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November 3, 2000

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Ron Micheli
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FROM: *Gay Woodhouse*
Gay Woodhouse
Wyoming Attorney General

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RE: Conservation District Supervisor Removal

Your question regarding which statutory provision controls the removal of a conservation district supervisor was specific to circumstances where a district supervisor is absent from meetings without an acceptable excuse. We limit our response to the situation presented. If there are additional facts or different circumstances, the legal advice will change. Please let us know if you have additional questions.

Issue Presented: Can the conservation districts remove a supervisor based on the events listed in the Special District Elections Law or does the principal act, Title 11, Chapter 16, Conservation Districts, take precedence?

OR

Is a vacancy of a district supervisor created for a conservation district under WYO. STAT. § 22-29-201(a)(vii) due to the district supervisor's unexcused absences?

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Short Answer: No. District supervisor removal is subject to neglect of duty or malfeasance in office pursuant to WYO. STAT. § 11-16-118(a). It would depend on the facts as to whether a district supervisor's failure to attend meetings constitutes neglect of duty.

Statutory Authority:

WYO. STAT. § 11-16-118:

(a) The term of the two (2) supervisors appointed extends from their appointment until the second annual election held in the district. A supervisor shall hold office from his election or appointment and taking of the oath of office until his successor has been elected or appointed, and qualified. Vacancies shall be filled for the unexpired term. Vacancies in the office of any supervisor shall be filled by appointment by the commission upon the recommendations of the district supervisors, the appointee to serve until the next election at which time the vacancy shall be filled by the electors for the unexpired term. A supervisor shall receive no compensation for his services, but is entitled to expenses, including traveling expenses, necessarily incurred in the discharge of his duties. **Any supervisor may be removed by the commission upon notice and hearing, for neglect of duty or malfeasance in office.** (emphasis added)

WYO. STAT. § 22-29-103:

(a) This act applies to the following districts as specified in subsection (b) of this section:

(ii) Conservation districts;

(b) This act specifies requirements pertaining to elections and changes in the organization of the districts listed in subsection (a) of this section where the principal act is silent and unclear. The specific provisions of a principal act are effective and controlling to the extent they conflict with this act.

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WYO. STAT. § 22-29-201:

A director's office shall be deemed to be vacant upon the occurrence of any one (1) of the following events prior to the expiration of the term of office:

(vii) If the person who was duly elected or appointed fails to attend three (3) consecutive regular meetings of the board of directors without the board of directors having entered upon its minutes an approval for at least one (1) of those absences. This provision shall not apply to instances where failure to attend the meetings was due to a temporary mental or physical disability or illness;

Discussion: Under WYO. STAT. § 22-29-103(b) the special district election act applies to conservation districts "where the principal act is silent and unclear." The principal act for conservation districts is the Wyoming Conservation Districts Law," WYO. STAT. §§ 11-16-101 through 11-16-134.

The first step is an analysis of the Wyoming Conservation Districts Law to determine if it is silent or unclear regarding a vacancy for unexcused absences. Your question correctly specifies the wording of WYO. STAT. § 11-16-118(a) as the applicable provision. WYO. STAT. § 11-16-118(a) reads in part, "Any supervisor may be removed by the commission [board of agriculture] upon notice and hearing, for neglect of duty or malfeasance in office."

In interpreting statutes, the court looks just to the language of the statute, and if the language is clear and unambiguous, the court will not look at statutory rules of construction, nor will it attribute another meaning to the statute, but will give the statute effect according to its plain and obvious meaning. *Amoco Production Co. v. Hakala*, 644 P.2d 785, 789 (Wyo. 1982). When the language of a statute is plain and unambiguous, there is no room for construction and the court is powerless to give it a different meaning. *Town of Clearmont v. State Highway Commission*, 357 P.2d 470, 475 (Wyo. 1960). Thus, a statute is not open to construction as a matter of course. *Druley v. Houdeshelt*, 294 P.2d 351, 352, *reh. den.*, 296 P.2d 251 (Wyo. 1956). A statute is unambiguous if "its wording is such that reasonable persons are able to agree as to its meaning with consistence and predictability." *Parker Land & Cattle v. Wyoming Game and Fish Commission*,

845 P.2d 1040, 1043 (Wyo. 1992) (quoting *Allied Signal, Inc. v. Wyoming State Bd. of Equalization*, 813 P.2d 214, 219 (Wyo. 1992)). We conclude the wording of the statute has a plain and obvious meaning. To clarify the discussion, we consider “neglect of duty,” then “malfeasance in office.”

A. Neglect of Duty

Neglect of duty is not defined in WYO. STAT. § 11-16-118 or any other provisions of the Wyoming Conservation District Law. Nor are there any cases interpreting what conduct is neglect of duty under WYO. STAT. § 11-16-118. We provide examples from cases discussing neglect of duty of public officers.

Actions which constitute neglect of duty will depend on the particular facts. The Supreme Court of Kansas described what constitutes neglect of duty under a county commissioner statute as:

The penalty denounced cannot be inflicted on an individual officer because of neglect of duty unless he has neglected to perform some ‘act which it is his duty to perform.’ Manifestly the duty must be personal, and the act must be one which he is able to perform, or he cannot be at fault. He cannot be guilty of neglect in failing to perform an act which he has no legal capacity or authority to perform. . . . It is not every oversight or omission within the strict letter of the law which will entail forfeiture of office. The statute must be interpreted in the light of the mischief it was intended to remedy. The purpose [of the county commissioner’s statute] was to prevent persons from continuing to hold office whose inattention to duty, either because of habitualness or its gravity, endangers the public welfare. Therefore the neglect contemplated must disclose either willfulness or indifference to duty so persistent or in affairs of such importance that the safety of the public interests is threatened.

State v. Kennedy, 108 P. 837, 841 (Kansas 1910).

The Nebraska Supreme Court recently wrote, “evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily

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establish incompetency or neglect of duty sufficient to constitute just cause for termination." *Boss v. Fillmore County Sch. Dist. No. 19*, 559 N.W.2d 448, 453 (Neb. 1997). The Nebraska Appellate Court in the earlier decision on the same case said, "Incompetency or neglect of duty is not measured in a vacuum nor against a standard of perfection but, instead, must be measured against the standard required of others performing the same or similar duties." *Boss v. Fillmore County Sch. Dist. No. 19*, 548 N.W.2d 1, 7-8 (Neb.Ct.App. 1996).

"Nonfeasance of an officer is the substantial failure to perform duty. Neglect of duty and nonfeasance mean the same thing." *Holmes v. Osborn*, 115 P.2d 775, 783 (Ariz. 1941).

"The terms 'malfeasance' and 'neglect of duty' are comprehensive terms and include any wrongful conduct that affects, interrupts, or interferes with the performance of official duty." *State ex rel. Knabb v. Frater*, 89 P.2d 1046, 1048 (Wash. 1930).

In summary, the court cases provide guidance as to what types of action or inaction by an office holder are neglect of duty of the office. The courts are able to examine particular facts to determine neglect of duty without saying that the concept is unclear. We conclude that courts are able to ascertain whether neglect of duty has occurred so we find the phrase is unambiguous. The Wyoming Conservation District Law, WYO. STAT. § 11-16-118(a), controls removal of district supervisors for neglect of duty. The special district law for vacancies does not apply because the principal act is clear.

B. Malfeasance in Office

Malfeasance in office is the second reason for the Board of Agriculture to remove a district supervisor under WYO. STAT. § 11-16-118(a). BLACK'S LAW DICTIONARY defines "malfeasance" as:

Evil doing; ill conduct. The commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which person ought not to do at all or the unjust performance of some act which the party had no right or which he had contracted not to do. Comprehensive term including any wrongful conduct that affects, interrupts or interferes with the performance of official duties. *State ex rel. Knabb v. Frater*, 198 Wash. 675, 89 P.2d 1046,

1048. Malfeasance is a wrongful act which the actor has no legal right to do, or any wrongful conduct which affects interrupts, or interferes with performance of official duty, or an act for which there is no authority or warrant of law or which a person ought not to do at all, or the unjust performance of some act, which party performing it has no right, or has contracted not, to do. *Daugherty v. Ellis*, 142 W.Va. 340, 97 S.E.2d 33, 42. It differs from "misfeasance" and "non-feasance" (*q.v.*).

Malfeasance in office is not defined in the Conservation Districts law. In addition, there are no Wyoming cases interpreting the phrase used in WYO. STAT. § 11-16-118. We provide examples from cases regarding malfeasance in office. Like neglect of duty, malfeasance in office depends on the individual circumstances. One of the clearer legal explanations of "malfeasance in office" comes from *State v. Geurts*, 359 P.2d 12, 14 (Utah 1961):

[B]y usage the phrase 'malfeasance in office' has acquired a commonly understood meaning: it requires an intentional act or omission relating to the duties of a public office, which amounts to a crime, or which involves a substantial breach of the trust imposed upon the official by the nature of his office, and which conduct is of such a character as to offend against the commonly accepted standards of honesty and morality.

The above meaning of the term is so well known what it was used in our state constitution. Art. VI, Secs. 19 and 21, which provide for the removal of public officials for 'malfeasance in office'; and the statues under attack simply implements those provisions. It is our opinion that the phrase is sufficiently definite to enable people of ordinary intelligence and understanding to know what conduct is required or prohibited and that it is, therefore, not so vague or uncertain as to be invalid.

The Colorado Supreme Court discussed malfeasance as: "Malfeasance in office cannot be charged except for breach of a positive statutory duty or for the performance of a discretionary act with an improper or corrupt motive. . . . Malfeasance is the doing of an intentional and corrupt act by an official. It is

readily distinguished from misfeasance or nonfeasance." *People v. Schneider*, 292 P.2d 982, 985 (Colo. 1956).

The Wyoming Supreme Court has included malfeasance in the definition of "misconduct" by a public official. *State Bank Charter Application v. Bonham*, 606 P.2d 296, 302 (Wyo. 1980).

One of the older Wyoming cases, *People v. Shawver*, 222 P. 11 (Wyo. 1924), contains a lengthy discussion of misconduct, malfeasance and vacancy in office. We summarize and highlight the following:

1. Legislatively created officers are within legislative control and may be abolished or incumbents removed in any manner declared by the Legislature;
2. Misconduct or malfeasance in office applies to acts or omissions relating to the performance of official duties not private or business conduct;
3. Removal has to be for the reason listed and not for additional reasons;
4. Without some statutory regulation, a vacancy can only exist in office when there is no lawful incumbent occupying it. As office cannot be said to be vacant while any person is authorized to act in it and does so act.

In summary, the court cases provide guidance as to what types of action or inaction by an office holder are malfeasance in office. The courts are able to examine particular facts to determine malfeasance in office. We conclude that courts are able to ascertain whether malfeasance in office has occurred so we find the phrase is unambiguous. The Wyoming Conservation District Law, WYO. STAT. § 11-16-118(a), controls removal of district supervisors for malfeasance in office. The special district law for vacancies does not apply because the principal act is clear.

The special district law **only** steps in where a principal act is silent or unclear. WYO. STAT. § 22-29-103(b). The Wyoming Conservation District Law addresses how vacancies are filled, but does not describe under what circumstances a vacancy occurs. If there is no incumbent to hold the seat due to removal under WYO. STAT. § 11-16-118(a), resignation, death, or qualification failure, then a vacancy would occur. The special district law which creates a vacancy in office for failing to attend three consecutive regular meetings does not apply since the Wyoming Conservation District Law requires removal for neglect of duty or malfeasance in office before a vacancy is created. Failing to attend

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meetings may constitute "neglect of duty" but the Board of Agriculture would have to determine whether a district supervisor should be removed based on the specific facts.

We note that district supervisor removal for neglect of duty or malfeasance in office provides greater security in the office than an automatic vacancy for failing to attend three consecutive meetings under the special districts statute.

Conclusion: On its face, the special district law only applies if the principal act is silent or unclear. We conclude that the principal act in this instance is clear that district supervisors may be removed by the Board of Agriculture upon notice and hearing, for neglect of duty or malfeasance in office. WYO. STAT. § 11-16-118(a). What constitutes "neglect of duty" or "malfeasance in office" will depend on the specific circumstances. The vacancy circumstances of the special district law, WYO. STAT. § 22-29-201(a)(vii), does not apply to conservation districts where removal is for cause. There may be specific situations where failing to attend conservation district meetings constitutes "neglect of duty" but that decision is left to the Board of Agriculture's determination after reviewing the evidence presented during the hearing.