IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY, a political subdivision of the State of Nevada; NEVADA COMMISSION, ON PEACE OFFICER STANDARDS & TRAINING,

Appellants.

vs.

ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township,

Respondent.

Electronically Filed
Nov 01 2019 02:25 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO. 78434

APPEAL

From the U.S. District Court of Nevada
The Honorable Jennifer Dorsey, U.S. District Court Judge
U.S. District Court of Nevada Case No. 2:17cv03017-JAD-CWH

APPELLANT CLARK COUNTY'S REPLY BRIEF

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
THOMAS D. DILLARD, JR., ESQ.
Nevada State Bar No. 6270
9950 West Cheyenne Avenue
Las Vegas, NV 89128
Attorney for Appellant
CLARK COUNTY

NRAP 26.1 DISCLOSURE

Clark County is a governmental party and thereby exempt from the disclosure rule.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

Respondent Robert Eliason ("Eliason") contends he is immune from removal from office by means of NRS 258.007 simply because it is not one of six other basis for removal permitted by other Nevada Revised Statutes, which includes *quo warranto*. Eliason cites no law and comes forward with no supporting rational for his argument that his enumerated list of six methods of removing a sitting public official is exhaustive. He further offers no persuasive argument as to why NRS 258.007 cannot then be included to his list because it is clearly and specifically intended to apply to urban constables, who fail to obtain the required training in the allotted amount of time to operate as a peace officer in highly populated Nevada townships. NRS 258.007, to be sure, is simply an independent constable removal statute.

Eliason's refrain in his answering brief is that Clark County does not have statutory authority to unilaterally remove him from office. However, Clark County never argued that it did. The 2013 Nevada Legislature, however, did cause his position to be forfeited if he did not legally become a peace officer within a date certain after he ran for and was elected to a peace officer public office.[1] Eliason's

[1] As set forth in the opening brief, NRS 258.007 was originally adopted in 2013 and then amended in 2015. In 2013, the one year requirement to obtain POST category II certification applied to constables for townships with a population

carefully worded argument about unilateral authority of Clark County both fails to account for the fact that NRS 258.007 by its express terms and does not reflect the factual and procedural background of this case. The plain terms of NRS 258.007 causes a constable to forfeit his office at the moment that he does not receive a category II peace officer certification from the Nevada Peace Officer Standards and Training Commission ("POST") within 1 year after he commences his elected office, or within 18 months if obtaining a 6 month written extension from POST. The failure of the condition, pursuant to the statute, in and of itself causes a forfeiture and "a vacancy is created" by clear operation of law. See NRS 258.007(2).

In addition, Eliason effectively concedes the second part of the legal question certified by the U.S. District Court of Nevada. There is absolutely no legal justification for the *dicta* unnecessarily and improperly included in the order by Eliason after the Eighth Judicial District Court granted his preliminary injunction. Nevada law makes clear *quo warranto* is not the one and only method

---

over 15,000. It was amended and changed to apply to constables in townships of 100,000 or more in 2015. It was amended once again in 2019 and now applies again to all constables in townships whose population is 15,000 or more. The constable of North Las Vegas was required to be a category II peace officer under each one of these versions of the statute. The 2013 requirement was also put in place prior to Eliason's election to this position.

a constable can be removed from office. Eliason's brief indeed recognizes this very point with his own under-inclusive list of various methods to remove a constable. His list, however, excludes NRS 258.007 which is self-executing and causes a forfeiture upon failure to get the required training in time and NRS 258.010 which expressly gives a board of county commissioners the discretion to abolish the office. Therefore, the Court must determine that the order granting the preliminary injunction is in error because it states that *quo warranto* "is the exclusive remedy to obtain . . . a forfeiture of public office . . . ." [Joint Appendix ("JA") 100].

II. ARGUMENT

A. The Legislature Enacted NRS 258.007 to Specifically Apply to Constables Only and Its Express Terms are Not Governed By Nor Derivative to *Quo Warranto* Actions under NRS 35.010.

There is no basis for Eliason's argument that *quo warranto,* pursuant to NRS 35.010, overshadows NRS 258.007 or that the 2013 Nevada Legislature intended the constable removal statute to be subservient to it. Eliason's entire argument is predicated upon interpreting NRS 258.007 (despite its being distinct and different from NRS 35.010) through the lens of the *quo warranto* process. There is just no statutory language nor case law support for Eliason's bald assertion that a *quo warranto* action pursuant to NRS 35.010 mandates that the

judiciary must make the determination that the constable failed to timely obtain the required training pursuant to NRS 258.007(1). It is also simply incorrect that the *quo warranto* process set forth in NRS 35.010 overlays the intent of NRS 258.007 and its self-contained process "in accordance with NRS 258.030." See NRS 258.007(2).

It is also baseless to argue that the self-executing nature of NRS 258.007(2) renders the provision of other unrelated Nevada statutes, including NRS 35.010, superfluous and meaningless. Eliason intentionally and impermissibly intermingles NRS 258.007 with other Nevada statutes because the plain and self-contained language of the constable removal statute for failure to obtain training is self-evident. Indeed, NRS 35.010 was not relevant to the drafters of NRS 258.007, when it was enacted in 2013 or when it was amended in 2015, and it is not relevant to the interpretation of NRS 258.007 now.

The cases Eliason relies on discussing judicial authority under NRS 35.010 are impertinent to the certified questions. Thus, Eliason's undue reliance on *Heller v. Legislature*, 120 Nev. 456, 93 P.3d 746 (2004) and *Leuck v. Teuton*, 125 Nev. 674, 219 P.3d 895 (2009) are simply irrelevant to NRS 258.007 since these cases only pertained to *quo warranto* and NRS 35.010 *et. al.* and both cases were decided well before NRS 258.007 was first enacted in 2013. These two cases

cannot be read as support for Eliason's asertino that the courts have "jealously guarding the ancient judicial authority to issue a writ of *quo warranto*" against any legislative intrusion from NRS 258.007. There is just no colorable legal basis to support the assertion that removing an elected official from office is solely the function of the judiciary. The Nevada Legislature permissibly took on this function when enacting NRS 258.007, stating that the failure to acquire the training by the deadline triggers the result that the "constable forfeits his or her office and a vacancy is created . . . ." Therefore, Eliason forfeited any right he had to hold office and serve in a peace officer capacity by failing to obtain the necessary training in time, or by July 5, 2016.

B. The Self-Executing Nature of NRS 258.007 is Evident from Its Specific Language and Its Clear Purpose.

NRS 258.007 applies only to select constables, like the North Las Vegas Constable, who fail to comply with the single requirement of timely obtaining peace officer training after being elected to an office involving the exercise of peace officer powers. Unlike NRS 35.010, it is not a procedure involving "public officers" generally who may or may not have done something to "usurp[], intrude[] or unlawfully hold[] or exercise a public office . . . ." NRS 258.007 rather directly targets non-compliant constables and independently removes them from

office because they have not obtained the training that the Nevada Legislature states is mandatory for public safety. The statute further directs the pertinent county commission to fill the vacancy with a qualified peace officer.

Eliason here tries to confuse the manifest intent and purpose of the Nevada Legislature in 2013 to mandate prompt state-certified training for an elected peace officer by again relying upon the intent of the legislature that enacted NRS 35.010 long ago. The question that he begs in doing so is that this old and separate Title of the Nevada Revised Statutes has any connection to NRS 258.007. The plain text of NRS 258.007 makes no reference at all to NRS Chapter 35 or *quo warranto* at all. The available documentation for legislative intent also is devoid of any reference to NRS 35.010 et. al or *quo warranto*. Furthermore, the only reference in fact made in NRS 258.007 is NRS 258.030 (stating " . . . if any vacancy exists or occurs in the office of constable in any township, the board of county commissioners shall appoint a person to fill the vacancy . . . .").

The Nevada Legislature reasonably and constitutionally determined that the public safety concerns raised from having untrained persons carry out law enforcement functions in populated areas was paramount to having an untrained person maintain an elected office. Eliason effectively argues that his right to hold the office that he was elected to hold is paramount and thus requires the institution

of a separate proceeding instituted only by the State and by a suitor to his office. The Nevada Legislature does not share his view and in fact elevates the public safety concern over his interest in maintaining his office.

Eliason's misinterpretation of NRS 258.007, again jaded by improperly superimposing NRS 35.010 over it, defies the clear intent of the legislature making certain that constables receive POST Training or replacing them with a properly trained officer if they do not. Category II officers must complete, at a minimum, a basic course that includes two hundred (200) hours of training. NAC 289.150. The category II training requirements involves course work and passing examinations in areas listed in four (4) sections of NRS 289.150 that include over fifty (50) different subjects. Among those subjects, the peace officer must pass courses in the following law enforcement essentials:

> (1) (a) Civil liability; (b) Constitutional law; (c) Crimes against persons; (d) Crimes against property; (e) Juvenile law; (f) Laws relating to arrest; (j) Probable cause; (k) Rights of victims; (l) Search and seizure; (n) Use of force;
>
> (2) (a) Abuse of older persons; (b) Child abuse and sexual abuse of a child; (c) Domestic violence, stalking and aggravated stalking; (e) Principles of investigation; (f) Techniques of interviewing and interrogation;
>
> (3) (a) Fire Safety and use of emergency equipment; (b) Interpersonal communications; (d) Provision of emergency first aid and CPR; (f) Tactics for the arrest and control of suspects

[and] methods for arrest and the use of less than lethal weapons; (h) Training in the use of firearms; (i) Writing of reports;

(4) (a) Care of persons in custody; (c) Counter-terrorism and weapons of mass destruction; (e) Crisis intervention; (f) Cultural awareness; (g) Ethics in law enforcement; (j) Handling of persons with mental illness; (p) Survival of peace officers; and (r) The realities of law enforcement.

Clearly, fundamental rights of both property and liberty of the public are at risk by permitting untrained officers to carry out law enforcement functions in circumstances that are volatile and dangerous and require snap judgments reliant on training. The U.S. Supreme Court has said:

> decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance" . . . [P]olice officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving.

County of Sacramento v. Lewis, 523 U.S. 833, 853 (1998). Some of the rights as well as safety of the public that are at risk from untrained officers operating in these difficult circumstances include the following:

- loss of liberty through detentions without reasonable suspicion[2];
- warrantless arrests without probable cause for felony crimes or for misdemeanor crimes committed outside the presence of

---

[2] *Terry v. Ohio*, 392 U.S. 1, 27-28, 88 S.Ct. 1868, 1883 (1968); *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 1661 (1996).

officers[3];

- deprivations of the right to be secure from intrusions into expectations of privacy involving persons, effects and places[4];

- deprivations and destruction of property without securing a warrant, probable cause and/or exigent circumstances[5]; and

- the right to be free from unreasonable force, including the use of deadly force.[6]

In light of these compelling interests to ensure that the constables are promptly trained in all such aspects, the Nevada Legislature enacted a statute mandating the immediate forfeiture of the constable's office and the creation of a vacancy that shall be filled by a trained officer by the elected county commissioners if the training is not promptly acquired.

Furthermore, Clark County in the opening brief cited a myriad of jurisdictions recognizing the use of the word "forfeit" in a statute is evidence of an

---

[3] *Carroll v. United States*, 267 U.S. 132, 156, 45 S.Ct. 280, 286 (1925); *Atwater v. City of Lago Vista*, 532 U.S. 318, 340-41, 121 S.Ct. 1536, 1550 (2001); *Kinna v. State*, 84 Nev. 642, 648, 447 P.2d 32, 36 (1968).

[4] *Mapp v. Ohio*, 367 U.S. 643, 660, 81 S.Ct. 1684, 1694 (1961); *Davis v. United States*, 564 U.S. 229, 232-34, 131 S. Ct. 2419, 2433-2435 (1969).

[5] *Dalia v. United States*, 441 U.S. 238, 258, 99 S.Ct. 1682, 1694 (1979); *Liston v. County of Riverside*, 120 F.3d 965, 979-980 (9th Cir. 1997)(*citing Tarpley v. Greene*, 684 F.2d 1, 9 (D.C.Cir.1982)).

[6] *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 1867-68 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8–9, 105 S.Ct. 1694, 1699–1700 (1985).

intent that the intended provision be automatic or self-executing. Eliason made no attempt to distinguish any of these cases or suggest that they are not persuasive authority with regard to the language and purpose of NRS 258.007. He also cited no case law supporting his position that the key language that the "constable forfeits his or her office and a vacancy is created" is actually intended to reflect that the constable, notwithstanding the clear violation of the statute, will still maintain his office until a judicial proceeding is instituted against the constable and the court enters an order declaring a forfeiture and a vacant office. In fact, the court order that was prepared indicated that the State of Nevada was the potential petitioner with standing to institute a separate judicial proceeding. Not only does this interpretation run afoul of the express language of the constable removal statute, it also undermines the express intent of the legislature to require prompt peace officer training for elected constables or the filling of the position with someone that is properly trained for failure to comply.

The forfeiture and resulting vacancy is clear through the express terms and the clear and the simple "yes" or "no" answer to the training inquiry. The legislature did not want the passage of further time to litigate whether the Nevada POST issued the requisite certificate to the constable within a year of the taking of the office or at most 18 months, if extended. The training requirement in the

statute is perfectly clear as is the forfeiture penalty for failure to obtain the training certificate. The legislature hence made NRS 258.007 self-executing to avoid the ongoing risk posed by untrained peace officers operating in a highly populated area.

C. Clark County's Agenda Item to Declare a Vacancy in the North Las Vegas Constable's Office Is Not Relevant to the Certified Questions.

Eliason generally argues Clark County's position that NRS 258.007(2) is automatic by operation of law is without merit--not because of the plain language of the statute--but rather because the Clark County Assistant County Manager's discretion in drafting the language for the agenda item when the issue came up before the board in a public hearing. The Assistant Manager drafted the agenda item as "That the Board of County Commissioners declare that . . . Eliason . . . has forfeited his office and that a vacancy in such office exists." [JA 88].

Clearly, the interpretation of NRS 258.007, the essence of the certified questions to this Court, has nothing to do with the legal description of the particular agenda item before the Board of County Commissioners ("BCC") or the recommended action from the Assistant County Manager. It further is irrelevant whether the BCC held a public vote on the issue of whether they individually determined that the office was forfeited. It is irrelevant whether they intended to or

had a discussion about Eliason's training and what duty they had pursuant to NRS 258.007 and NRS 258.030. It is further irrelevant as to whether there was a consensus by the BCC on any of these issues. In fact, Eliason obtained the preliminary injunction order from the state court on July 14, 2017 and so the agenda item never came before the BCC as scheduled for the public meeting on July 18, 2017. [JA 31-32]. In other words, the BCC never took any action on the agenda item Eliason argues is pertinent to the certified questions of law.

Clearly, the description of the agenda item is a red herring argument before the Clark County Board of County Commissioners on July 5, 2017 is impertinent to the legal questions before this Court. The BCC agenda item, to be sure, did not alter the law or violate Eliason's rights. The certified issues are simply one of legal interpretation of the statute and not a review of any process before the preliminary injunction was ordered.

D. Nevada Law Plainly Recognizes that Constables May Be Removed From Office Without a State Petitioner Prevailing in a *Quo Warranto* Action.

Eliason conceded that the preliminary injunction order contained an incorrect statement of law that constables can only be removed with a *quo warranto* action. The U.S. District Court of Nevada requested that this issue be answered to decide the pending motions before the Court. [JA 48]. This includes

Eliason's attempt to make the Eighth Judicial District Court's order on the preliminary injunction motion the law of the case and impermissibly preclude Clark County from taking action under separate provisions of Nevada law. [JA 98-101]. In fact, Eliason seemingly attempts to do the same thing here by misdirection in suggesting that there are only six methods that he can be removed from office. His list ignores the abolishment of the office by Clark County pursuant to NRS 258.010.

Given the far-reaching dicta in the preliminary injunction order that Eliason requested to be included in the order that he drafted and was signed by the District Court judge, the U.S. District Court of Nevada reasonably requested this Court to decide this issue along with the scope of NRS 258.007. The removal of a constable from office is absolutely not exclusively confined to NRS 35.010. This Court, at a minimum, should simply decide that a constable can be removed outside a *quo warranto* action.

/ / /

/ / /

/ / /

/ / /

/ / /

III. CONCLUSION

In accordance with the foregoing, this Honorable Court should answer the first certified question regarding NRS 258.007 and declare that it is a self-executing statute resulting in the forfeiture of Eliason's office when he did not obtain category II peace officer certification by July 5, 2016. [JA 17]. Second, the Court should further declare that a constable can be removed under Nevada law outside of a *quo warranto* action.

DATED this 1st day of November, 2019.

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI

/s/ Thomas D. Dillard
THOMAS D. DILLARD, JR., ESQ.
Nevada Bar No. 006270
9950 West Cheyenne Avenue
Las Vegas, NV 89129
(702) 384-4012
Attorneys for Defendant/Appellant
CLARK COUNTY

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Word Perfect in size 14 font in Times New Roman; or

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 3649 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed ___ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of November, 2019.

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI

/s/ Thomas D. Dillard

THOMAS D. DILLARD, JR., ESQ.
Nevada Bar No. 006270
9950 West Cheyenne Avenue
Las Vegas, NV 89129
(702) 384-4012
Attorneys for Defendant/Appellant
CLARK COUNTY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of November, 2019, I served the above **APPELLANT CLARK COUNTY'S REPLY BRIEF** through the Nevada Supreme Court e-filing system (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

Kelly A. Evans, Esq.
Chad R. Fears, Esq.
EVANS FEARS & SCHUTTERT, LLP
2300 W. Sahara Ave., Ste. 900
Las Vegas, Nevada 89102
P: 702-805-0290
F: 702-805-0291
kevans@efstriallaw.com
cfears@efstriallaw.com

Jeffery F. Barr, Esq.
ASHCRAFT & BARR, LLP
2300 W. Sahara Ave., Ste. 900
Las Vegas, Nevada 89102
P: 702-631-7555
F: 702-631-7556
barrj@ashcraftbarr.com

Attorneys for Plaintiff

///

///

Adam Paul Laxalt, Esq.
Attorney General
Michael D. Jenson, Esq.
Senior Deputy Attorney General
555 Wright Way
Carson City, Nevada 89711
P: 775-684-4603
F: 775-684-4601
mjensen@ag.nv.gov
Attorneys for Defendant
Nevada Commission on Peace
Officer Standards & Training

/s/ Melissa Burgener
An Employee of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI