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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Supreme Court Case No. 69100

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

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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REPLY

Respondents Assemblymen Ira Hansen and Jim Wheeler (the Assemblymen) hereby file this 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 pending complaint filed in the district court 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]

I. The Assemblymen have standing to bring an OML complaint.

The Commission contends 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. The Commission is wrong as a matter of law on both contentions.

NRS 241.037(2) provides OML complaints may brought by "[a]ny person denied a right conferred by this chapter." The Court has stated the use of the expansive term "any person" in the OML "demonstrates the Legislature's intent to provide a broad right to sue." Stockmeier v. State Dep't of Corr., 122 Nev. 385,

[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.

394 (2006), *overruled in part on other grounds by* State v. Morrow, 255 P.3d 224, 228-30 (Nev.2011). The Court has stated this broad right to sue is essential to ensuring vigilant scrutiny of public bodies:

> This interpretation of "any person" complements the purpose of the open meeting law as stated in NRS 241.010, which provides that "all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." The statute was enacted to open the people's business—the government—to public scrutiny. A more restrictive interpretation of "any person" would have the opposite effect, shrinking the pool of people who could sue under the statute and obscuring the actions of public bodies. The public interest in the operation of the government requires a broad interpretation.

Id. Thus, use of the broad term "any person" in the OML means any "human being" or "natural person" has OML standing. Id. In Stockmeier, a prisoner had OML standing because "as a human being, [the prisoner] plainly falls within the definition of 'any person.' [His] status as a convicted felon who is currently incarcerated in Nevada's prisons does not change this result." Id. at 395.

As human beings, the Assemblymen have OML standing, and their status as public officers does not change this result. Despite the Commission's arguments, public officers are not less than human beings, and they do not have fewer OML rights than prisoners. Because public officers are some of the human beings who are most likely to observe OML violations while acting in their governmental capacities, it plainly follows that they are human beings who have standing to bring OML complaints in their governmental capacities. To interpret the OML

otherwise would shrink the pool of "persons" who could bring OML complaints contrary to the Legislature's intent to provide a broad right to sue in order to ensure vigilant scrutiny of public bodies.[2]

Further, the Commission's attempt to limit OML standing to "private persons" finds no basis in the OML or NRS 0.039's general definition of "person." That definition includes "a natural person," but generally excludes "a government, governmental agency or political subdivision of a government," except as "required by the context." As human beings, public officers are *natural persons* who fall within NRS 0.039's general definition of "person." Nevertheless, the Commission suggests they are not persons because NRS 0.039 excludes "a government, governmental agency or political subdivision of a government." But

[2] The Commission's argument is disingenuous given that it broadly interprets the term "person" in the Ethics Law to allow public officers and employees to file ethics complaints in their governmental capacities under NRS 281A.440(2)(b). Indeed, during the 2015 session, the Commission requested certain statutory protections for public officers and employees who file ethics complaints in their governmental capacities. AB60, 2015 Nev.Stat., ch.198, §3(9)(a), at 920. Its executive director testified: "Part of the reasoning for that request was to accommodate public employees and public officers who intend to file complaints against individuals within their agencies." Hearing AB60 Sen. Comm. Legis. Ops. & Elecs., 78th Leg. (May 4, 2015). Since the Ethics Law and OML are both intended to provide broad rights to file complaints, it follows that the term "person" in both laws gives public officers and employees standing to file complaints in their governmental capacities. And given that the Legislature expressly excluded prisoners from standing under the Ethics Law, the fact that the Legislature did not expressly exclude "any person" from OML standing is added evidence that OML standing is even broader than Ethics Law standing.

public officers are *natural persons* even when they work for governmental agencies and political subdivisions. Therefore, they have OML standing, regardless of whether governmental agencies and political subdivisions are excluded from NRS 0.039's general definition of "person."[3]

In addition, *as required by the context of the OML*, public officers have OML standing regardless of NRS 0.039's general definition of "person." That definition codifies the "long-standing principle of statutory construction [which] instructs that 'person' does not include the sovereign." Simonian v. Univ. Sys., 122 Nev. 187, 191 (2006) (quoting Vt. Agency v. U.S. ex rel. Stevens, 529 U.S. 765, 780 (2000)). However, this principle of statutory construction is not a "'hard and fast rule of exclusion,' but it may be disregarded only upon some affirmative showing of statutory intent to the contrary." Vt. Agency, 529 U.S. at 781 (quoting U.S. v. Cooper Corp., 312 U.S. 600, 604-05 (1941)). In Stockmeier, the Court found a statutory intent to provide OML standing to any "human being" or "natural person." 122 Nev. at 394. To carry out that statutory intent, public officers—who

[3] The Commission's argument is disingenuous given that the term "person" is used in the Ethics Law to define the terms "public officer" and "public employee." NRS 281A.150-.160. If, as argued by the Commission, the term "person" applies only to "private persons" and excludes public officers and employees in their governmental capacities, then only "private persons" are subject to the Ethics Law. Since the Commission's argument would produce such absurd or unreasonable results, it must be rejected. See Carson-Tahoe Hosp. v. Bldg. & Const. Trades, 122 Nev. 218, 220 (2006) ("this court will not read statutory language in a manner that produces absurd or unreasonable results").

are human beings and natural persons—are entitled to OML standing regardless of NRS 0.039's general definition of "person."

The Commission also contends the Assemblymen lack OML standing because they were not denied any rights conferred by the OML. According to the Commission, since there was no meeting, the Assemblymen can only claim they were denied the right to provide public comment at a Commission meeting. The Commission is wrong as a matter of law because the Assemblymen were denied numerous OML rights, including the right to have the Commission make the decision to appeal in an open meeting under the OML. In other words, it is the failure of the Commission to actually hold an open meeting that violated the Assemblymen's rights. That violation, by itself, is sufficient to confer OML standing. McKay v. Bd. of Cnty. Comm'rs (McKay II), 103 Nev. 490 (1987) (public body's failure to hold open meeting on litigation matter violated OML).

Further, because the Commission failed to hold an open meeting, the Assemblymen were denied all other OML rights stemming from that failure, including the right to publicly posted notices and a properly drafted agenda for the meeting, the right to obtain any supporting materials for agenda items, the right to attend the meeting, the right to hear and observe the Commission's members, the right to make comments, the right to inspect the written minutes and audio recording or transcript of the meeting and the right to make an audio or video

recording of the meeting. NRS 241.010, 241.020, 241.035. And because the decision to appeal required the Commission to consider the Assemblymen's character, alleged misconduct or professional competence as assailed in the RFOs, the Commission also denied the right to personal notice and proof of service under NRS 241.033. The denial of any one of these rights is sufficient to confer standing. Stockmeier, 122 Nev. at 395-98. The Commission denied them all.[4]

Finally, the Commission contends "the Assemblymen could have appeared at every public meeting of the Commission to provide public comment, including the meeting held on December 16, 2015, at which the ratification of Commission Counsel's authority to file the notice of appeal was heard. In an apparent lack of concern, they did not appear." Not only is this argument irrelevant to standing, but it disregards the Commission's duties under the OML.

[4] The Commission argues the Assemblymen or their attorneys could not make comments on the contested cases at an open meeting because the comments would have resulted in ex parte communications and due process violations under the APA. The Commission's argument is irrelevant to standing because the Assemblymen were denied numerous OML rights, not just the right to make comments. It also makes no sense because communications are ex parte only if they occur without "notice and opportunity to all parties to participate." NRS 233B.126. If the Commission had held a properly noticed open meeting, the comments could not have resulted in ex parte communications or due process violations because all parties would have been present at the meeting and would have been provided with notice and opportunity to participate. See Gipe v. State Med. Bd., No. 02AP–1315, 2003-Ohio-4061, 2003 WL 21757507, ¶¶71-73 (Ohio App. July 31, 2003) (holding that comments made to board "in an open meeting attended by appellant and counsel" are not ex parte communications where board "afforded appellant the opportunity to speak on his behalf.").

First, because the Commission failed to hold any public meetings in October and November 2015 during the jurisdictional appeal period, the Assemblymen could not have appeared at any public meetings involving the decision to appeal. Thus, it was the Commission's lack of concern for holding public meetings which denied the Assemblymen's OML rights and gives them standing.

Second, OML standing does not require the Assemblymen to appear at every public meeting of the Commission to make comments on items not listed on properly noticed and drafted agendas. Rather, it is the Commission's duty to provide notice and agendas to "give the public clear notice of the topics to be discussed at public meetings so that the public can attend a meeting when an issue of interest will be discussed." Sandoval v. Bd. of Regents, 119 Nev. 148, 155 (2003). Because "discussion at a public meeting cannot exceed the scope of a clearly and completely stated agenda topic," the public is assured that the public body cannot discuss or take action on any items not listed on properly noticed and drafted agendas. Id. at 154-56. Since the Commission failed to provide any notice or agendas for public meetings involving the decision to appeal, it was the Commission's lack of concern for this OML requirement which denied the Assemblymen's OML rights and gives them standing.

Lastly, because the Commission denied the Assemblymen's OML rights when it filed the notice of appeal without first making the decision to appeal in a

public meeting, the Assemblymen already had OML standing before the Commission held its post-violation meeting on December 16, 2015, at which the Commission made a legally ineffective attempt to ratify the void notice of appeal. Therefore, it is simply irrelevant to OML standing whether the Assemblymen attended the post-violation meeting.[5]

Accordingly, because the Assemblymen are persons denied rights conferred by the OML, they have standing under NRS 241.037(2) to bring an OML complaint against the Commission to void its actions which violate the OML.

II. The Commission's failure to make the decision to appeal in a public meeting violated the OML.

The Commission contends it did not violate the OML because it never held a meeting to provide "direction" to counsel to file the appeal. Thus, 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 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

[5] It also is notable that on the day of the post-violation meeting (Dec. 16), the Assemblymen were in Carson City engaged in their legislative duties at the 29th special session, and the Commission held its meeting in Las Vegas without tele- or videoconference to Carson City (*Comm'n Ex. E*) and without providing the Assemblymen with personal notice of the meeting as required by NRS 241.033.

meeting under the OML. The Commission is wrong as a matter of law because it ignores fundamental principles of decision-making by public bodies.

All public bodies, including administrative agencies, are governed by fundamental principles of decision-making that must be followed to give legal effect and validity to their decisions. Webster v. Tex. & Pac. Mtr. Transp. Co., 166 S.W.2d 75, 76-77 (Tex.1942); Burgin v. N.C. State Bd. of Elections, 198 S.E. 592, 595-96 (N.C.1938); Lee Cnty. v. James, 174 So. 76, 77 (Miss.1937); State ex rel. Mayer v. Schuffenhauer, 250 N.W. 767, 767-68 (Wis.1933); Mason's Manual Legis. Proc. §42 (NCSL 2010). One such principle is "[d]ecision-making powers of a group can be exercised only at a meeting of the group." Mason's §43(2). Another is "[a] public body cannot delegate its powers, duties or responsibilities to any other person or groups, including a committee of its own members," so "[w]here duties or responsibilities are imposed on a public body . . . that body is bound to exercise those duties and responsibilities and cannot divest itself of them by delegation to others." Id. §51(1)-(2). In Knight v. Higgs, 659 S.E.2d 742, 746-49 (N.C.App.2008), the court held a public body could not delegate its decision-making authority to its attorney and since the body failed to make the delegated decision in a public meeting, it violated the state's OML.

In this case, 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. See Johnson v. Tempe Elem. Sch. Dist., 20 P.3d 1148, 1151 (Ariz.App.2000); City of Tombstone v. Beatty's Guest Ranch, No. 2 CA-CV 2013-0018, 2013 WL 6243854 (Ariz.App. Nov. 27, 2013).[6] Furthermore, 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. Since the Commission admits it never held a public meeting under the OML, any purported delegation by the Commission violated the OML, and its notice of appeal is therefore void under the absolute voiding rule in NRS 241.036. As stated by the North Dakota Supreme Court:

[6] The Commission argues citation to the unpublished case of Tombstone is improper under Arizona court rules, but those rules do not apply in Nevada state courts, and this Court does not prohibit citation to unpublished cases from other jurisdictions because it is for the Court to decide whether they have any persuasive value based on their legal reasoning and citation to authority. Schuck v. Signature Flight Support, 126 Nev. 434, 441 n.2 (2010) (permitting citation to unpublished federal district court cases "which may be cited for their persuasive, if nonbinding, precedential value."). The Commission also argues the Arizona cases are distinguishable due to differences in Arizona's open meeting law. However, this Court has relied on Arizona cases in interpreting Nevada's OML. Stockmeier, 122 Nev. at 390-91. Moreover, based on the Arizona cases' sound legal reasoning and citation to compelling caselaw from other states, the Court should give significant weight to the Arizona cases for their persuasive, if nonbinding, precedential value.

> In the instant case no meeting was called, no notice of meeting was given and no meeting was held. No official action was taken by the [board] to appeal. In the absence of these requirements, the action taken by two members of the board of arbitration as individuals does not constitute the action of the [board] and we find that no appeal has been authorized or directed in this case.

State ex rel. Hjelle v. Bakke, 117 N.W.2d 689, 696 (N.D.1962).

Thus, contrary to the Commission's arguments, its chair and executive director did not have authority to provide "direction" to counsel to file the appeal, and counsel did not have authority under NRS 281A.260 or the rules of professional conduct to file the appeal without first obtaining authorization from the Commission as a body. It is well established that "an attorney retained to litigate an issue has no power to appeal without authorization of the client." People ex rel. R.D., 259 P.3d 562, 566 (Colo.App.2011). As a result, "the decision to appeal belongs to the litigant, not to the lawyer. It always has been and always will be that the client must decide whether to appeal a judgment." In re J.R.J., 357 S.W.3d 153, 157 (Tex.App.2011) (citations omitted). In fact, a lawyer generally has a professional duty to refrain from filing an appeal unless the lawyer has authorization from the client. Restatem't (3d) Law Governing Lawyers §22 (2000) (stating that decision of "whether to appeal" requires authorization from client); Legal Ethics, Lawyer's Deskbook on Prof'l Resp. §1.2-2(a) (ABA 2015-16) (same); In re Jud. Settlem't McGinty, 492 N.Y.S.2d 349, 352 (N.Y.Sur.Ct.1985) ("where an attorney is retained to prosecute or defend an action there is no implied

authority in the event of a judgment adverse to the client, to prosecute review proceedings by appeal"); Zorn v. Lowery, 181 So. 249, 250 (Ala.1938) (same). Thus, a lawyer can violate the rules of professional conduct "by filing the appeal without advising his clients and without obtaining their consent." In re Paauwe, 654 P.2d 1117, 1120 (Or.1982) (disciplinary proceeding).[7]

These rules apply to lawyers who represent public bodies. Shaw v. Common Council, 63 N.W.2d 252, 253-55 (S.D.1954) (dismissing appeal because agency, as a body, did not authorize its counsel to file appeal); Bakke, 117 N.W.2d at 692-96 (same). Nevertheless, the Commission argues a public body's counsel should be allowed to file an appeal without prior authorization to protect the body's interests because, without such authority, the body's appellate rights could be extinguished and it could be denied appellate review on the merits. However, the OML does not stop the public body or its counsel from protecting the body's appellate rights. It simply requires the public body to hold a public meeting first and then timely file

[7] Because the OML's legislative history clearly shows a public body's decision to settle a case must be made in a public meeting, the Commission argues the decision to settle is not comparable to the decision to appeal because filing a notice of appeal is "more similar to the filing of a motion or other pleading in defense of an ongoing case, which actions are well within the authority of the lawyer under the Rules of Professional Conduct." However, authorities on professional conduct state "[w]hether to appeal is an issue much like whether to settle," so both issues must be decided by the client, not the lawyer, because both issues exceed the lawyer's implied authority to manage the case. Restatem't (3d) Law Governing Lawyers §22 & cmt. d (2000); Legal Ethics, Lawyer's Deskbook on Prof'l Resp. §1.2-2(a) (ABA 2015-16); McGinty, 492 N.Y.S.2d at 352.

its appeal during the jurisdictional appeal period. In McKay II, the Court rejected creating implied attorney-client exceptions based on claims that holding public meetings imposed extra burdens on public bodies and their attorneys because:

> Any detriment suffered by the public body in this regard must be assumed to have been weighed by the legislature in adopting this legislation. The legislature has made a legitimate policy choice—one in which this court cannot and will not interfere."

103 Nev. at 496. The same reasoning applies to this case.[8]

In sum, as the client, only the Commission, as a body, had the power to determine whether to appeal by holding a public meeting under the OML during the jurisdictional appeal period. The Commission admits that it did not, as a body, make the decision to appeal in such a public meeting. Therefore, the Commission's notice of appeal is void under NRS 241.036.

III. The Commission's decision to appeal is not exempt from the OML.

The Commission contends its decision to appeal is completely exempt from the OML under NRS 241.016(3) and 281A.440(16). The Commission is wrong as a matter of law because, by their plain language, the statutes create a limited OML

[8] Given the generous jurisdictional appeal period, public bodies can easily hold a public meeting and file a notice of appeal within that period. The period begins when the lower court's written judgment is entered and expires 30 days "after the date of service of written notice of the entry of the judgment," plus 3 more days are added if service is by mail. NRAP 4(a)(1) & 26(c); In re Duong, 118 Nev. 920, 922 (2002). Based on these rules, the Commission had 55 days (Oct. 1-Nov. 25, 2015) to comply with the OML. That was ample time for the Commission and its counsel to protect the body's appellate rights.

exception that does not apply to the decision to appeal in this case.[9]

The Commission argues sub. 3 of NRS 241.016 creates a complete OML exemption, but the only complete exemptions are in *sub. 2*, which states: "The following are *exempt* from the [OML]." NRS 241.016(2) (emphasis added). By contrast, sub. 3 lists statutes with limited OML exceptions for specific meetings—including NRS 281A.440—and says any such statute "prevails over the general provisions of [the OML]." NRS 241.016(3). If the Legislature wanted sub. 3 to create complete exemptions, it could have simply used the term "exempt" in sub. 3 like it did in sub. 2. By using different terms in the subsections, it must be presumed the Legislature meant something different. See Coast Hotels v. State Labor Comm'n, 117 Nev. 835, 841 (2001) ("when the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded"). This interpretation is confirmed by NRS 241.016's descriptive

[9] Although the OML contains a limited exception for litigation, the Commission declines to argue it and therefore waives it. See Bisch v. LVMPD, 302 P.3d 1108, 1112 n.2 (Nev.2013) (failure to argue issue waives it). Further, because the Ethics Law does not contain an express exception for litigation, such an exception can exist only by implication. But when the Legislature expressly creates an exception, it is presumed the Legislature did not intend to create other exceptions by implication. See Sonia F. v. Dist. Ct., 125 Nev. 495, 499 (2009); TRW, Inc. v. Andrews, 534 U.S. 19, 28 (2001). By expressly creating the OML's litigation exception, it must be presumed the Legislature did not intend to create other litigation exceptions by implication in the Ethics Law. McKay II, 103 Nev. at 491-96 (there are no implied OML litigation exceptions). Thus, there is only one express OML litigation exception, and by failing to argue it, the Commission cannot claim any other litigation exception by implication.

title: "Application of chapter; *exempt meetings and proceedings*; *specific exceptions*; circumvention of chapter." (Emphasis added.) The title clearly reflects the Legislature's intent to create "exempt meetings" in sub. 2 and "specific exceptions" in sub. 3. See Coast Hotels, 117 Nev. at 841-42 ("The title of a statute may be considered in determining legislative intent."). Therefore, because it is listed in sub. 3, NRS 281A.440 is a limited OML exception. See NRS 241.020(1); Chanos v. Nev. Tax Comm'n, 124 Nev. 232, 239-44 (2008) (holding that specific statute—NRS 360.247—now listed in sub. 3 is limited OML exception).

The Commission's claim for a complete exemption is disingenuous because under its decades-long interpretation of NRS 281A.440(16), it actually holds a meeting, gives notice to the subject under sub. 11 of the statute, follows all other notice, agenda and meeting requirements for limited OML exceptions, deliberates in a closed session and makes its decision in an open session. NRS 241.020, 241.035. The Commission did none of this here. Thus, NRS 281A.440(16)'s exception has no application to the decision to appeal in this case.[10]

[10] The exception also does not apply for the reasons stated in the motion to dismiss. The Commission's reliance on subs. 8, 10 and 17 of the statute is also misplaced because those subs. create exceptions to the Public Records Act, not the OML, and the Assemblymen waived all confidentiality of the RFOs under sub. 8. It also is absurd for the Commission to claim its proceedings in this case are protected from disclosure when the entire administrative record has been publicly disclosed in this litigation. The bizarre result would be that all parts of the Commission's proceedings are now publicly available except the decision to appeal.

IV. The Commission's attempted ratification is legally ineffective and cannot give retrospective effect to the void notice of appeal.

The Commission argues it cured the OML violation by taking corrective action under NRS 241.0365 that ratified counsel's filing of the appeal, but the Commission ignores sub. 5 of the statute which says any corrective action "is effective prospectively." When an action is effective prospectively, it does not change "the legal consequences of acts completed before its effective date." Miller v. Burk, 124 Nev. 579, 592 n.44 (2008) (quoting Miller v. Florida, 482 U.S. 423, 430 (1987)). The legal consequence of the Commission's OML violation is that the notice of appeal is void under NRS 241.036, and 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.[11]

Further, if the Legislature wanted to allow retrospective corrective action, it could have mirrored Oregon's OML where corrective action reinstates the prior void action "effective from the date of its initial adoption." ORS §192.680(1). Instead, Nevada's OML makes corrective action "effective prospectively" barring retrospective effect. See 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

[11] In its response, the Commission fails to respond to the Assemblymen's argument that sub. 5 of the statute bars retrospective corrective action. The Court may treat the Commission's failure to respond as a concession on this issue of law. See Polk v. State, 126 Nev. 180, 184-86 (2010).

not be retroactively ratified."). Thus, the Commission's attempted ratification at the Dec. 16 meeting is legally ineffective and cannot give retrospective effect to the void notice of appeal.[12]

In addition, 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. Under NRS 241.033, a public body cannot "consider" any person's character, alleged misconduct or professional competence at a meeting unless it first provides the person with timely personal notice and receives proof of service of the notice. Stockmeier, 122 Nev. at 396-98; OMLO 2010-01 (2/25/10); OMLO 2004-01 (1/13/04). The term "consider" in the OML means to "think about" or "take into account or bear in mind." McKay v. Bd. of Sup'rs, 102 Nev. 644, 648 (1986); OMLO 1999-22 (4/7/99). The OAG advises public bodies that "anyone whose name appears on an agenda item . . . should receive notice that their character or

[12] In Webster Cnty. Bd. of Educ. v. Franklin, 392 S.W.3d 431, 435 (Ky.App.2013), the court rejected a similar attempt by a board to ratify a lawsuit after the jurisdictional filing period had expired. The court held the 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. Therefore, the court affirmed dismissal of the lawsuit.

competence might be discussed." OMLO 2011-01 (3/29/11).

The Assemblymen's names appeared on the agenda item for the Dec. 16 meeting. (*Comm'n Ex. E.*) To decide whether to take action on the agenda item, the Commission necessarily had to evaluate the potential merits of the appeal, which meant that it needed to "think about" or "take into account or bear in mind" the allegations in the RFOs assailing the Assemblymen's character, alleged misconduct or professional competence.[13]

Thus, because the attempted ratification of the appeal necessarily involved consideration of the Assemblymen's character, alleged misconduct or professional competence as assailed in the RFOs, the Commission failed to satisfy NRS 241.033's personal notice and proof-of-service requirements for the Dec. 16 meeting, and its attempted ratification is void under NRS 241.036.

CONCLUSION

The Assemblymen respectfully ask the Court to grant the relief requested in their motion to dismiss the appeal for lack of appellate jurisdiction.

[13] The OAG advises public bodies that their general discussions of pending lawsuits which simply mention parties' names do not require personal notice to the parties under NRS 241.033. OMLM §5.09 (12th.ed 2016); OMLO 2003-14 (3/21/03). However, the OAG has not addressed a situation, as in this case, where in deciding whether to take action on an agenda item regarding an appeal, the public body must necessarily consider a party's character, alleged misconduct or professional competence in order to evaluate the potential merits of the appeal and arrive at its decision.

DATED: This **9th** day of February, 2016.

Respectfully submitted,

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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' Reply in Support of 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:

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