



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Joseph M. Lombardo**,
Sheriff of Clark County,
State of Nevada,

Ethics Complaint
Consolidated
Case Nos. 21-062C, 21-082C

Subject. /

ORDER CONTINUING HEARING
NAC 281A.442 & 281A.457

This is a consolidated matter consisting of two Ethics Complaints filed in connection with the campaign of Joseph M. Lombardo who was then Sheriff of Clark County. See Ethics Complaint Nos. 21-062C & 21-082C ("Consolidated Matter"). On June 9, 2023, after learning that one Commissioner intended to participate in his hearing via virtual link and another Commissioner was unavailable to participate in the hearing, now-Governor Lombardo filed a Motion for Continuance requesting a new hearing date on the basis that all eligible members of the Commission should attend his hearing in person. Mot. for Continuance at 1. Governor Lombardo seeks a continuance and a requirement that all eligible Commissioners attend the hearing in person.

Procedural History

This Consolidated Matter was initiated in 2021 during the campaign season and alleged ethics violations arising from then-Clark County Sheriff Lombardo's use of his badge and uniform in campaign materials. The two Ethics Complaints were consolidated by an order dated November 18, 2021, and the Commission issued its Order on Jurisdiction and Investigation the same day. On February 24, 2022, a Review Panel consisting of Vice-Chair Duffrin and Commissioner Gruenewald, with Commissioner Sheets dissenting, issued a Review Panel Determination, referring the Consolidated Matter to the Commission for further proceedings. On that date, counsel for candidate Lombardo executed a Waiver of Statutory Requirements pursuant to NRS 281A.745 which voluntarily waived the sixty-day time limit for the Commission to act on the Consolidated Matters.

An Amended Notice of Hearing and Scheduling Order dated December 12, 2022 scheduled a dispositive motion hearing for February 15, 2023. Thereafter, the Executive Director and Governor Lombardo (the "Parties") stipulated to a set of facts and agreed to have the Consolidated Matters resolved by dispositive motion practice. The Parties jointly submitted a request to move the dispositive motion hearing from February 2023 to March 2023. During a hearing on the joint request, counsel for Governor Lombardo sought to move the dispositive motion hearing to the May 17, 2023, regularly scheduled hearing of the Commission. Pursuant to that request the dispositive motion hearing was scheduled for May 2023, and a Second Amended Notice of Hearing and Scheduling Order was issued on January 17, 2023.

On April 27, 2023, Governor Lombardo filed a Motion for Continuance on the basis that the demands of Nevada's legislative session would prevent him from assisting his counsel for the hearing scheduled for May 17, 2023. In that Motion and through his counsel, Governor Lombardo represented that "he would be open to a hearing date prior to June 21, 2023 (so long as it did not interfere with the Legislative Session) if the Commission would allow." Mot for Continuance, Decl. of S. Mirkovich at ¶ 11 (Apr. 27, 2023). The Executive Director again opposed the requested continuance, but the continuance was granted over the objection. In a Third Amended Notice of Hearing and Scheduling Order, the new hearing date was scheduled for June 13, 2023, "the date on which the most Commissioners could be in attendance" Opp'n to Mot. for Continuance at 2 (June 10, 2023).

The 82nd Session of the Nevada Legislature concluded *sine die* on June 6, 2023. On June 6, 2023, Governor Lombardo convened the 34th Special Session of the Legislature which concluded *sine die* later that same day. On June 7, 2023, Governor Lombardo executed a Proclamation to Convene Special Session of the Legislature initiating the 35th Special Session which is ongoing.

Motion for Continuance

Governor Lombardo seeks a further continuance of the dispositive motion hearing on the basis that not all of the eligible Commissioners can appear in person at the hearing. Mot. for Continuance at 1.¹ Governor Lombardo argues that every eligible member must participate in rendering a decision in the Consolidated Matter. The Motion argues that all eligible Commissioners should participate because of the "unprecedented" relief sought by the Executive Director including "the specter of legislative impeachment proceedings" Mot. for Continuance at 2.

The Executive Director opposes the requested continuance on the basis that Governor Lombardo has not shown good cause as required under NAC 281A.457(2). Opp'n to Mot. at 3-4. The Opposition further recites and correctly identifies that the hearing has complied with all requirements of the law. *Id.* at 3. In fact, Governor Lombardo admits in the Motion that even a "three-member panel would constitute a quorum necessary to render a decision under NAC 281A.200(2)." Mot. for Continuance at 2.

Governing Law and Analysis

NAC 281A.520(2)(a) provides that a continuance may be granted if the moving party shows "good cause." The NAC specifically provides that a "scheduling conflict" constitutes good cause. *Id.* However, a continuance shall be denied if a party opposing a continuance shows either that a continuance: (1) is requested merely for delay or inexcusable neglect; (2) would create an unjust or undue delay; or (3) would unfairly prejudice that party's interests. NAC 281A.520(4). Nevada courts have defined good

¹ The Motion for Continuance states that only three of the five eligible Commissioners could attend the hearing. This is incorrect as four of the five are scheduled to be in attendance. Some Commissioners may appear by virtual link, a common practice for the Commission, Nevada District Courts, the United States District Court for the District of Nevada, the Nevada Legislature, local governments, etc. Virtual attendance of any Commissioner is both permitted and consistent with common practice and procedure at all levels of government. Indeed, the Motion for Continuance provides no legal basis for the Commission to compel in-person attendance at the hearing or to continue a hearing until the Commission can assemble in full.

cause as "a substantial reason . . . that affords a legal excuse." See, e.g., *Brown v. McDaniel*, 130 Nev. 565, 569 (2014).

Once a review panel has determined that just and sufficient cause exists for the Commission to render an opinion, the panel members are not eligible to "participate in any further proceedings of the Commission relating to that matter." NRS 281A.220(4). Moreover, once the members of a review panel are ineligible to participate "the necessary quorum to act upon and the number of votes necessary to act upon the matter is reduced as though the member who is disqualified is not a member of the Commission." NAC 281A.200(2). If the Commission were fully staffed with eight members and three of those served on the review panel, the remaining five would constitute the reduced Commission with three sufficient to conduct business as a majority. NAC 281A.200(1) (a meeting of the Commission can proceed with a majority present).

Here, because of their participation on the Review Panel which determined that just and sufficient cause existed for the Commission to render an opinion, Vice-Chair Duffrin and Commissioners Gruenewald and Sheets² are not eligible to "participate in any further proceedings of the Commission" related to the Consolidated Matter. NRS 281A.220(4). Thus, the Commission is empowered to act with a majority of the five remaining Commissioners. The law governing actions by the Commission therefore specifically contemplates the circumstances here—the business of the Commission can proceed despite not all eligible Commissioners attendance at a meeting. The Executive Director's Opposition points out that this is not an uncommon circumstance for the Commission and provides a number of recent cases in which this occurred. Opp'n to Mot. at n.2. The Motion provides no law, precedent, or analogous cases regarding any requirement that more than a majority of the Commissioners act on a matter.

If a subject believes a Commissioner should be disqualified, the subject may file a motion to disqualify the Commissioner "for good cause." NAC 281A.263. Although the Motion for Continuance raises an issue regarding resolution of this Consolidated Matter by opposing political parties and appointments of Commissioners by a previous governor, it stops short of any arguments regarding the impartiality of these Commissioners and cites no law indicating impropriety. Instead, the Motion seeks unique treatment from all other matters before the Commission based on the belief that the nature of the fine sought by the Executive Director merits an order compelling in-person attendance by all eligible Commissioners.³

Finally, the Executive Director points out that, as this case proceeds and is delayed further, Governor Lombardo will be asked to reappoint or replace Commissioners whose terms expire. Opp'n to Mot. at 5-6. Those appointed Commissioners will then be eligible to participate in the Consolidated Matter. Therefor, any further delay raises an issue of the appearance of prejudice to the Executive Director as Commissioners are asked to participate in a hearing regarding the individual who appointed them.⁴

² Commissioner Sheets resigned from the Commission leaving seven active Commissioners, five of whom are eligible to participate in the Consolidated Matters.

³ Although unique circumstances may require in-person attendance, those circumstances do not exist here where no witnesses will give testimony and only legal issues remain.

⁴ This Order makes no determination of the propriety of the actions of any Commissioners who may be appointed by Governor Lombardo. It merely makes an observation regarding the appearance of appointing an individual to the Commission who then must adjudicate a matter where the appointing Governor is the subject.

Although the law specifically provides that the Commission may proceed with its business by a majority of eligible Commissioners (either virtual or in-person attendance), two factors merit further scrutiny in granting a continuance. First, Governor Lombardo's team believed that all Commissioners would appear in person at the dispositive motion hearing. Although incorrect, this belief and the clarifications contained herein could result in alterations in the presentation or arguments addressed at the dispositive motion hearing.

And second, Governor Lombardo previously sought a continuance when the Legislature was still in session based on his ability to assist in his own defense. As pointed out in the Order granting the previous continuance, the subject of an investigation is entitled to assist in his defense. And at that time, the Motion for Continuance sought a continuance to the "next available setting." Motion at 1:21-22 (Apr. 27, 2023). Neither Party addressed the circumstance of a potential Special Legislative Session in the previous continuance briefing. Although Governor Lombardo does not raise the issue here, the Commission is aware that the 35th Special Session is ongoing and may prevent Governor Lombardo from assisting in the preparation of his case.

Based on the foregoing, the hearing on this Consolidated Matter is continued to the next meeting of the Nevada Commission on Ethics. The Executive Director is, as occurred in scheduling the June 13, 2023 meeting, requested to poll the Commissioners to determine availability to attend the meeting and provide counsel for Governor Lombardo with the information regarding anticipated attendance of Commissioners. Presently, no in-person attendance of any Commissioner is required. This Consolidated Matter will be heard at the meeting of the Nevada Commission on Ethics scheduled in July pursuant to a forthcoming Amendment to the Third Amended Notice of Hearing Scheduling Order. As indicated above, further delay may result in prejudice to the Parties, and any further requests for continuances are discouraged.

DATED: June 12, 2023


Chair Kim Wallin, CPA, CMA, CFM

CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada Commission on Ethics and that on this day in Carson City, Nevada, I transmitted a true and correct copy of the foregoing **Order Granting Motion for Continuance** via electronic mail, return receipt requested, to the Parties and counsel of record, as follows:

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