

Case No. CV-1408108

Dept. No.

FILED

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NICHOLE BARTON
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DEPUTY

**IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WHITE PINE**

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MANAGEMENT BOARD OF THE WHITE PINE HISTORICAL FOUNDATION, INC.; ROGER BOWERS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE MANAGEMENT BOARD, RANDY LARSON, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE MANAGEMENT BOARD, CARL MARSH, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE MANAGEMENT BOARD, JOHN C. GIANOLI, IN HIS INDIVIDUAL CAPACITY AND STEPHEN D. LEITH, IN HIS INDIVIDUAL CAPACITY;

Plaintiff,

vs.

BOARD OF TRUSTEES FOR THE WHITE PINE HISTORICAL RAILROAD FOUNDATION, INC., THE CITY OF ELY; THE ELY CITY COUNCIL, DALE DERBIDGE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ELY CITY COUNCIL AND CHAIRMAN OF THE BOARD OF TRUSTEES AND IN HIS PERSONAL CAPACITY; MARION (SAM) HANSON, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ELY CITY COUNSEL, AND BOARD OF TRUSTEES AND IN HIS PERSONAL CAPACITY; RANDY LEE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ELY CITY COUNCIL AND BOARD OF TRUSTEES AND HIS PERSONAL CAPACITY; BRUCE SETTERSTROM, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ELY CITY COUNSEL AND BOARD OF TRUSTEES AND IN HIS PERSONAL CAPACITY; MARTIN WESTLAND, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ELY CITY COUNCIL AND BOARD OF TRUSTEES AND IN HIS PERSONAL CAPACITY; MAYER MELODY VANCAMP, IN HER CAPACITY AS THE EXECUTIVE OF THE CITY OF ELY; DOES 1 THROUGH X, INCLUSIVE; AND ROE CORPORATIONS I THROUGH X, INCLUSIVE,

Defendants.

SUPPLEMENTAL ORDER

FACTUAL AND PROCEDURAL HISTORY

This Court has issued Findings of Fact and Order holding that the Board of Trustees for the White Pine Historical Railroad Foundation (the Board of Trustees) committed several violations of Nevada's Open Meeting Law at its August 7, 2014 meeting when it removed two members of the Management Board of the White Pine Historical Railroad Foundation, Inc. (Management Board). That Order held that the removal action was void, that the two removed members be restored to their positions, and their appointed replacements be removed because no vacancy should have been created.

These rulings were sufficient to determine the legality of the action taken at the August 7, 2014 meeting without any further determinations by this Court. However, the parties have requested the Court address the sufficiency of the evidence presented to support the removal of the two Board Members because the issue may arise again as the Board of Trustees renews its efforts to remove members of the Management Board. While advisory opinions are not favored, see Applebaum v. Applebaum, 97 Nev. 11, 621 P.2d 1110 (1981), it is permissible to issue such a decision when the controversy will continue and the issue will repeat itself. Accordingly, this supplemental decision is issued.

I. REMOVAL FOR MISFEASANCE, MALFEASANCE, OR COMMISSION OF A FELONY

The bylaws of the Foundation that relate to the Management Board provide that a member of the Management Board of the Foundation can be removed for "reasonable cause" and this is defined as "misfeasance, malfeasance or commission of a felony". There is no allegation that any Management Board member committed a felony, so the attempted removal was either for misfeasance or malfeasance. There was no discussion at the Board of Trustee's meeting about the sufficiency of the evidence or whether

misfeasance or malfeasance had been shown. The Board of Trustees simply made a motion for the removal of the two Management Board's members and the motion passed.

Words and terms are to be given their ordinary and commonly understood meaning, unless otherwise indicated.¹ Black's law Dictionary defines misfeasance as "a lawful act performed in a wrongful manner, or, more broadly, a transgression or trespass"; and malfeasance as "a wrongful or unlawful act or wrongdoing, or misconduct by a public official in so doing". Misfeasance has been described by the Nevada Supreme Court as the doing in a wrongful manner that which the law authorizes or requires a person to do.² And similar definitions in cases dealing with the words misfeasance or malfeasance are found in other jurisdictions.³ Therefore, after considering the above definitions, the Court believes that the most appropriate definitions of Misfeasance and Malfeasance are as follows:

MISFEASANCE is the substantial failure to perform a required act or legal duty in a competent manner.

MALFEASANCE is doing an act in a wrongful or illegal manner by a person authorized or required to perform the act.

II. ADEQUATE NOTICE OF FACTS SUPPORTING CHARGES OF MISFEASANCE OR MALFEASANCE

In charging someone with misfeasance or malfeasance, it is not enough to simply state that misfeasance or malfeasance was committed, but the charge should also state

¹ City Council of Reno v. Reno Newspapers, Inc. 105 Nev. 886, 784 2d 974 (1989).

² Schumacher v. State ex rel. Furlong, 78 Nev. 167, 370 P.2d 209, (1962).

³ In re: Recall of Pearsall-Stipek, 129 Wash.2d 399, 918 P.2d 493 (1996) (misfeasance and malfeasance both mean any wrongful conduct that affects, interrupts or interferes with the performance of official duty); Arellano v. Lopez, 81 N.M. 389, 467 P.2d 715 (1970) (misfeasance is the performance of a legal act in an improper or illegal manner, and malfeasance is the doing of an official act in an unlawful manner without sufficient excuse).

sufficient facts to support such a charge so that the person accused of misconduct can adequately understand the charges against him or her, and have sufficient time to respond.⁴ Removal from office by ambush is not favored by the law.

Applying these principles to the notice given Mr. Gianoli and Mr. Leith in the case at bar, the allegation of reasonable cause for removal contained in the Agenda for August 7, 2014 was legally inadequate because the notice merely recited a conclusion without stating the facts on which those allegations were based. No individual notice was given to either of the removed Board of Trustees members. Mr. Leith, one of the removed Management Board members, stated that at the August 7, 2014 meeting that he did not know about the general allegations of misconduct until the morning of the hearing, and “would like at least an opportunity to talk with my own personal family lawyer”.⁵ And presumably, he did not know until the meeting that he was one of the two Board members whose removal would be sought. In addition to the insufficiencies of the notice to the removed board members in the context of the Open Meeting Law as addressed in a previous order, this notice was insufficient to meet procedural due process requirements.

III. EVIDENCE PRESENTED TO ESTABLISH MISFEASANCE OR NONFEASANCE

At the August 7, 2014 Meeting of the Board of Trustees, the general outline of the Agenda was followed. When the Board came to the item calling for the removal of two members of the Management Board, the proponent of this agenda item, Mr. Bruce Setterstrom, stated his reasons for proposing such action. His basic complaint was that he was charged with oversight of the Management Board but was not given information

⁴ See People v. Schneider, 133 Colo. 173, 292 P.2d 982 (1956) (Charging a county commissioner with malfeasance without more is only stating a conclusion and provides no notice of the charge against him.); In re: Recall of West, 155 Wash.2d 659, 121 P.3d 1190 (2005) (Factual sufficiency is required when charging an officer with misfeasance).

⁵ Hearing Transcript, p. 41.

he requested from the Management Board members and employees, and that there was a lack of transparency in the operation of the Railroad, the Management Board, and its employees. He also did not think the Railroad operation was being properly managed.

Specifically, Mr. Setterstrom's complaints were that:

1. He had asked for information about the indebtedness of the Railroad and stated he received insufficient or conflicting answers from the members of the Management Board. However, there was an audit report received about the Railroad's operation a month before the August 7th hearing, and it was not explained to the Court why this was not sufficient to supply Mr. Setterstrom with the information he sought. Further, Mr. Scott Husbands, the attorney for the Management Board and S and S Railroad, stated at the hearing that the audit established that the present debt of the Railroad was \$375,000, a very substantial reduction from what it was several years earlier.

2. The Management Board had not revised its policy manual to add or address the subject of nepotism. Joan Bassett is employed by the Railroad and she is the wife of Mark Bassett who is the executive director of the Railroad. The Audit Report referred to this situation as creating additional risk. By not taking action to change its nepotism provision, it could be inferred that the Management Board is aware of the situation, but believes that the benefits of employing Joan Bassett outweigh the potential risk. Pool Pack, an entity associated with the insurance company, was said by Mr. Setterstrom not to have accepted the Management Board inaction, but there was no definitive evidence presented to establish Pool Pack's position. Therefore, there was insufficient evidence presented that the failure to adopt a nepotism clause in the Management Board's or Foundation's Policy Manual amounted to misfeasance.

3. Mr. Setterstrom also stated that employees were encouraged to go to a public meeting to support the Railroad, and those who went to the meeting were paid for the time in attending. Mr. Bassett stated that no one was compelled to go, and the Foundation is

not a public entity. While such payment for attendance at a meeting may be problematic, insufficient evidence and legal authority was presented to the Court to support a finding that this was either misfeasance or malfeasance.

4. Mr. Setterstrom also believed that Mr. Scott Husbands' representation of the Management Board, the S & S Railroad, and Joan and Mark Bassett was a "big conflict" of interest. Mr. Husbands responded that all these clients knew of his representations of the others, and apparently consented to it. Without more evidence being presented at the hearing, the Court cannot make a determination about the potential conflicts and whether there has been an informed waiver of any potential conflicts by Mr. Husbands' clients.

It should be noted that Mr. Gianoli and Mr. Bassett testified about their long participation in assisting the Foundation and how they had helped to keep the Railroad in operation and raise money for its continued operation. In fact, Mark Bassett made a least one personal loan to keep the Railroad in operation, and Mr. Gianoli arranged a large favorable loan from the bank where he is employed when money was most needed.

IV. FINDINGS OF FACT REGARDING MISFEASANCE AND MALFEASANCE

The Court makes the following findings of fact:

1. The Board of Trustees failed to give Mr. Gianoli and Mr. Leigh adequate notice before the August 7, 2014 meeting that their specific removal was sought and the facts upon which their removal was sought for misfeasance or malfeasance. This finding concerning notice is in addition to the findings of inadequate notice made in the prior decision concerning the Open Meeting law.

2. The Board of Trustees did not establish by a preponderance of the evidence presented at the hearing on August 7, 2014 that either Mr. Gianoli or Mr. Leigh had committed any acts that constitute misfeasance or malfeasance. Much of the above evidence and more was also presented at the hearing on October 15-15, 2014. However, that evidence cannot be used to supplement deficiencies in evidence presented at the

August 7, 2014 hearing. But even if the evidence presented at the October hearing was considered by the Court, the totality of evidence would still be insufficient to establish reasonable cause to remove any member of the Management Board.

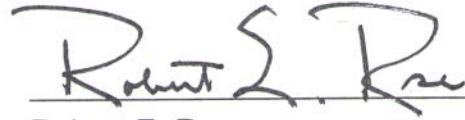
But, this does not mean that Mr. Setterstrom's concerns about the operation of the Railroad are not legitimate. With the oversight obligation placed on the Board of Trustees, concerns about the Railroad's total indebtedness, nepotism and transparency of operations are certainly appropriate and necessary. However, the process of asking questions to and requesting information from the Management Board should be a more formal process than presently exists. Such a formal process would provide a written record of when and what was requested, and the response from the Management Board should also be in writing or made at a recorded meeting. In the past, the requesting of information has been largely verbal, with members of the Board of Trustees providing information how and where they chose. The Board of Trustees has the right to get their questions answered directly and in a written response or at a Board Meeting, not verbally in Mr. Gianoli's office. In some respects, the members of the Management Board and Railroad employees have not been totally committed to providing information to the Board of Trustees. This will have to change because the new members of the Council and Board of Trustees do not want to do business in the informal way of the past.

V. NEED FOR LEGAL ASSISTANCE

The Board of Trustees is in real need of effective legal representation to do its job and perform its responsibility for oversight of the railroad operation. The shortcomings in complying with Nevada's Open Meeting Law have already been addressed, and these could have been avoided with adequate legal representation. But competent legal assistance is also needed to provide notice of any allegations of misfeasance and malfeasance in the future. This includes assistance in providing timely and sufficient notice of the charges and the presentation of witnesses and other evidence to provide the

legal sufficiency of such charges. In short, the Board of Trustees needs engaged and effective legal representation to avoid the legal errors that have occurred in this case, and to avoid liability for those legal errors.

Dated this 7TH day of January, 2015

A handwritten signature in black ink, appearing to read "Robert E. Rose", written over a horizontal line.

Robert E. Rose
Senior Justice