

1 jurisdiction to investigate and take appropriate action in this matter pursuant NRS 281A.280 and
2 NRS 281A.440.

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4 **3. Issues:**

5 The issues are whether Borasky violated:

- 6
7 **I.** NRS 281A.420(2) by using his position in government to secure unwarranted
8 privileges, preferences, exemptions or advantages by directing Johnson to inspect
9 properties at 4701 and 4671 W. Dyer and correct alleged issues with the elevation
10 of two garage pads previously excavated by Borasky.
- 11 **II.** NRS 281A.420(7) by directing Johnson to use his government time to inspect the
12 properties at 4701 and 4671 W. Dyer.
- 13 **III.** NRS 281A.400(9) by directing Johnson, his subordinate, to perform an inspection
14 at 4701 and 4671 W. Dyer.

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16 **4. Notices to Subject: (Tab C):**

17 A notice to Subject of RFO 10-12C was issued to Borasky on March 23, 2010. A record
18 indicates that Borasky received the Notice on March 26, 2010. (Tab C).

19
20 **5. Response to Ethics Complaint. (Tab D):**

21 Borasky's response to the Ethics Complaint was submitted by his legal counsel, Lillian
22 Donohue Esq., on April 22, 2010. The response indicated that Borasky did not violate any
23 provisions of NRS 281A.400. Borasky admitted that he had called Johnson but stated that his
24 calls were only inquiries rather than directives. He also stated that the calls were placed only to
25 ask for Johnson's suggestions of how to correct the alleged issues with the garage pads.
26 Borasky vehemently denied requesting or directing Johnson to perform an inspection or asking
27 Johnson to correct the alleged problems. (Response, Tab D).

Investigation Resources:

I interviewed the following individuals and reviewed their responses:

1. Witnesses interviews and responses. (Tab E):

- Andrew Borasky, subject of RFO 10-12C. (Response, Tab C), in person interview on April 19, 2010 incorporated in the report. (Investigator's Report, Tab A, pp. 6-7).
- Richard Johnson, Requester, on April 5, 2010 and April 15, 2010. (Investigator's Report, Tab A, p. 6).
- John Lohman, Nye County planning director, Witness, on April 15, 2010. (Investigator's Report, Tab A, p. 7).
- Denise Laird, office manager, Triangle Surveying, on April 20, 2010. (Investigator's Report, Tab A, p. 7).
- Michael Colbert, president of Nationwide Homes, on April 20, 2010. (Investigator's Report, Tab A, p. 5).
- George Bernath, compliance officer, Nye County Department of Building Safety and Code Compliance, on April 20, 2010. (Investigator's Report, Tab A, p. 7).
- Bonnie Drinkwater, Esq., attorney contracted by Nye County. (Investigator's Report, Tab A, p. 8).

2. Documents. (Tab F):

I obtained and reviewed the following relevant documents and materials:

- Elevation Certificates for the manufactured homes and detached garages at 4701 and 4671 W. Dyer Road, Pahrump, NV 89048. (Exhibit 1).
- FEMA Flood Insurance Rate Map, Nye County, NV (partial). (Exhibit 2).
- FEMA blank Elevation Certificate and Instructions. (Exhibit 3).
- Parcel detail for parcels 041-471-06 and 041-471-07, Nye County Assessor. (Exhibit 4).

- 1 • Permit Applications for 4701 and 4761 W. Dyer dated January 3, 2006, issued to A.
2 Borasky Excavating. (Exhibit 5).
- 3 • Nevada State Contractors Board, Andrew Borasky license information. (Exhibit 6).
- 4 • Subpoena Duces Tecum issued to Nye County Custodian of Records. (Exhibit 7).
- 5 • CONFIDENTIAL documents related to investigation conducted by Bonnie Drinkwater,
6 Esq. on behalf of Nye County. (Exhibit 8).

7

8 **3. Relevant Statutes and Commission Opinions. (Tab G):**

- 9 • NRS 281A.400(2), (7) and (9).
- 10 • NRS 281A.420(8).
- 11 • In re Boggs-McDonald, NCOE RFO No. 04-77C.

12

13 **Investigative findings:**

14

15 Borasky was elected as Nye County Commissioner for District 4 on November 2006 and
16 sworn into the office in January 2007. Prior to the election, Borasky served on the Nye County
17 Planning Commission for approximately two years. Due to his prior experience as a Planning
18 Commissioner, Borasky currently serves as a liaison between the County Planning Department
19 and County Commission. Aside from his public office, Borasky owned a small business
20 operated under the name of A. Borasky Excavating, which functioned mainly as a
21 subcontractor. (Response, Tab D, p.1). The main scope of Borasky's business was site
22 preparation such as excavating, grading, trenching, surfacing and sewerage. Borasky was in the
23 business for approximately 10 years and claims that he surrendered his contractor's license upon
24 becoming elected to the County Commission.

25 In January 2006, Borasky entered into an agreement with Nationwide Homes to
26 excavate and grade two pads for garages and two pads for manufactured homes at 4671 and
27 4701 W. Dyer Road in Pahrump, NV. The work for Nationwide Homes did not include a formal
28 written contract; Borasky submitted an estimate to the builder and was selected as the

1 subcontractor. I note that Borasky did only the excavating and grading work, the concrete work
2 was provided by another contractor.

3 Borasky's response indicated that "In 2006, two years prior to my election as Nye
4 County Commissioner, I was a subcontractor doing excavating contractor (sic), involving site
5 preparations. At that time, I submitted paperwork to prepare the properties located at 4671 W.
6 Dyer and 4701 W. Dyer ..." (Emphasis added). The date provided by Borasky is inconsistent
7 with Nye County Recorder records and Borasky's own statement during my interview. Borasky
8 was elected in November 2006 and the work on 4671 and 4701 W. Dyer was completed in
9 January-March 2006.

10 In addition, Borasky claims that he surrendered his contractor's license in 2006 upon
11 being elected as Nye County Commissioner. Although it appears that Borasky did no more
12 excavation work after his election, the Nevada State Contractor's Board indicates that Borasky
13 possessed two licenses following his election; one was surrendered in November 2009 and one
14 in March 2008; therefore 1 ½ years and 3 years after Borasky's election as Nye County
15 Commissioner.

16 As to the claim that Borasky threatened, intimidated and harassed Johnson and used his
17 position to coerce Johnson to perform an inspection on the properties in question, I found that
18 on September 25, 2008, Michael Colbert, president of Nationwide Homes called Johnson and
19 stated that the elevation of the pads at 4671 and 4701 W. Dyer Road in Pahrump was improper
20 and the properties failed to qualify for a HUD (U.S. Department of Housing and Urban
21 Development) loan as a result. Colbert told Johnson that Borasky had done the site preparation
22 and asked Johnson if he can look into the issue, so corrective actions, if any were required could
23 be taken.

24 I spoke with Colbert on April 20, 2009; although he did not recall the exact dates and
25 details of the conversation, he remembered speaking to both Johnson and Borasky regarding the
26 issue. Colbert provided no details as to what Johnson's response was to his request to look into
27 the issue. No further details are available as Johnson declined to comment on the conversation
28 with Colbert.

1 I spoke to Johnson on April 5, 2010. Initially, Johnson agreed to meet in person but
2 changed his mind during the follow-up telephone conversation on April 15, 2010.

3 Johnson claims in his Complaint that on October 6, 2008 (two weeks after he received
4 the call from Colbert), Borasky called him and demanded that Johnson stop what he was doing
5 and concentrate his full attention to the issue with garage pads at 4671 and 4701 W. Dyer.
6 Johnson told Borasky that he was overloaded with County work but Borasky allegedly insisted
7 that Johnson comply with his demand. (Complaint, Tab B, p. 4). Johnson felt intimidated by
8 Borasky's request and investigated the pads. At about 4 p.m. that day, Johnson called Borasky to
9 inform him the work was completed; thereafter, Borasky came to Johnson's office at Nye
10 County Planning Department and discussed the issue with Johnson for more than three hours.

11 I interviewed Borasky on April 19, 2010. Borasky admitted speaking with Johnson on
12 the telephone on several occasions but reiterated that his communication with Johnson was
13 intended only to acquire information and suggestions to correct the alleged issue with the garage
14 pads. I questioned Borasky regarding the letter attached to the Complaint. (Complaint, Tab B,
15 pp. 6-12). Borasky stated that Johnson filed a complaint with the County alleging harassment,
16 intimidation and retaliation by Borasky and other county officials. Borasky stated that he was
17 informed not to contact Johnson directly and to submit his inquiries through the Nye County
18 manager but no other corrective measures were taken. The letter is heavily redacted and the
19 Commission's Executive Director is pursuing a subpoena to obtain a copy of the full version and
20 results of the investigation. (Exhibit 7). Should the Commission obtain the full document, it will
21 be made available to the panel.

22 As to the allegation of using government resources to further Borasky's personal interest,
23 Borasky stated that his request did not take Johnson away from his county work because his
24 inquiry was a part of the county Planning Department's function. (Response, Tab D, p.3 ¶ 1).
25 Borasky admitted that he spoke with Johnson on October 6, 2008 but claims the call was made
26 to inquire rather than direct Johnson to look into the issue. Borasky denied remembering
27 meeting with Johnson on October 6 for more than three hours but he does recall his exact
28 location and the time when he called Johnson earlier that day.

1 Furthermore, Borasky claims that Johnson's complaint has no merit because the pads
2 were properly elevated and it would not make sense to "direct" Johnson to perform a job that
3 was not required. (Response, Tab D, p. 1). Borasky provided copies of elevation certificates,
4 affirming his claim that the properties were properly elevated. (Exhibit 1).

5 On April 20, 2010, I contacted George Bernath, compliance officer for Nye County
6 Building Safety and Compliance Department to learn more about the elevation certificates.
7 Bernath explained that the properties in question are located in a flood zone AO and as such,
8 they must be elevated according to FEMA requirements. (Exhibit 2). I asked Bernath what
9 would happen if the property was not properly elevated and if there was a way to bring the
10 property to compliance. Bernath explained that if a property located in a flood zone fails to meet
11 the elevation requirements, flood openings must be constructed. (Exhibit 3, instructions, page
12 8).

13 On April 20, 2010, I spoke to Denise Laird, an office manager from Triangle Surveying.
14 Triangle Surveying is the non-governmental entity that issued the elevation certificates for the
15 properties on W. Dyer Road. (Exhibit 1). Laird affirmed that flood openings would be needed if
16 the properties were not properly elevated. However, she added that both properties were
17 elevated as required and flood openings were not needed as claimed by Johnson. In addition, I
18 asked Laird if the properties in question have flood openings constructed. Laird stated that the
19 properties have only what appear to be small ventilation openings but these are not flood
20 openings as required by FEMA. There is an apparent inconsistency between Johnson's
21 statement in his Complaint and the information provided by Triangle Surveying. The second
22 page of the elevation certificates includes a comment from Johnson that "[f]lood openings
23 completed and inspected" but according to Triangle Surveying, there are no flood openings.
24 However, it is this Investigator's opinion that this inconsistency has no significant impact in the
25 analysis of the Complaint.

26 On April 15, 2010, I spoke to John Lohman, Johnson's supervisor and a witness listed in
27 the Complaint. Lohman stated that he did not want to provide me with any information at this
28 time.

1 On May 3, 2010, I spoke to Bonnie Drinkwater Esq., an attorney contracted by Nye
2 County to conduct the investigation of Johnson's complaint against Borasky. (Complaint, Tab
3 B, p.6). Subsequently, I received an e-mail containing information related to her investigation.
4 The information provided contains confidential personnel information and Ms. Drinkwater
5 made confidentiality a condition of its release. The Commission's Executive Director has
6 agreed to keep the document from being included in the public record. (Exhibit 8¹).

7
8 **1. Allegation one: On October 6, 2008 Borasky violated NRS 281A. 400(2) by**
9 **directing Johnson to inspect properties at 4701 and 4671 W. Dyer regarding**
10 **alleged issues with the elevation of two garage pads.**

- 11 ■ NRS 281A.400(2) provides, in relevant part:

12 A public officer or employee shall not use the public officer's or employee's
13 position in government to secure or grant unwarranted privileges, preferences,
14 exemptions or advantages for the public officer or employee, any business entity
15 in which the public officer or employee has a significant pecuniary interest, or
any person to whom the public officer or employee has a commitment in a
private capacity to the interests of that person. As used in this subsection:

16 (a) "Commitment in a private capacity to the interests of that person" has the
17 meaning ascribed to "commitment in a private capacity to the interests of
others" in subsection 8 of NRS 281A.420.

18 (b) "Unwarranted" means without justification or adequate reason.

19
20 As to the allegation that Borasky used his position in government to secure unwarranted
21 privileges, preferences, exemptions or advantages by directing Nye County Building Safety and
22 Compliance Manager Richard Johnson to inspect properties at 4701 and 4671 W. Dyer in
23 Pahrump, NV and correct alleged issues with elevation of two garage pads; the evidence is as
24 follows:

25 Borasky admitted calling Johnson but claims the nature of the call was only to inquire,
26 not to direct Johnson to perform an inspection and make the appropriate corrections if any were
27

28 _____
¹ Members of the Investigative Panel have been provided a copy of this document for their "in-camera" review. Any confidential documents provided for such review should be protected from distribution and destroyed.

1 required. (Response, Tab D). Johnson claims the call from Borasky was a directive and not an
2 inquiry. (Complaint, Tab B, p.4).

3
4 **2. Allegation two: On October 6, 2008, Borasky violated NRS 281A.400(7)² by**
5 **using Johnson's government time for his personal benefit, when he directed**
6 **Johnson to inspect the properties at 4701 and 4671 W. Dyer and correct alleged**
7 **issues with the elevation of two garage pads.**

- 8
9 ■ NRS 281A.400(7) provides, in relevant part:

10 A public officer or employee, other than a member of the Legislature, shall not
11 use governmental time, property, equipment or other facility to benefit his
12 personal or financial interest. This subsection does not prohibit:

13 (a) A limited use of governmental property, equipment or other facility for
14 personal purposes if:

15 (1) The public officer who is responsible for and has authority to authorize the
16 use of such property, equipment or other facility has established a policy
17 allowing the use or the use is necessary as a result of emergency circumstances;

18 (2) The use does not interfere with the performance of his public duties;

19 (3) The cost or value related to the use is nominal; and

20 (4) The use does not create the appearance of impropriety;

21 As to the allegation that Borasky used Johnson's government time for his personal
22 benefit, the evidence is as follows:

23 Borasky admitted calling Johnson but claims the nature of the call was only to inquire,
24 not to direct Johnson to perform an inspection and make the appropriate corrections. (Response,
25 Tab D). Johnson claims the call from Borasky was a directive and not an inquiry. (Complaint,
26 Tab B, p.4).

27 **3. Allegation three: On October 6, 2008, Borasky violated NRS 281A.400(9)**
28 **when he directed Johnson, his subordinate, to inspect properties at 4701 and**
4671 W. Dyer and correct alleged issues with elevation of two garage pads.

² Changes were made by the 2009 Legislation; however the allegation occurred prior to the Legislative session.

- 1 ▪ NRS 281A.400(9) provides, in relevant part:

2 A public officer or employee shall not attempt to benefit the public officer's or
3 employee's personal or financial interest through the influence of a subordinate.

4 As to the allegation that Borasky influenced Johnson, his subordinate, to inspect
5 properties at 4701 and 4671 W. Dyer and correct alleged issues with elevation of two garage
6 pads, the evidence is as follows:

7 Borasky admitted calling Johnson but claims the nature of the call was only to inquire,
8 not to direct Johnson to perform an inspection and make the appropriate corrections. (Response,
9 Tab D). Johnson claims the call from Borasky was a directive and not an inquiry. (Complaint,
10 Tab B, p.4).

11 It is this Investigator's opinion that this case is similar to Commission's Opinion In re
12 Boggs-McDonald RFO No. 04-77. In that opinion, the Commission held that "An employee
13 may very well feel undue pressure to follow instructions given by an elected official regardless
14 of the number of management levels between the employee and the elected governing body on
15 which the official serves."

16
17 Dated this 3 day of May 2010.

18 NEVADA COMMISSION ON ETHICS

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23 Mike Vavra, MPA
24 Investigator
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