

MINUTES OF THE SPECIAL MEETING OF
THE NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Held at DEPARTMENT OF OCCUPATIONAL
SAFETY & HEALTH
Las Vegas-Clark County Library District
Windmill Library
7060 W. Windmill Lane, Las Vegas, Nevada
Thursday, December 21, 2017
Commencing at 10:00 o'clock a.m.

PRESENT

James Barnes (public)
James Halsey (labor)
Steve Ingersoll (labor)
Sandra Roche (management)
Rodd Weber (management)
Fred Scarpello, Esq., Legal Counsel

ABSENT

Frank Milligan (alternate)

The Nevada Occupational Safety and Health Review Board convened the scheduled meeting at 10:00 a.m., December 21, 2017. The Chairman called the Board to order. The notice of meeting was duly provided under Chapter 618 of the Nevada Revised Statutes and in accordance with NRS Chapter 241 of the Nevada Open Meeting Law. A copy of the notice is attached to these minutes and made a part hereof as though fully set forth herein. Chairman Barnes announced the meeting would be limited to only administrative matters subject of the published agenda. He noted for the record that contested case hearings require personal attendance of members for appropriate consideration of sworn testimony and submittal of documentary evidence; however meetings limited to only administrative matters may be conducted telephonically dependent upon the subject matter.

On roll call, all members above were present personally; Ms. Roche telephonically.

The Chairman referenced the published agenda and noted the electronic publication and postings completed in accordance with applicable law. He directed Board attention to the subject matters referenced on the published agenda.

I.

The Review Board (RB) recognized the presence of Administrator Decker (AD) and also the appearance of Chief Administrative Officer, Jess Lankford (CAO JL). There was no appearance by the DIR Senior Legal Counsel Smith.

Discussions referenced Chapter 618 legislation, particularly the special statute NRS 618.585(2) authorizing the "Board may employ legal counsel;" and NAC 333.150, the exception to the general independent contractor hiring process where there is a "specific statute." Reference was made to the Nevada State Legislature determinations when the State Plan enacted through the federal system including considerations to conflicts of interest. The legislature enacted the specific Board right to employ its own counsel rather than utilize state employee lawyers. Counsel noted for example that a state employee attorney of the AG advising the hearing tribunal RB under NRS 618, while the AG also responsible for representing the state of Nevada as an employer reflects a threshold, direct, and/or appearance, of conflict. The state of Nevada as an employer, has and continues to receive complaints requiring enforcement action by NOSHES under jurisdiction of the Nevada RB and defended by the AG. There are other special statutes in Nevada for independent counsel employment; and many independent legal counsel contracts routinely approved by the Nevada AG.

AD expressed preference for a competitive bidding process for Board legal services notwithstanding the decision already made directly by the Board in furtherance of NRS 618.585(2) and NAC 333.150 et seq. Counsel stated the plain meaning of the NAC has been historically interpreted to restrict the general terms of the competitive or standard independent contractor employment process as not triggered when there is a "special statute."

Counsel noted that although all the foregoing information was conveyed to DIR on September 15th, 2017, subject of public discussion, and advance notice published, no formal objections were presented by DIR, state budget office, the AG or anyone else. To date there have been no verifiable legal nor budgetary bases presented for delaying the processing and/or implementation of the new legal services contract.

AD represented he had contacts with a Deputy Attorney General whose advise he was relying upon for withholding approval based upon a question of conflict of interest and/or requirement for competitive bidding. Similarly that a budget office representative agreed to provide him correspondence identifying the financial

reasons for objecting to the contract which he had expected to have in hand this date and would provide to the Board.

Board counsel again noted the September 13, 2017 minutes and previous advisories to Board members that his current and historical low fee rate is based upon discounted "pro bono" consideration for state work. Counsel further opined that the Barnes fee rate was fair and reasonable in Nevada, particularly considering his unique administrative background, legal qualifications and extensive OSHA experience which are essential to provide the RB competent legal services in the specialized practice field.

Counsel advised the best way to resolve the matter would be through meetings including the Senior DIR legal counsel, state budget officials, the Deputy AG and Board counsel. Any proposed resolutions could be reported to the RB and AD/DIR.

Board members discussed the lack of any meaningful results from the discussion and exchanges to reach an agreeable resolution. On motion of member Halsey, second by Mr. Ingersoll, discussion, and unanimous vote, the Board members agreed to delay action based upon imminent receipt of the budget office correspondence so that Board counsel and DIR counsel might understand and address the reasons, rationale, and support for the objections, including those of the Deputy AG. The motion was approved with the expectancy that the correspondence would be received prior to the forthcoming January deadline for resubmittal of the contract to the BOE.

Board members instructed current Board counsel continue under the extended interim legal services contract with the contested case processing and legal work; but reset the January hearing schedule to upcoming months to allow additional time to resolve the long term contract issues. Counsel was instructed to confirm a quorum of Board members for the scheduled February contested hearings and meeting in Las Vegas now set for February 14 and 15, 2018.

II.

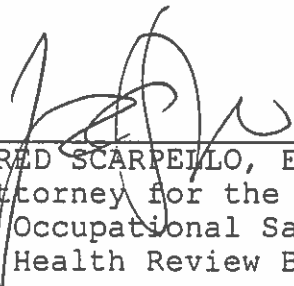
Counsel reported on the continued problems with directives from DIR restricting use of only stenographic reporters on the "approved state list." Counsel advised that after accessing the list on the state website, every court reporter on the approved list was found not in current contract status; all expired October 2017. Board Counsel represented he advised DIR counsel of the status in November 2017 and reviewed the need for immediate correction to avoid cancellations of prescheduled hearings if the

Board could not assure certified reporters as required by NRS and NAC. Board counsel reported, he confirmed the pre-scheduled services of the statewide reporter firm (Litigation Services), based upon state purchasing confirmation it would provide interim payment for same. The state purchasing personnel indicated the formal reporter contracts, including those of Litigation Services and the others, should be approved but not until forthcoming BOE meetings. DIR is apparently required to submit requests for approvals of the court reporting agencies under the "good for the state" policy.

AD advised the issue resulted from a computer problem; and resolution of court reporter contract issues underway. He advised the Board could continue with the pre-scheduled court reporter firm, with assurance the company would be paid by DIR under interim purchase orders.

The chairman noted there were no individuals in attendance as members of the public to request public comment, and therefore closed that portion of the meeting accordingly.

There being no further business before the Board, on motion, second and unanimous vote, the meeting of the Nevada Occupational Safety and Health Review Board was adjourned at approximately 12:15 p.m.



FRED SCARPEILLO, ESQ.
Attorney for the Nevada
Occupational Safety and
Health Review Board