevada's quorum standard.

The Commission strongly contests the allegations set forth in the First and Second OML Case because the Commission has not violated the OML and the contentions in both complaints are without merit. The Commission has presented substantial and meritorious defenses, including that pre-panel proceedings of the Commission are exempt from the OML and the Assemblymen, who have only appeared in their official capacities in all relevant proceedings, have no standing to sue for an OML violation under NRS 241.037(2), or to utilize government legal resources from LCB to file the OML cases associated with redress of a personal rather than governmental right, among others. *See* Opposition to Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction etc. filed January 19, 2016 ("Opposition to Motion to Dismiss").

Respondents' contentions, that the Supreme Court lacks jurisdiction due to an alleged OML violation rely solely on Arizona precedent citing one unpublished decision and a decision of an Arizona Appellate Court viewing distinctly varied and distinguishable circumstances associated with interpretation of Arizona rather than Nevada law.¹ More recently, the United States District Court for the District of Arizona distinguished Arizona law from Nevada law based upon the "quorum standard." The district court dismissed the count applying the quorum standard. *Mohr v. Murphy Elem. Sch. Dist. 21*, 2010 U.S. Dist. Lexis 53240, affirmed by the

¹ Respondents rely on the cases of *Johnson v. Tempe Elem. Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 20 P.3d 1148, 2000 Ariz. App. LEXIS 195, 343 Ariz. Adv. Rep. 25 (Ariz. Ct. App. 2000) and the **unpublished** opinion of *Tombstone v. Beatty's Guest Ranch and Orchard*, No. 2 CA-CV 2013-0018, 2013 WL 6243854 Ariz.Ct.App. Nov. 27, 2013.

Ninth Circuit Court of Appeals, 449 Fed. Appx. 650, 652, 2011 U.S. App. LEXIS 18692 (2011), citing *Boyd v. Mary E. Dill Sch. Dist.* No. 51, 631 P.2d 577, 580 (Ariz.Ct.App. 1981)(affirming dismissal of open meeting law claim where the alleged legal action was taken by less than a quorum of board members); and *Dewey v. Redevelopment Agency of City of Reno.* 119 Nev. 87, 64 P.3d 1070 (2003)(following the majority of states in adopting a quorum standard as the test for applying the Open Meeting Law to a gathering of the members of public bodies”).

The Assemblymen’s assertion that they have presented a proper challenge to jurisdiction based upon the lack of appellate jurisdiction also fails because the Second OML Case, which complaint was inserted into this Appeal through the improper and untimely filing of the Supplemental Exhibits, demonstrates the frivolousness of these contentions. The Commission does not ignore the fact that it held a public meeting on December 15, 2016. Without an admission of wrongdoing, it held this meeting as a precautionary measure within 15 days of the filing of the First OML Case and appropriately directed the Court to the duly noticed public meeting in the Commission’s Opposition to Motion to Dismiss, at pgs. 5, 6, 9, 17, and 18 and Exhibits E and F, agenda and transcript, respectively.

Respondents’ Opposition disregards the significant due process implications associated with the Improper Pleadings and seeks to underrate the Commission’s contention that the Motion to Strike was the first opportunity in the Appeal to address the allegations of the Second OML Case. By Respondents’ filing the Improper Pleadings and their pages of lengthy argument in this appeal, the Commission is deprived of its right and a meaningful opportunity to present defenses to the OML Cases and the Motion to Dismiss. In particular, the Second OML Case was not filed in district court until February 16, 2016, and was included in the voluminous packet of Supplemental Exhibits, submitted for filing in this appeal on the same date. Therefore, the Second OML Case was filed in this Appeal

one month after the Commission's Opposition to the Motion to Dismiss was filed, which was January 19, 2016.

The Commission recognizes the provisions of NRAP which might have afforded the opportunity for a surreply; however, given the number of violations of NRAP, a Motion to Strike the Improper Pleadings was legally appropriate and is likewise permitted under NRAP 27(a), which allows a party to seek relief by motion and does not restrict the Commission to only filing a surreply.

Further, in the 10 pages of the Motion to Strike, the Commission concisely demonstrated that the Improper Pleadings should be stricken, the Second OML Case lacks merit and that Agenda Item No. 4 from the December meeting did not relate to taking administrative action against a person during which that person's character or competence would be considered or discussed in a public meeting. Therefore, there was no requirement to provide personal notification to the Assemblymen under NRS 241.033. The Assemblymen's overreaching interpretation that the identity of a person's name as part of a pending lawsuit discussed in a public meeting constitutes consideration of that person's character or competence, as asserted in the Second OML Case, is not only unreasonable, it would require the courts to view alleged violations of the OML on the basis of unexpressed thoughts and speculative mental cogitations of the individual members of the reviewing public body rather than on the basis of the record associated with the public meeting. The OML Manual expressly provides that discussion of a pending lawsuit involving a particular person does not require special notice to the person under NRS 241.033. OML Manual § 5.09 at p.54, citing OMLO 2003-14 (March 21, 2003).

B. The Supplemental Exhibits were not Timely and do not State they were for Informational Purposes Only

Respondents do not provide the Court with any authority which would permit the filing of the Second OML Case recently submitted for filing as part of the errant Supplemental Exhibits. NRAP 27(a)(2) requires that any papers

supporting a motion be served and filed with the motion. It does not permit filing of papers after the filing of the responsive pleadings to the motion, which is what has occurred here, without any formality of seeking leave of court.

Moreover, the Supplemental Exhibits do not state they were for informational purposes only. On the contrary, the title and text of the pleading unequivocally state the purpose of the filing to be in supplement to the Motion to Dismiss and also to keep the Court informed of the district court case. To now contend that the purpose of the filing was for “informational purposes only” is disingenuous.

IV. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court grant its Motion to Strike and redirect the resources of the Court to the real issues in this Appeal, which relate to the authority of the Commission to determine its jurisdictional boundaries where legislative privilege and immunity are asserted, which immunity arguments were, in part, premised upon amendments to NRS 41.071, adopted in the crucial moments of the last full day of the 2015 Legislative Session through AB 496, which legislation was not in existence at the time the Commission made its decision and which the Commission asserts expanded legislative immunity in Nevada to be retroactively applied to the underlying administrative proceedings.

Submitted this 23rd day of March, 2016.

Respectfully,

NEVADA COMMISSION ON ETHICS

/s/ Tracy L. Chase

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of the Nevada Commission on Ethics and that on this day I placed in the Court's electronic filing system a true and correct copy of the attached **REPLY IN SUPPORT OF APPELLANT'S MOTION TO STRIKE** for service as follows:

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Dated: 3/23/16

/s/ Darci Hayden
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