COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 20, 2019 1:32 PM
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2018) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #74 ("Establishment of Expanded Learning Opportunities Program") **Petitioner**: Kenneth Nova, **v.** **Respondents**: Monica R. Colbert and Juliet Sebold, **and** **Title Board**: Ben Schler, LeeAnn Morrill, and Jason Gelender.	▲ **COURT USE ONLY** ▲ Case No. 2019SA88
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THE TITLE BOARD'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,001 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

The brief contains, under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Michael Kotlarczyk
MICHAEL KOTLARCZYK, #43250
Assistant Attorney General

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Title Board correctly determined that it lacked jurisdiction to consider Petitioner's motion for rehearing, which was the second rehearing motion filed for Proposed Initiative 2019-2020 #74.[1]

STATEMENT OF THE CASE

Respondents Juliet Sebold and Monica R. Colbert seek to circulate #74 to obtain the requisite number of signatures to place a measure on the ballot to enact a new article, § 22-86.1-101, *et seq*., in Colorado's revised statutes. The proposed initiative seeks to create a new "Expanded Learning Opportunities Program" for Colorado children and youth. Record for Initiative #74, p 2, filed May 3, 2019 ("Record").

On April 17, 2019, the Board concluded that it lacked jurisdiction to set a title for #74 because the proposed initiative violated the

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[1] This original proceeding presents an identical issue as 2019SA89, *In the matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #75.* Accordingly, this Opening Brief is largely the same as the Board's Opening Brief in that proceeding.

Colorado Constitution's single-subject requirement.[2] Respondents Sebold and Colbert filed a timely motion for rehearing. Record, p 18. On April 26, 2019, the Board held a rehearing on #74, concluded that #74 does contain a single subject, and set a title.[3]

Neither Petitioner Kenneth Nova nor his counsel addressed the Title Board concerning #74 at the April 26 rehearing. On April 29, Nova filed a second motion for rehearing on #74. Record, p 21. Counsel for Petitioner and counsel for Respondents Sebold and Colbert appeared at the May 1 Title Board meeting and addressed whether the Board had jurisdiction to consider this second rehearing motion. The Board concluded that it lacked jurisdiction and dismissed Nova's motion.[4]

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[2] *Hearing Before Title Board on Proposed Initiative 2019-2020 #74, Part II* (Apr. 17, 2019), *available at* https://tinyurl.com/y6enzlxn (statement at 1:41:30).

[3] *Hearing Before Title Board on Proposed Initiative 2019-2020 #74* (Apr. 26, 2019), *available at* https://tinyurl.com/y6enzlxn (statement at 2:20:15).

[4] *Hearing Before Title Board on Proposed Initiative 2019-2020 #74* (May 1, 2019), *available at* https://tinyurl.com/y6enzlxn (statement at 27:00).

On May 3, 2019, Nova filed this original proceeding under C.R.S. § 1-40-107(2), challenging the Board's determination that it lacked jurisdiction to consider the second motion for rehearing. On May 6, Nova filed a Supplement to Advisory List of Issues, seeking to raise a new issue in this Section 107(2) proceeding. Later that same day, the Court denied Nova leave to add an additional issue.

SUMMARY OF THE ARGUMENT

The plain statutory language shows that the Title Board lacked jurisdiction over Petitioner's motion for rehearing. Specifically, the statute provides that "the decision of the title board on any motion for rehearing shall be final," subject to this Court's review, "and ***no further motion for rehearing*** may be filed or considered by the title board." § 1-40-107(1)(c), C.R.S. (2018) (emphasis added). Accordingly, the Board's decision was final when it decided the first rehearing motion, and it lacked jurisdiction to consider Petitioner's subsequent motion.

The legislative history of this provision confirms the General Assembly intended to preclude successive motions for rehearing such as Petitioner's. When this language was proposed in 2012, both the bill

summary and testimony in support of the bill confirmed that only one set of rehearing motions could be brought before the Title Board.

Finally, this conclusion is also supported by sound policy reasons underlying the statutory scheme governing the initiative process. The process is infused with strict timelines to ensure proponents have sufficient time to gather signatures. Limiting the number of rehearing motions furthers this goal, while permitting successive motions would invite the very sort of delay the General Assembly has sought to avoid. Nor does limiting successive motions for rehearing cause any prejudice. The statute permits any elector to speak in support of, or opposition to, a motion for rehearing. If the elector exercises that right, he may appeal the Board's determination to this Court. Nova needed only to comply with this statutory procedure to have his concerns heard by the Board and, if necessary, this Court.

ARGUMENT

I. The Board correctly concluded that it lacked jurisdiction to hear Petitioner's motion for rehearing.

A. Standard of review and preservation

Whether the Board had jurisdiction to consider Petitioner's motion for rehearing is a matter of statutory interpretation subject to de novo review. *See Matter of the Title, Ballot Title, & Submission Clause for 2013-2014 #103*, 2014 CO 61, ¶ 11 ("The question of whether the Title Board had authority to act on the rehearing motions in this case is a matter of statutory interpretation, and thus 'a question of law subject to de novo review.'") (quoting *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010)).

The Board agrees that Petitioner preserved the issue of whether the Board possessed jurisdiction to hear his motion for rehearing.

B. The plain language of § 1-40-107(1)(c) bars Petitioner's motion.

When construing a statute, the Court "attempt[s] to give effect to the legislative purpose behind the statute . . . by examining the plain language of the statute and giving the words their plain and ordinary

meaning." *Colo. Dep't of Corr., Parole Div. v. Madison*, 85 P.3d 542, 544 n.2 (Colo. 2004). "If the plain language of a statute is unambiguous and clear, [courts] need not employ other tools of statutory interpretation." *Id.* (citing *Anderson v. Watson*, 953 P.2d 1284, 1290 (Colo. 1998)).

The statutory provision governing motions for rehearing before the Title Board expressly bars Petitioner's motion for rehearing. "The decision of the title board on any motion for rehearing shall be final, except as provided in subsection (2) of this section [concerning appeals to the Supreme Court], and no further motion for rehearing may be filed or considered by the title board." § 1-40-107(1)(c). By the plain terms of the statute, then, the Board's April 26 decision at the rehearing—that #74 contained a single subject and setting a title—was "final." Petitioner was not entitled to file a "further motion for rehearing," and the Board was not permitted to "consider" it. *Id.*

Importantly, this statutory prohibition applies to all successive motions for rehearing, not just to multiple motions for rehearing filed by the same party. The statute provides that the Board's decision on "***any*** motion for rehearing shall be final," and prohibits the board from

considering any "further motion for rehearing." *Id.* (emphasis added). Thus, once the Board decided the first motion for rehearing on April 26, its decision was final. The Board then lacked jurisdiction to consider any new motions for rehearing, including Petitioner's.

C. The legislative history of § 1-40-107(1)(c) confirms that the General Assembly intended to preclude successive motions for rehearing.

Because the statutory language is clear and dispositive, there is no need for the Court to consider the legislative history of § 1-40-107(1)(c). *See Welby Gardens Co. v. Adams Cty. Bd. Of Equalization*, 71 P.3d 992, 995 (Colo. 2003) ("Since we have concluded that the plain language of the statute is clear, we need not consider other interpretive aids."). However, should the Court decide to review the legislative history, it confirms this plain language interpretation. *See id.* (considering the legislative history and "conclud[ing] that our plain language interpretation is consistent with the legislative intent").

The final sentence of Section 107(1)(c)—providing that the Board's decision "on any motion for rehearing shall be final"—was added to the statute in 2012. *See* Ch. 141, 2012 Colo. Sess. Laws § 2, at 511.

Legislative materials and testimony offered in support of the bill both make clear that the bill was intended to limit the rehearing process to a single set of motions for rehearing filed "within seven days after the [Board's] decision is made." § 1-40-107(1)(a)(I), C.R.S. (2018).

First, the bill summary for H.B. 12-1313 stated that the bill "[s]pecifies that after the title board takes action on a motion for rehearing, no further motions for rehearing may be heard." *See* H.B. 12-1313, LLS No. 12-0707.01 (Feb. 20, 2012). Even more explicitly, former Deputy Secretary of State William Hobbs testified before the House State, Veterans, and Military Affairs Committee that the purpose of this amendment was "to clarify that there's only one set of motions for rehearing. There would be simply one rehearing held by the Title Board. That would be the end of the process."[5]

[5] *Hearing Before House State, Veterans, and Military Affairs Committee on H.B. 12-1313* (Mar. 14, 2012), *available at* https://tinyurl.com/y2wye37e (statement of W. Hobbs at 7:00). Mr. Hobbs is counsel for Respondents Sebold and Colbert in this proceeding.

The legislative history thus removes any doubt that the General Assembly meant what it said: after conducting a rehearing on an initiative, the Board cannot consider any new rehearing motions.

D. Precluding successive rehearing motions furthers the policy goal of expediting the initiative review process and does not prejudice objectors.

Sound policy reasons also support this interpretation of the statute. "In order to provide proponents of initiatives with sufficient time for the collection of signatures and for public debate, stringent time restraints are placed on the proponents and opponents of initiatives, as well as on the Title Board." *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 No. 219*, 999 P.2d 819, 821 (Colo. 2000). For example, a motion for rehearing before the Title Board must be filed with the Secretary of State within seven days (§ 1-40-107(1)(a)(I)); the Board must hear any motion for rehearing at its next scheduled meeting, or within 48 hours if the rehearing concerns titles set at the last April meeting (§ 1-40-107(1)(c)); anyone dissatisfied with the Board's determination after rehearing has only seven days to file a proceeding with this Court (§ 1-40-107(2)); and the Court must

dispose of the matter "promptly" (*id.*). Allowing only one rehearing furthers this overarching legislative purpose of "expediting the review process governing initiatives." *In re No. 219*, 999 P.2d at 821.

Finally, this interpretation does not prejudice any elector who wishes to be heard on a proposed initiative. Any registered elector has a right to be heard at a rehearing, not just the elector who filed the motion for rehearing. And any elector who exercises that right can petition this Court to review the Board's decision.

Under § 1-40-107(2), a petition for review of the Title Board's decision can be filed with the Supreme Court by: (a) "any person presenting or the designated representative of the proponents of an initiative petition for which a motion for a rehearing is filed"; (b) any elector who filed a motion for rehearing; or (c) "any ***other*** registered elector who appeared before the title board in support of or in opposition to a motion for rehearing." § 1-40-107(2) (emphasis added). The statute thus clearly contemplates that other electors can be heard on a motion for rehearing in addition to the elector who filed the motion. And, if an elector appears before the Board on the motion for rehearing, he can

petition this Court for a review of the Board's action on the motion. *Id.*; *see also Matter of Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 17 ("Any person who remains dissatisfied after the rehearing, who either presented the initiative or is a registered elector and filed a motion for rehearing ***or appeared before the Title Board***, may then file a copy of the motion for rehearing . . . 'with the clerk of the supreme court.'") (quoting C.R.S. § 1-40-107(2)) (emphasis added).

Petitioner could have had this Court consider the merits of his objection had he raised them with the Board when it addressed Sebolt's and Colbert's motion for rehearing. Instead, when the Board heard argument on their motion for rehearing, Petitioner was silent. Petitioner thus failed to follow the straightforward procedure provided in the statute, and he is barred from remedying this failure by filing an additional rehearing motion before the Title Board.

CONCLUSION

The Board respectfully requests that the Court affirm the Board's determination that it lacked jurisdiction to consider Petitioner's motion for rehearing.

Respectfully submitted on this 20th day of May, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCEF, at Denver, Colorado, this 20th day of May, 2019 addressed as follows:

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