

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

Held at NEVADA STATE BUSINESS CENTER
3300 W. Sahara Ave., Suite 425
Las Vegas, NV 89102

and by video conference
DEPARTMENT OF BUSINESS AND INDUSTRY
1830 College Parkway, Suite 100
Carson City, NV 89701

Friday, April 20, 2018
Commencing at 10:00 o'clock a.m.

PRESENT

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

The Nevada Occupational Safety and Health Review Board was convened for the duly noticed scheduled meeting at 10:00 a.m., Friday, April 20, 2018. 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 Ingersoll announced the subject meeting was restricted to a single administrative matter involving the status of the Board authorized employment of new independent contract legal counsel, Mr. James Barnes.

Additional parties present at the meeting were BI Director, CJ Manthe; Assistant Director, Terry Reynolds; OSHES counsel, Salli Ortiz; James Barnes; Chief Administrative Officer, Jess Lankford; public, John Wiles.

Chairman Ingersoll announced the meeting was being reported by a certified court reporter in furtherance of the Board policy for expanded public access under the Nevada Open Meeting Law.

Following is a summary of the meeting:

Chairman Ingersoll opened the meeting for general discussion on status, progress and proposals to resolve the impasse for

processing the James Barnes legal counsel contract by the DIR through the Board of Examiner (BOE) state contracting approval process. Board members exchanged comments noting delayed processing of the matter and an impasse existent over seven months. Chairman Ingersoll noted Mr. Barnes employment by the Board had been duly approved under the applicable Nevada Revised Statute 618.585, at a regularly scheduled and noticed meeting on September 13, 2017. The contract terms and conditions were drafted through DIR Senior Legal Counsel; then processed by Administrator, Mr. JD Decker acting under DIR funding arm responsibilities pursuant to the Nevada State (OSHA) Plan. The contract was signed by Mr. Barnes as independent contractor and Mr. Decker on behalf of DIR. Mr. Decker reported the contract had been timely submitted to the Board of Examiners for approval at the November 2017 meeting, but he was instructed to remove same from the agenda, based upon state budget office advisory.

Mr. Ingersoll noted the sole issue for current objection to the contract is reported to be a determination made by state budget office personnel denying DIR's approval and submittal based upon the potential for a shortfall in the budgeted sums reserved for legal services. The budget personnel questioned whether the reserved funds would meet the anticipated requirements due to the higher fee rate of Mr. Barnes, which could potentially result in a shortfall.

Current Board counsel noted only approximately 12 months left in the 2018-2019 June 30 fiscal year prior to the next funding analysis by DIR for the state required (biennium) two year based budget. The current reserves are more than sufficient to meet the legal expected fee requirements for new Board counsel, based upon the past year appellate hearing and legal processing fee requirements, even considering the Barnes higher hourly rate. The Barnes contract was originally intended to be a two year term; however after the past seven months of delays and impasse, the contract services time period to be charged would only occur from June 2018 until June of 2019 when a new two year funding would occur.

Comment was made from the public by former DIR Senior Legal Counsel, Mr. John Wiles, now a private attorney practicing in the OSHA field. He explained that during his 15 years with DIR, budget shortfalls appeared at various DIR levels. The Interim Finance Committee was always available to step in with additional funding. He further noted the importance of compliance with the legislation for Board independent legal counsel employment. The special statute (NRS 618.585) entitles the Board to retain its attorney. That intent was to assure independence from state government and OSHA legal field expertise by an attorney with a background as

established by Mr. Barnes. His resume and qualifications are well demonstrated. Mr. Wiles further noted there are few Nevada lawyers who practice in the specialized OSHA field; and those who regularly appear before the Board and practice are engaged representing private employers as respondents in contested hearings and likely either conflicted by their client base or simply unwilling to serve at a fee rate far lower than earned in the private sector.

The Chairman acknowledged a copy of correspondence dated April 18, 2018 submitted by Mr. Wiles to Director Manthe, regarding the importance of OSHA experienced private counsel for the Board position.

Board members and Director Manthe, Assistant Director Reynolds exchanged comments and engaged in discussion regarding the impasse, what might be done going forward.

Chairman Ingersoll noted unanimous vote from the previous Board meeting of April 11, 2018, identifying the purpose of this meeting to resolve the impasse. He referenced that a result must be achieved prior to the May 31, 2018 expiration of the current counsel legal services contract or the Board must regrettably suspend further contested hearings and the processing of cases until the issue resolved.

At the conclusion of the discussions, Director Manthe and Assistant Director Reynolds indicated they are unable to pay the Barnes fee rate based upon the state budget directive. They further advised the Review Board must now proceed on its own directly to the Board of Examiners for contract approval. The Board must present its own case rather than follow the previous contract policy, guidelines and those instructed by DIR Administrator Decker, notwithstanding DIR is the designated state contract funding arm.

Comment was made that Administrator Decker previously directed by email ". . . the Board is not permitted to go outside the DIR offices to seek contract approval. . ."

The Chairman and Board counsel inquired of the Director and Assistant Director as to the BOE process, and contact information considering the previous limitations on direct action. The time limit for BOE contract submittal is May 8, 2018 for the June 19 2018 meeting. Assistant Director Reynolds indicated contact information for the BOE clerk would be provided.

At the conclusion of the meeting, Chairman Ingersoll read an extract from a recent OSHA case decision by the Nevada Court of Appeals. The case was decided on a jurisdictional issue requiring

mandatory inclusion of identified independent parties in an appeal. The Court rationale confirmed independence of the Review Board, and listed factors including the special statute permitting the Board to employ its own counsel, enact its own rules, set hearings at a time and place of Board selection and other indices as demonstrating the Nevada Occupational Safety and Health Review Board is an "independent agency." Mr. Ingersoll explained the appellate court case acknowledges the Board right to employ an independent qualified OSHA attorney. The Chairman expressed exasperation over the Barnes contract approval delays and needless consumption of appointed members time over a period of approximately seven months. He added that lack of resolution results in a detriment to the hearing process for Nevada employers, employees and the public.

There being no further business, on motion, second and unanimous vote, the meeting of the Occupational Safety and Health Review Board was adjourned at approximately 11:20 a.m.



Fred Scarpetto, Esq.
OSHA Review Board Legal Counsel