

Vance D. Day, OSB #912487
vance.day@teamvanceday.org
Law Offices of Vance D. Day, PC
PO Box 220
Powell Butte, OR 97753
Telephone: (503) 409-5562

Elizabeth A. Jones, OSB #201184
beth@montoyahisellaw.com
Law Offices of Montoya, Hisel and Associates
901 Capitol St. NE
Salem, OR 97301
Telephone: (503) 480-7252
Fax: (503) 779-2716
Attorneys for Plaintiff Brian J. Boquist

**From the Desk of
Senator Brian Boquist**

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

BRIAN J. BOQUIST,

Case No. 6:19-cv-01163-MC

Plaintiff,

v.

**PLAINTIFF'S SUR-REPLY TO
DEFENDANTS' REPLY TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

OREGON STATE SENATE PRESIDENT
PETER COURTNEY, in his individual and
official capacities; SENATOR FLOYD
PROZANSKI, in his individual and official
capacities as Chairman of the Senate Special
Committee on Conduct; SENATOR JAMES
MANNING, in his individual and official
capacities as member of the Special Senate
Conduct Committee,

Defendants.

LR 56-1(b) provides, “If an evidentiary objection is raised by the moving party in its reply memorandum, the non-moving party may file a surreply memorandum pursuant to this subparagraph within seven days addressing only the evidentiary objection.”

EVIDENTIARY OBJECTION

Defendants, through the Second Declaration of Marc Abrams, incorrectly assert that “Exhibit O is a copy of legislation showing Rule 27 as it was in effect in 2019.” (ECF 69, ¶ 2).¹ But “Exhibit O” is a copy of HCR 28, adopted in 2021. (ECF 69-1). Defendants rely upon this faulty evidence to argue that Rule 27 defined “Employee” and “Legislative Branch” in a particular manner when Boquist was disciplined in July 2019. (ECF 68, pp. 17-18). But there was no operative Rule 27 (3) Definitions section between July 1 and November 25, 2019. (Jones Decl., Ex. 1) (Plaintiff’s counsel conferred by email with Defendants’ counsel on this objection and Defendants’ counsel agrees “the definitions did not go into effect until November 2019.”). Under the operative HCR 20, Rule 33, Rule 27 sections (1) – (16) were not in effect until a Legislative Equity Officer was appointed on November 25, 2019. (ECF 53-7, p. 16).

CONCLUSION

There was no Rule 27 definition of “Employee” or “Legislative Branch” at any relevant time here and this Court should not credit any such argument by Defendants.

DATED this 17th day of April, 2023.

s/ Elizabeth A. Jones
 Elizabeth A. Jones, OSB #201184
 Vance D. Day, OSB #912487
 Of Attorneys for Plaintiff

¹ Plaintiff also noticed his Motion for Summary Judgment contains an error. Rule 27 was amended by HCR 221 on August 10, 2020, not 2019. (ECF 51, p. 12; 053-8). To Plaintiff’s knowledge, this scrivener’s error does not create any factual disputes or affect any legal arguments.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFF'S SUR-REPLY TO DEFENDANTS' REPLY TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT on:

Tracy Ickes White
Marc Abrams
Oregon Department of Justice
100 SW Market Street
Portland, OR 97201
Attorneys for Defendants

by the following indicated method or methods:

- by **electronic means through the Court's Case Management/Electronic Case File system** on the date set forth below;
- by **emailing** a copy thereof to each attorney at each attorney's last-known email address on the date set forth below;
- by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to plaintiff's last-known address listed above and depositing it in the U.S. mail at Salem, Oregon on the date set forth below.

DATED this 17th day of April, 2023.

s/ Elizabeth A. Jones
Elizabeth A. Jones, OSB #201184
Vance D. Day, OSB #912487
Of Attorneys for Plaintiff

Vance D. Day, OSB #912487
vance.day@teamvanceday.org
Law Offices of Vance D. Day, PC
PO Box 220
Powell Butte, OR 97753
Telephone: (503) 409-5562

Elizabeth A. Jones, OSB #201184
beth@montoyahisellaw.com
Law Offices of Montoya, Hisel and Associates
901 Capitol St. NE
Salem, OR 97301
Telephone: (503) 480-7252
Fax: (503) 779-2716
Attorneys for Plaintiff Brian J. Boquist

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

BRIAN J. BOQUIST,

Case No. 6:19-cv-01163-MC

Plaintiff,

v.

**DECLARATION OF ELIZABETH A.
JONES IN SUPPORT OF PLAINTIFF'S
SUR-REPLY TO DEFENDANTS'
REPLY TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

OREGON STATE SENATE PRESIDENT
PETER COURTNEY, in his individual and
official capacities; SENATOR FLOYD
PROZANSKI, in his individual and official
capacities as Chairman of the Senate Special
Committee on Conduct; SENATOR JAMES
MANNING, in his individual and official
capacities as member of the Special Senate
Conduct Committee,

Defendants.

I, Elizabeth A. Jones, hereby declare under the penalty of perjury that the following is true:

1. I am one of the attorneys representing Plaintiff in this matter. This Declaration is offered in support of Plaintiff's Sur-Reply to Defendants' Reply to Defendants' Motion for Summary Judgment.

2. Attached to this Declaration and marked "Exhibit 1" is a true and correct copy of the email correspondence between Plaintiff's counsel (Vance Day and Beth Jones) and Defendants' counsel (Marc Abrams and Tracy White) between Friday, April 14, and Monday, April 17, 2023. Defendants' counsel agrees that Abrams' Exhibit O, HCR 28, was *not* operative in 2019, and that under the operative HCR 20, "the definitions did not go into effect until November 2019." (HCR 20, Rule 33 provided that Rule 27 sections (1) – (16) were not in effect until a Legislative Equity Officer was appointed, which did not occur until November 25, 2019.).

I hereby declare under penalty of perjury that the foregoing is true and correct.

DATED this 17th day of April, 2023.

s/ Elizabeth A. Jones
Elizabeth A. Jones, OSB #201184
Of Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DECLARATION OF ELIZABETH A. JONES IN SUPPORT OF PLAINTIFF'S SUR-REPLY TO DEFENDANTS' REPLY TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT on:

Tracy Ickes White
Marc Abrams
Oregon Department of Justice
100 SW Market Street
Portland, OR 97201
Attorneys for Defendants

by the following indicated method or methods:

- by **electronic means through the Court's Case Management/Electronic Case File system** on the date set forth below;
- by **emailing** a copy thereof to each attorney at each attorney's last-known email address on the date set forth below;
- by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney's last-known address listed above and depositing it in the U.S. mail at Salem, Oregon on the date set forth below.

DATED this 17th day of April, 2023.

s/ Elizabeth A. Jones
Elizabeth A. Jones, OSB #201184
Vance D. Day, OSB #912487
Of Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Beth Jones

From: Abrams Marc <marc.abrams@doj.state.or.us>
Sent: Monday, April 17, 2023 1:28 PM
To: Beth Jones; Vance Day; White Tracy I
Subject: RE: Evidentiary Objection to Declaration and Exhibit to Defendants' Reply

Beth—

Upon review we agree the definitions did not go into effect until November 2019. You may so represent with our concurrence. That said, if your position is that, therefore, Sen. Boquist is an “employee” we definitively disagree with that and would file a counter to any sur-reply if that is the intent.

Marc

Marc Abrams

971-673-0913 (M-Th) 503-740-4995 (F)
marc.abrams@doj.state.or.us

From: Beth Jones <beth@montoyahisellaw.com>
Sent: Monday, April 17, 2023 9:42 AM
To: Abrams Marc <marc.abrams@doj.state.or.us>; Vance Day <vance.day@teamvanceday.org>; White Tracy I <Tracy.I.White@doj.state.or.us>
Subject: RE: Evidentiary Objection to Declaration and Exhibit to Defendants' Reply

CAUTION EXTERNAL EMAIL This email originated from outside of DOJ. Treat attachments and links with caution. ***CAUTION EXTERNAL EMAIL***

DUPLICATE

Beth Jones

From: Abrams Marc <marc.abrams@doj.state.or.us>
Sent: Monday, April 17, 2023 11:59 AM
To: Beth Jones; Vance Day; White Tracy I
Subject: RE: Evidentiary Objection to Declaration and Exhibit to Defendants' Reply

I am trying to double check with Lege Counsel but my belief is we simply disagree on this.

Marc Abrams

971-673-0913 (M-Th) 503-740-4995 (F)
marc.abrams@doj.state.or.us

From: Beth Jones <beth@montoyahisellaw.com>
Sent: Monday, April 17, 2023 9:42 AM
To: Abrams Marc <marc.abrams@doj.state.or.us>; Vance Day <vance.day@teamvanceday.org>; White Tracy I <Tracy.I.White@doj.state.or.us>
Subject: RE: Evidentiary Objection to Declaration and Exhibit to Defendants' Reply

CAUTION EXTERNAL EMAIL* This email originated from outside of DOJ. Treat attachments and links with caution. *CAUTION EXTERNAL EMAIL

Marc,

I want to be sure I understand what you're saying...

You believe that HCR 20 (3) was operative on June 29, not in November when the LEO was hired?

The subsection you're referring to in Reply n.2 is (17). Subsection 17 is not in the same posture as Sections (1) – (16).

HCR 20, Rule 33 (Jones Decl., Ex. 7, p. 16) provides:

"Subsections (1) to (16) of Legislative Branch Personnel Rule 27, as set forth in this concurrent resolution, become operative on the date that the Joint Committee on Conduct, ... notifies the presiding officers that the Legislative Equity Officer, ... has been appointed or, ... that an acting Legislative Equity Officer has been appointed."

On November 25, 2019, "the Joint Committee on Conduct notified the presiding officers that Jackie Sandmeyer was appointed to serve as the acting Legislative Equity Officer," so "[a]ll sections of Rule 27 (HCR 20 (2019)) became operational November 25." (Jones Decl., Ex 16; Ex 35 ("[Legislative Counsel] Dexter reminded me that the date of this memo is what triggers the operative date for section 1-16 of HCR 20."). *See also* Jones Decl., Ex. 15 @ 02:50 (08/08/2019 hearing - "we have a new Rule 27 but most of it has not come into effect because we do not yet have an equity officer..."); (Jones Decl., Ex. 10, p. 2, fn 2) ("Rule 27 was recently amended, but its amendments, as are relevant to this complaint, are not yet effective.").

Accordingly, subsection (3) Definitions was not operative until November 25.

I don't understand how you're seeing HCR 20 (3) was operative on June 29, 2019?

Beth

From: Abrams Marc <marc.abrams@doj.state.or.us>

I don't understand how you're seeing HCR 20 (3) was operative on June 29, 2019?

Beth

From: Abrams Marc <marc.abrams@doj.state.or.us>

Sent: Monday, April 17, 2023 9:30 AM

To: Beth Jones <beth@montoyahisellaw.com>; Vance Day <vance.day@teamvanceday.org>; White Tracy I <Tracy.I.White@doj.state.or.us>

Subject: RE: Evidentiary Objection to Declaration and Exhibit to Defendants' Reply

Beth—

I would suggest that such an objection is most appropriately reserved for oral argument. That said, I would be fine if, rather than anything ponderous, you simply write a one or two paragraph supplement basically saying what you have just said and then finish up with "Defendants disagree and refer to their MSJ reply at 3 n2." And then we are all covered.

Marc

Marc Abrams

971-673-0913 (M-Th) 503-740-4995 (F)

marc.abrams@doj.state.or.us

From: Beth Jones <beth@montoyahisellaw.com>

Sent: Monday, April 17, 2023 9:15 AM

To: Abrams Marc <marc.abrams@doj.state.or.us>; Vance Day <vance.day@teamvanceday.org>; White Tracy I <Tracy.I.White@doj.state.or.us>

Subject: RE: Evidentiary Objection to Declaration and Exhibit to Defendants' Reply

CAUTION EXTERNAL EMAIL This email originated from outside of DOJ. Treat attachments and links with caution. ***CAUTION EXTERNAL EMAIL***

Marc,

Defs' Reply, n.2, references HCR 20 (17) – which we agree was operative when amended. However, HCR 20 (1) – (16) were not operative until the LEO was hired in Nov 2019, per Rule 33. Therefore, the definitions section of HCR 20 (3) was not operative at any relevant time in this case.

Even if HCR 28 includes similar language as HCR 20, HCR 28 was not in effect in 2019 and the definitions section (3) of HCR 20 was not in effect until November 2019. This is our objection. There was no operative definition of "employee" or "legislative assembly" (or any definitions) on July 8, 2019.

Please let us know how you want to proceed.
Thank you,
Beth

From: Abrams Marc <marc.abrams@doj.state.or.us>

Sent: Monday, April 17, 2023 8:11 AM

To: Vance Day <vance.day@teamvanceday.org>; White Tracy I <Tracy.I.White@doj.state.or.us>

Cc: Beth Jones <beth@montoyahisellaw.com>

Subject: RE: Evidentiary Objection to Declaration and Exhibit to Defendants' Reply

Vance—

This was the copy I came up with when pulling together in that last round of briefing. Here's my thinking: Yes, HCR 28 *after* adoption would be new and not what was in effect, but the text within HCR 28 shows what it was *before* it adoption, and that, existing text is, I believe, that text in effect in July 2019. I am happy to file a clarifying declaration to that effect if it will resolve your concerns. Just let me know. That said, we have a disagreement as to when the material at issue went into effect, and I do not agree with you it didn't go into effect until November 2019. See Defendants Summary Judgment Reply at 3, n. 2.

So it seems you are actually raising *two* issues, one is whether the document is the correct document and one that is a substantive issue. As to the former, I am happy to listen to any suggestion. As to the latter, I believe you have already made that argument, we have both briefed it and there is no basis or entitlement to file any further briefing.

Marc

Marc Abrams

971-673-0913 (M-Th) 503-740-4995 (F)

marc.abrams@doj.state.or.us

From: Vance Day <vance.day@teamvanceday.org>

Sent: Friday, April 14, 2023 2:01 PM

To: Abrams Marc <marc.abrams@doj.state.or.us>; White Tracy I <Tracy.I.White@doj.state.or.us>

Cc: Beth Jones <beth@montoyahisellaw.com>

Subject: Evidentiary Objection to Declaration and Exhibit to Defendants' Reply

CAUTION EXTERNAL EMAIL This email originated from outside of DOJ. Treat attachments and links with caution. ***CAUTION EXTERNAL EMAIL***

Dear Marc & Tracy:

Beth and I were reading over your Exhibit O and the attending declaration. We have an evidentiary objection to the accuracy of your Second Declaration (ECF 69) and exhibit (69-1).

You declare that "Exhibit O is a copy of legislation showing Rule 27 as it was in effect in 2019." But the attached "Exhibit O" was not effective in 2019. HCR 28 was adopted by the Senate on June 24, 2021. Additionally, HCR 28 was making amendments to "Rule 27-B, as amended and in effect on August 10, 2020".

At the time of the hearing, on July 8, 2019, HCR 11 (Jones Ex. 6) had recently been amended by HCR 20 (Jones Ex. 7). HCR 20 was operative on July 8, 2019, however, subsections (1) to (16), including the definitions section, were not operative until the committee notified the presiding officers that the LEO had been appointed – which occurred in November 2019. (Ex. 7, p. 16). Accordingly, there was no operative definition of "employee," or "legislative branch" on July 8, 2019 as alleged in Defendants' Reply. (ECF 68, p. 17).

We want to give you an opportunity to correct this error with the Court as it's likely not intentional but a result of the variety of amendments to Rule 27.

Let us know your thoughts on this objection in light of the requirements under LR 7-1(a). We are required under LR 56-1(b) to file a surreply memorandum before Tuesday morning, April 18, 2023.

Again, we view this as an unintentional and an easily corrected error.

We await your reply,

Vance Day

***** CONFIDENTIALITY NOTICE *****

This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.

***** CONFIDENTIALITY NOTICE *****

This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.

***** CONFIDENTIALITY NOTICE *****

This e-mail may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If you are not the addressee or it appears from the context or otherwise that you have received this e-mail in error, please advise me immediately by reply e-mail, keep the contents confidential, and immediately delete the message and any attachments from your system.

