

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARILYN O'CONNOR,

Appellant,

vs.

KEVIN L. PASQUALE, IN THE CAPACITY
OF DISTRICT ATTORNEY OF CHURCHILL
COUNTY, STATE OF NEVADA; AND,
BRUCE A. MATLEY, IN THE CAPACITY
OF DEPUTY DISTRICT ATTORNEY OF
CHURCHILL COUNTY, STATE OF NEVADA,

Respondents.

No. 35254

FILED

JUL 07 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from a final order of the district court denying a complaint for removal of respondents from office pursuant to NRS 283.440.¹

The complaint alleged that respondent Kevin Pasquale, while holding the office of Churchill County District Attorney, unlawfully accepted an appointment by the Fallon Paiute-Shoshone Tribe to the paid office of Chief Judge of the Tribal Court. The complaint further alleged that respondent Bruce Matley, while holding the office of Deputy District Attorney of Churchill County, unlawfully accepted an appointment by the Fallon Paiute-Shoshone Tribe to the paid office of Criminal Prosecutor for the Tribal Court.

NRS 283.440 provides a summary proceeding to remove from office any person holding an office in this state who is

¹We note that appellant also appeals from an order of the district court denying her proper person motion to reconsider "pursuant to NRCP 59(e)." Because appellant designated NRCP 59(e) in the motion, and based on the substance of the motion, we construe it as a motion to alter or amend the judgment pursuant to NRCP 59(e). While an order denying a motion to alter or amend the judgment is not appealable, see *Uniroyal Goodrich Tire v. Mercer*, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995), a motion to alter or amend the judgment does terminate the time for filing the notice of appeal from the final judgment. Consequently, appellant's November 29, 1999, notice of appeal was timely filed after resolution of the motion to alter or amend the judgment.

guilty of malpractice or malfeasance in office. Specifically, NRS 283.440(1) states that "[a]ny person now holding or who shall hereafter hold any office in this state, except a justice or judge of the court system, . . . who is guilty of any malpractice or malfeasance in office, may be removed therefrom as hereinafter prescribed in this section."

In the complaint, appellant alleged that Pasquale and Matley committed malpractice and malfeasance by violating Nevada Constitution article 4, section 9, which provides in relevant part: "No person holding any lucrative office under the Government of the United States or any other power, shall be eligible to any civil office of Profit under this State." Matley filed a motion to dismiss the complaint pursuant to NRCP 12(b)(5), which Pasquale joined. The district court denied the motion to dismiss, concluding that the complaint established a prima facie case. However, after conducting a summary hearing pursuant to NRS 283.440(2), the district court denied appellant's complaint. This appeal followed.

On appeal, this court will not disturb the district court's findings of fact unless they are clearly erroneous. See, e.g., NRCP 52(a); *Sportsco Enter. v. Morris*, 112 Nev. 625, 629, 917 P.2d 934, 936 (1996). However, questions of law are reviewed de novo. See, e.g., Sportsco, 112 Nev. at 629, 917 P.2d at 936; *Matter of Varain*, 114 Nev. 1271, 1276, 969 P.2d 305, 309 (1998).

Having reviewed the record on appeal, we conclude that the district court did not err in denying appellant's complaint as to Pasquale. The issue of Pasquale's removal from office pursuant to NRS 283.440 became moot when Pasquale lost his bid for re-election in the November 1998 general election, and was no longer Churchill County District Attorney as of January 3, 1999. Regarding appellant's claim for damages in the complaint, NRS 283.440 does not provide for a

damages remedy, and appellant cited no other basis for an award of damages. Thus, appellant's claim for damages was properly denied.

We further conclude that the district court did not err in denying the complaint as to Matley. First, Matley did not commit malpractice or malfeasance in his position as deputy district attorney because he did not violate Nevada Constitution article 4, section 9 by accepting the position as Criminal Prosecutor. The district court's finding that Matley was a contractual employee of the Fallon Business Council, the governing body of the Fallon Paiute-Shoshone Tribe, rather than an officer of the Tribe, is supported by the record and is not clearly erroneous. Thus, Matley was not an officer of the United States or of any other power by virtue of his employment as Criminal Prosecutor for the Tribe. See Davis v. Littell, 398 F.2d 83, 85 (9th Cir. 1968) (stating that the position of tribal counsel of the Navajo Tribe, which was held by a non-Indian and under a terminable employment contract, was not a public office in the ordinary sense; rather, it was employment under a contract and terminable as such).

Second, Matley did not commit malpractice or malfeasance under NRS 283.440 by engaging in the private practice of law.² NRS 252.070(4) authorizes deputy district attorneys in counties with a population of less than 100,000 to engage in the private practice of law. The district court took judicial notice of the fact that Churchill County has a population of less than 100,000. See NRS 47.130. Thus, to the extent Matley's service as Criminal Prosecutor was

²The private practice of law issue was not raised in the complaint; however, it was raised in Matley's motion to dismiss and at the summary hearing in the district court. Thus, the district court did not err in considering the issue. See NRCP 15(b) (providing that an issue not raised by the pleadings is to be treated as if it had been raised when the issue is tried by the express or implied consent of the parties).

considered the private practice of law, it was allowed under NRS 252.070(4), and did not constitute malpractice or malfeasance. Consequently, the complaint was properly denied as to Matley.

Having reviewed the record on appeal, we conclude that this appeal is without merit, and we

ORDER this appeal dismissed.

<u>Young</u> Young	J.
<u>Agosti</u> Agosti	J.
<u>Leavitt</u> Leavitt	J.

cc: Hon. Michael E. Fondi, District Judge
Churchill County District Attorney
Bruce A. Matley
Marilyn O'Connor
Churchill County Clerk