

REC'D & FILED

2017 AUG 29 AM 9:25

SUSAN MERRILL

V. Alegria

BY _____
DEPUTY

1 JOSEPH F. BECKER, ESQ.
2 Nevada State Bar No.12178
3 NPRI CENTER FOR JUSTICE AND
4 CONSTITUTIONAL LITIGATION
5 75 Caliente Street
6 Reno, Nevada 89509-2807
7 Tel: (775) 636-7703
8 Fax: (775) 201-0225
9 cjcl@npri.org

Attorney for Petitioner

10 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
11 **IN AND FOR CARSON CITY**

12 DOUGLAS E. FRENCH,

Plaintiff,

vs.

13 HEIDI GANSERT in her official capacity as Executive Director,
14 External Relations for the University of Nevada, Reno;
15 UNIVERSITY OF NEVADA, RENO; NEVADA SYSTEM OF
16 HIGHER EDUCATION; NEVADA BOARD OF REGENTS;
17 and the STATE OF NEVADA on Relation to The Nevada
18 System of Higher Education, The Nevada Board of Regents, and
19 the University of Nevada, Reno;

Defendants.

) Case No.: 17 0C 000231B

) Dept. No. I

20 **NOTICE OF APPEAL**

21 Notice is hereby given that Douglas French, above named party of record, hereby
22 appeals to the Supreme Court of Nevada from the Order of Dismissal entered on August 3, 2017.

23 //

24 //


25 //

26 //

27 //

1 A true and correct copy of the Order is attached hereto.

2 DATED: this 21st day of August, 2017.

3
4
5 
6 JOSEPH F. BECKER
7 Nevada State Bar No.: 12178
8 NPRI Center for Justice
9 75 Caliente Street
10 Reno, NV 89509
11 Tel: 775-636-7703
12 cjcl@npri.org
13 Attorney for Plaintiff
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), the undersigned hereby certifies that on the 27th day of August, 2017,
I deposited a true and correct copy of the foregoing Notice of Appeal in the U.S. Mail with postage
prepaid thereon, addressed to:

Melissa P. Barnard
University of Nevada, Reno
1664 N. Virginia Street, MS 0550
Reno, NV 89557

**NPRI CENTER FOR JUSTICE AND
CONSTITUTIONAL LITIGATION**

BY: 
ANNA M. BUCHNER, CP
NPRI CENTER FOR JUSTICE
AND CONSTITUTIONAL LITIGATION
75 Caliente Street
Reno, NV 89502
Telephone: (775) 636-7703
Fax: (775) 201-0225

INDEX OF EXHIBITS

1. Order 9 pages

EXHIBIT 1


EXHIBIT 1

REC'D & FILED

2017 AUG -3 AM 9:55

SUSAN MERRIWETHER

CLERK

BY  DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

DOUGLAS E. FRENCH,

Plaintiff,

vs.

Case No. 1700000231B

Dept. No. I

HEIDI GANSERT in her official capacity as
Executive Director, External Relations for
the University of Nevada, Reno;
UNIVERSITY OF NEVADA, RENO;
NEVADA SYSTEMS OF HIGHER
EDUCATION; NEVADA BOARD OF
REGENTS; and the STATE OF NEVADA on
Relation to The Nevada System of Higher
Education, The Nevada Board of Regents,
and the University of Nevada, Reno;

Defendants.

ORDER

This matter is before this Court on a Motion to Dismiss filed by Defendant Heidi Gansert and a Motion to Dismiss filed by Defendant Board of Regents of the Nevada System of Higher Education on behalf the University of Nevada, Reno ("NSHE Defendants"). Defendant Gansert's Motion to Dismiss the First Amended Complaint was filed pursuant to NRCP 12(b)(5) and NSHE Defendants' Motion to Dismiss the First Amended Complaint was filed pursuant to NRCP 12(b)(1), 12(b)(2) and 12(b)(5). Both Motions were filed on May 12, 2017. On May 26, 2017, Plaintiff Douglas E.

1 French filed one Opposition in response to both Motions. Defendant Gansert filed a
2 Reply to the Opposition on June 8, 2017 and the NSHE Defendants also filed a Reply
3 to the Opposition on June 8, 2017. A Request for Submission was filed in regards to
4 both Motions on June 8, 2017.

5 The First Amended Complaint filed in this matter asserts that because
6 Defendant Gansert holds the Nevada Executive Branch position of Executive
7 Director, External Relations at the University of Nevada, Reno while concurrently
8 serving as a State Senator in the Nevada Legislature, there is a violation of Article 3,
9 Section 1(1) of the Nevada Constitution.

10 The Motions to Dismiss assert that Article 3, Section 1(1) is not written as
11 broadly as Plaintiff French claims and that there are several conditions that must be
12 met before the restrictions of Article 3, Section 1(1) apply. Specifically, Article 3,
13 Section 1(1) applies only to those employees charged with Constitutional power for
14 their particular branch and only to those employees when they exercise a function
15 related to another branch. Defendant Gansert asserts that Plaintiff French failed to
16 allege that Defendant Gansert was charged with any Constitutional powers and also
17 failed to allege that she exercised any function related to another branch. The NSHE
18 Defendants assert that Plaintiff French also failed to bring any allegations against the
19 NSHE Defendants that state a cause of action or entitle him to any relief against
20 them. Finally, the NSHE Defendants also seek dismissal of the University of
21 Nevada, Reno on the basis that it is not a legal entity capable of being sued.

22 Nevada Rule of Civil Procedure 12(b)(5) requires the Court to dismiss a
23 complaint that fails to state a claim upon which relief can be granted. Dismissal is
24 appropriate where plaintiff "could prove no set of facts, which, if true, would entitle [him]
25 to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 226–227, 181
26 P.3d 670, 672 (2008); *Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985)
27 (court must dismiss complaint which fails to "set forth allegations sufficient to make out
28 the elements of a right to relief.").

When considering a Rule 12(b)(5) motion to dismiss, the Court will construe the
pleading liberally and consider well-pled factual allegations as though they were true.
Buzz Stew, 124 Nev. at 226–227, 181 P.3d at 672. The Court need only accept the

1 nonmoving party's factual allegations as true. *Shoen v. SAC Holding Corp.*, 122 Nev.
2 621, 635, 137 P.3d 1171, 1180 (2006). Moreover, the Court is not required to "assume
3 the truth of legal conclusions merely because they are cast in the form of factual
4 allegations." See *W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)
5 (interpreting substantively identical Fed. R. Civ. P. 12(b)(6)); see also *Sproul Homes of*
6 *Nev. v. State*, 96 Nev. 441, 445, 611 P.2d 620, 622 (1980) (plaintiff cannot survive a
7 motion to dismiss when its "complaint is replete with generalizations and conclusory
8 matter.").

8 **A. Necessary Parties**

9 NRCP 12(b)(6) authorizes dismissal for failure to join a necessary party. In order
10 to render a complete decree in any civil action, "all persons materially interested in the
11 subject matter of the suit [must] be made parties so that there is a complete decree to
12 bind them all." *Olsen Family Trust v. District Court*, 110 Nev. 548, 553, 874 P.2d 778,
13 781 (1994). Failure to join a necessary party to a case is "fatal to the district court's
14 judgment." *Olsen Family Trust*, 110 Nev. at 554, 874 P.2d at 782; see also *Univ. of Nev.*
15 *v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979). Thus, the trial court may
16 raise the issue *sua sponte*. *Tarkanian*, 95 Nev. at 396, 594 P.2d at 1163.

17 NRCP 19(a) requires joinder when an individual claims an interest in the subject
18 matter of the action and adjudication in the individual's absence may inhibit the ability to
19 protect that claimed interest or when an individual claims an interest in the subject
20 matter of the action and adjudication in the individual's absence potentially subjects an
21 existing party to "double, multiple, or otherwise inconsistent obligations." NRCP 19(a).
22 In applying NRCP 19(a), the Nevada Supreme Court has broadly indicated that a third
23 party must be joined if the third party's interest "may be affected or bound by the
24 decree," or if the third party "claims an interest in the subject matter of the action." *Olsen*
Family Trust, 110 Nev. at 553-54, 874 P.2d at 781-82.

25 Here, Plaintiff French is asking the Court to declare that employment in the
26 Executive Branch of Nevada while serving in the Nevada State Legislature violates
27 Article 3, Section 1(1) of the Nevada Constitution. Plaintiff French is also asking this
28 Court to enjoin Defendant Gansert from continuing employment in the Executive Branch
and also from retaining any money or benefits while she concurrently served in both

1 branches. If the Court were to grant Plaintiff French's requested declaratory relief, it
2 would affect additional State legislators who are also State employees. At the hearing
3 on the Motions to Dismiss, the parties indicated that there are as many as four other
4 additional legislators who are State employees. The Court finds that these other State
5 employees claim an interest relating to the subject of Plaintiff's First Amended
6 Complaint and are so situated that the disposition of the matter in their absence may as
7 a practical matter impair or impede their interests.

8 At the hearing on the Motions to Dismiss, Plaintiff French conceded that he had
9 no standing to bring an action against the other legislators who are State employees.
10 As such, the Court finds that these additional State legislators could not be made a
11 party to the action. Pursuant to NRCP 19(b), the Court has determined that the case
12 should be dismissed in the absence of these other State legislators since an adverse
13 judgment would be prejudicial to them because their employment with the State would
14 be impacted. The Court does not believe that it could make the broad declaration
15 requested by Plaintiff French and also shape relief that would lessen or avoid the
16 prejudice to these other State employees because the requested relief impacts their
17 employment and also their service in these two branches. As such, Plaintiff French's
18 First Amended Complaint is dismissed pursuant to NRCP 19(a) for failure to join
19 necessary parties.

20 **B. Defendant University of Nevada, Reno**

21 Defendant University of Nevada, Reno asserts that it is not a legal entity capable
22 of being sued because it does not legally exist for purposes of bringing or defending suits.
23 NRS § 396.020 provides that the legal and corporate name for the State
24 University is the University of Nevada and that it is administered by a Board of
25 Regents, collectively known as the Nevada System of Higher Education ("NSHE").
26 NSHE comprises all the various institutions and facilities that the Board of Regents
27 deems appropriate. NRS § 396.020. The University of Nevada, Reno is one of the
28 institutions or sub-units of NSHE, but it is not an independent legal or corporate entity
capable of being sued. See, *Robinson v. Nev. Sys. Of Higher Educ.*, 2016 U.S. Dist.
LEXIS 92221 (D. Nev. 2016). Accordingly, Defendant University of Nevada, Reno is
dismissed.

1 **C. Defendants NSHE and Board of Regents**

2 NSHE Defendants assert French has failed to set forth any allegations in his First
3 Amended Complaint against NSHE or the Board of Regents. There are no factual
4 allegations that reference or mention NSHE or the Board of Regents in the "Allegations
5 Common to All Claims for Relief" or the "First Claim for Relief" seeking declaratory and
6 injunctive relief. The only factual allegations in the body of the First Amended
7 Complaint related to NSHE and the Board of Regents are the allegations in the section
8 entitled "Parties" where Plaintiff French identifies NSHE and the Board of Regents as
9 Defendant Gansert's employer.

10 At the hearing on the Motions, Plaintiff French asserted that the First Amended
11 Complaint was amended to specifically make allegations against NSHE and the Board
12 of Regents and these allegations are found in the prayer for relief of the First Amended
13 Complaint. Allegations in a prayer for relief are not part of the cause of action.

14 *Kingsbury v. Copren*, 43 Nev. 448, 454-455, 187 P. 728, 729 (1920); *Keyes v. Nevada*
15 *Gas Co.*, 55 Nev. 431, 435-436, 38 P.2d 661, 663 (1943).

16 Dismissal is appropriate where plaintiff "could prove no set of facts, which, if true,
17 would entitle [him] to relief." *Buzz Stew*, 124 Nev. at 226-227, 181 P.3d at 672. Based
18 upon the lack of factual allegations against NSHE and the Board of Regents in the First
19 Amended Complaint and in the cause of action for declaratory and injunctive relief,
20 Plaintiff French failed to state a claim against NSHE and the Board of Regents.
21 Accordingly, the First Amended Complaint as against NSHE and the Board of Regents
22 is dismissed.

23 **D. Defendant Gansert**

24 Plaintiff French asserts that the Nevada Constitution, Article 3, Section 1(1)
25 states that no one may serve any function in one branch while serving in another
26 branch. Defendants assert that Article 3, Section 1(1) is not as broad as Plaintiff
27 claims and the limitation on exercising any function applies only to those persons
28 charged with powers under the Nevada Constitution.

Article 3, Section 1(1) states:

1
2 "The powers of the Government of the State of Nevada shall be divided
3 into three separate departments, the Legislative, the Executive and the
4 Judicial; and no persons charged with the exercise of powers properly
5 belonging to one of these departments shall exercise any functions,
6 appertaining to either of the others..."

7 By its own terms, Article 3, Section 1(1) does not prohibit all persons in one branch from
8 exercising any function related to another branch. The limitation on exercising any
9 function only applies to those persons who are charged with the exercise of powers
10 given to the departments or branches of government. These departments are each
11 charged by other parts of the Constitution with certain duties and functions, and it is to
12 these constitutional duties and functions to which the prohibition in Article 3, Section
13 1(1) refers. *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P. 437, 439 (Nev. 1893).

14 Not every employee in a branch is charged with these constitutional powers,
15 duties and functions. Public employees, as distinguished from public officials or
16 officers, do not exercise functions or powers of the state. See, *State ex rel. Kendall v.*
17 *Cole*, 38 Nev. 215, 9, 148 P. 551, 553 (1915); *State ex rel. Mathews v. Murray*, 70
18 Nev. 116, 120-21, 258 P.2d 982, 983 (1953); *Eads v. City of Boulder City*, 94 Nev.
19 735, 737, 587 P.2d 39, 41 (1978). Public officers are the only persons who exercise
20 the sovereign functions of state government. *Mathews*, 70 Nev. at 120-21, 258 P.2d
21 at 983. This is because public employees have not been invested by the State with
22 some portion of the powers, duties and functions of the government. *Mathews*, 70 Nev.
23 at 120-21, 258 P.2d at 983; *Kendall*, 38 Nev. at 229, 148 P. at 553 ("To be an officer,
24 one must be charged by law with duties involving the exercise of some part of the
25 sovereign power of the state").

26 The case law describing public officials is consistent with the statutory law. NRS
27 281.005(1) states that a public officer is a person elected or appointed to a position
28 which: (a) Is established by the Constitution or a statute of this State, or by a charter or
ordinance of a political subdivision of this State; and (b) involves the continuous
exercise, as part of the regular and permanent administration of the government, of a
public power, trust or duty. NRS 281.005(1).

Defendant French does not allege that Defendant Gansert's position is
established by the Nevada Constitution, by statute or is a public officer position.

1 Defendant Gansert's position as Executive Director, External Relations is not a public
2 office. There are only two groups of people in NSHE that have been determined to be
3 public officers: members of the Board of Regents and presidents of the universities,
4 state colleges and community colleges. *Univ. & Cmty. Coll. Sys. v. DR Partners*, 117
5 Nev. 195, 205, 18 P.3d 1042, 1048 (2001) ("the sovereign functions of higher education
6 repose in the Board of Regents, which has been constitutionally entrusted to control and
7 manage the University"); NRS 281A.182 (a president of a university, state college or
8 community college within the NSHE system is a public officer for purpose of Chapter
9 281A).

10 The Court may take judicial notice of facts generally known or capable of
11 verification from a reliable source, whether it is requested to or not. NRS 47.150(1). The
12 Court may take judicial notice of facts that are "[c]apable of accurate and ready
13 determination by resort to sources whose accuracy cannot reasonably be questioned,
14 so that the fact is not subject to reasonable dispute." See NRS 47.130(2)(b). The Court
15 may take judicial notice of information posted on government websites as it can be
16 "accurately and readily determined from sources whose accuracy cannot reasonably be
17 questioned". *FTC v. AMG Servs.*, 2014 U.S. Dist. LEXIS 10490, *45-46, n. 5 (Nev.
18 2014); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-999 (9th Cir. 2010) ("It is
19 appropriate to take judicial notice of this information, as it was made publicly available
20 by government entities").

21 The Court takes judicial notice of the University of Nevada, Reno organizational
22 chart because it is a public record available on the University's website, capable of
23 verification from a reliable source and the facts are not subject to reasonable dispute.
24 The organizational chart demonstrates that Defendant Gansert is not the president of
25 the University. The Court takes judicial notice of the current elected members of the
26 Board of Regents as posted on NSHE's website to demonstrate that Defendant Gansert
27 is not a current member. Defendant Gansert's position of Executive Director, External
28 Relations is not one that is charged with constitutional powers as described in Article 3,
Section 1(1).

There are no allegations that Defendant Gansert is charged with any power belonging to NSHE and there are no allegations that she exercised any functions relating to the Legislative Branch. The Court finds that the specific criteria of Article 3, Section 1(1) have not been met and there has been no violation under that provision in this matter.

Therefore, good cause appearing,

IT IS HEREBY ORDERED that the NSHE Defendants Motion to Dismiss is granted and Defendant Gansert's Motion to Dismiss is granted. Plaintiff French's First Amended Complaint is dismissed with prejudice.

Dated this 3 day of August, 2017.

James T. Russell
District Judge

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7

Joseph F. Becker, Esq.
NPRI Center for Justice
75 Caliente Street
Reno, NV 89509

Melissa P. Barnard, Esq.
University of Nevada, Reno
1664 N. Virginia Street/MS 0550
Reno, NV 89557

Angela Jeffries
Judicial Assistant, Dept. 1