



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Third-Party Request
for Opinion Concerning the Conduct of
JOANN MALONE, Former County Clerk,
White Pine County, State of Nevada,

Request for Opinion No. 10-81C

Subject. /

STIPULATED AGREEMENT

1. **PURPOSE**: This stipulated agreement resolves Third-Party Request for Opinion (“RFO”) No. 10-81C before the Nevada Commission on Ethics (“Commission”) concerning JoAnn Malone (“Malone”), former County Clerk of White Pine County, Nevada, and serves as the final opinion in this matter.

2. **JURISDICTION**: At all material times, Malone served as County Clerk (“Clerk”) of White Pine County, Nevada. Pursuant to Nevada Revised Statute (“NRS”) 246.010, the position of County Clerk is an elected office. In accordance with NRS 245.170, Malone was appointed as Clerk to fill an unexpired term. NRS 281A.280 gives the Commission jurisdiction over current and former elected and appointed public officers for conduct which occurred within the immediately preceding two years. Accordingly, the Commission has jurisdiction over Malone.

3. **PROCEDURAL STATUS AND HISTORY:**

The following events are relevant to the matter:

- a. Pursuant to Chapters 245 and 246 of NRS, on or about August 2008, Malone was appointed by the White Pine County Board of Commissioners to serve the remainder of the unexpired term (expiring January 2011) vacated by the previous County Clerk. Malone sought a new term as County Clerk by filing her candidacy in the 2010 general election. Malone lost her bid for election to the office in November, 2010 and vacated the position on or about January 3, 2011.
- b. On or about November 1, 2010 (before the general election), the Commission received a Third-Party RFO from Malone's opponent in the election (and a Deputy County Clerk under the direction/supervision of Malone), Linda "Lin" Burleigh ("Burleigh"), regarding Malone's alleged conduct as County Clerk interfering with her private interests in her candidacy for election to the office in violation of various provisions of NRS 281A. The RFO generally alleged that Malone had: 1) failed to avoid conflicts between her private interests in her campaign and those of the public she served; 2) used her official position to benefit her personal interests and to influence subordinates regarding her campaign as the incumbent for election to the office of County Clerk; and 3) used government time, property, equipment or other facility by collecting a salary for her Clerk's position while attending to her personal business interests in a local restaurant where she was employed.
- c. As required by NAC 281A.410, the Commission provided Malone with notice of the RFO by mail. Pursuant to NRS 281A.440(3), Malone was provided an opportunity to file a written response to the RFO and submitted a written response to the allegations

through her appointed counsel, Rebecca Bruch, Esq., of Erickson, Thorpe & Swainston, Ltd. in Reno, Nevada.

- d. Based on the facts developed from the Commission's investigation, the Commission's Executive Director provided a report to an investigatory panel pursuant to NRS 281A.440(4) recommending that there was credible evidence to establish just and sufficient cause for the investigatory panel to forward certain allegations implicating various provisions of NRS 281A to the Commission for a hearing and opinion as follows:

(1) Malone's alleged failure to avoid conflicts between her private interests in her campaign as the incumbent for election to the office of County Clerk and those of the public which she served, implicating NRS 281A.020;

(2) Malone's alleged attempts to use her official position to seek or grant unwarranted privileges, preferences and advantages for herself and influence subordinates when she implemented an internal office policy regarding the handling of election matters and the issuance and acceptance of voter registration applications and subsequently terminated the employment of her opponent and subordinate, Burleigh, during the course of campaigning for the November 2010 general election for allegedly violating that office policy, implicating NRS 281A.400(2) and (9);

- e. The Commission's Executive Director further recommended that credible evidence did not exist to support allegations that Malone's conduct violated:

(1) NRS 281A.400(1) because that provision of NRS was inadvertently included in the Commission's Notice to Subject; and

(2) NRS 281A.400(7) by using governmental time, property or other facility to benefit her personal and financial interest by collecting a full-time salary despite her regular absence from the Clerk's office to attend to her personal business interests in a local restaurant. The Executive Director determined that the provisions of NRS governing County officers authorize their absence if the Office maintains statutorily mandated office hours staffed by competent deputies (NRS 245.040). The evidence revealed that Malone employed competent deputies and maintained the necessary office hours. Accordingly, there was insufficient credible evidence on this basis that Malone used government time in violation of NRS 281A.400(7).

- f. Pursuant to NRS 281A.440, on July 28, 2011, a two-member investigatory panel of the Commission reviewed the RFO, Malone's response, the Executive Director's report and recommendation and other evidence. The Panel adopted the Executive Director's recommendations described in paragraphs "d" and "e" herein and forwarded the matter to the Commission for a hearing and opinion. However, the Panel further determined that the alleged conduct described in paragraph "d" governing the implementation and enforcement of the office policy also implicated the provisions of NRS 281A.400(7) governing improper use of government time and property for personal benefit.
- g. In lieu of a full hearing regarding these alleged violations of NRS 281A, Malone now enters into this stipulation acknowledging her duty as a former public officer to commit to avoid conflicts between her private interests and those of the public she served. Accordingly, Malone agrees that an appearance of impropriety and conflicts

of interest arose from using her official position to benefit her personal interests. *See generally* NRS 281A.020 and NRS 281A.400.

4. **RELEVANT STATUTES:** The following excerpts from Nevada Revised Statutes are relevant to the allegations giving rise to this stipulated agreement:

a. **NRS 281A.020(1)** – Public Policy / Legislative Declaration

1. It is hereby declared to be the public policy of this State that:

(a) A public office is a public trust and shall be held for the sole benefit of the people.

(b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

b. **NRS 281A.400(2)** – Unwarranted Preferences

2. A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity 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:

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

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

c. NRS 281A.400(7) – Using Government Time, Property or Equipment For Personal Interest

7. Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit the public officer's or employee's personal or financial interest. This subsection does not prohibit:

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

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

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

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

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

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

↪ If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

d. NRS 281A.400(9) – Using Position to Influence Subordinate

9. A public officer or employee shall not attempt to benefit his personal or financial interest through the influence of a subordinate.

e. NRS 281A. 170 – “Willful Violation” Defined

“Willful violation” means a violation where the public officer or employee:

1. Acted intentionally and knowingly; or

2. Was in a situation where this chapter imposed a duty to act and the public officer or employee intentionally and knowingly failed to act in the manner required by this chapter.

f. NRS 281A.105 – “Intentionally” Defined

“Intentionally” means voluntarily or deliberately, rather than accidentally or inadvertently. The term does not require proof of bad faith, ill will, evil intent or malice.

g. NRS 281A.115 – “Knowingly” Defined

“Knowingly” imports a knowledge that the facts exist which constitute the act or omission, and does not require knowledge of the prohibition against the act or omission. Knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent person upon inquiry.

5. **FINDINGS/STIPULATIONS OF FACT:**

a. Malone’s Interests

(1) Malone served as the appointed County Clerk of White Pine County between approximately August 2008 and January 2011 to fill the unexpired term of her predecessor, earning a salary of approximately \$60,000 per year.

(2) Near the expiration of her appointed term, Malone sought election to a full term as County Clerk in the November 2010 general election. Burleigh, Malone’s subordinate as a deputy clerk, also filed her candidacy for election against Malone and ultimately defeated Malone in the November 2010 general election.

(3) Malone was also employed by The Big Apple Restaurant in Ely, Nevada.

b. Malone’s Conduct

(1) As County Clerk, Malone was generally responsible for creating and maintaining records of the meetings of the County Commission, issuing marriage licenses, filing and recording court and legal documents, administering all elections and registering eligible electors within the County. Malone supervised all deputy

clerks, including Burleigh. Burleigh served as the deputy clerk responsible for matters involving elections, including voter registrations.

- (2) Within days of learning that Burleigh had filed her declaration of candidacy for the office of County Clerk, Malone issued an internal office memo regarding voter registration applications and office duties concerning election-related matters. Malone also transferred supervision of Burleigh to the Chief Deputy County Clerk.
- (3) The office memo instructed staff that all election-related questions were to be directed to Malone and that she and Burleigh would no longer accept or hand out voter registration applications. Concerned over potential conflicts of interest between her and a subordinate pursuing the position while both serving in the office during the election, Malone discussed the matter with the County Human Resource Director and District Attorney who both generally supported the effort to avoid conflicts of interests while Malone and Burleigh performed duties in their official capacities during office hours. Neither the Human Resource Director nor the District Attorney drafted or approved the specific policy, but generally understood there to be policy intended to apply uniformly to Malone and Burleigh to restrict election-related activities while acting in their official capacities. They did not understand any policy to restrict Malone or Burleigh from accessing voter registration applications, or prohibit staff from providing such forms to Malone or Burleigh, in their private capacities. The staff of the Clerk's office generally understood and construed the policy in the same manner.

- (4) The professional relationship between Malone and Burleigh was strained during the course of the campaign as evidenced by numerous public disputes, newspaper articles and staff discourse within the office of the Clerk. Malone felt restricted in her ability to effectively campaign for the Clerk position against an employee she supervised and Burleigh felt that Malone was not performing the duties of the Clerk by spending significant time pursuing her private business interests in a local restaurant.
- (5) During the course of the campaign with hard feelings among the candidates, Burleigh, in her official capacity as Deputy Clerk, was disciplined for insubordination for making a derogatory remark about Malone during office hours in the presence of co-workers. Malone learned of the remark from staff and reported the matter to the County Human Resource Director who conducted an independent investigation in which Burleigh admitted to the conduct. The Human Resource Director determined the appropriate disciplinary action, in accordance with the County's personnel policies, would include one week of paid administrative leave and one week of unpaid administrative leave.
- (6) While Burleigh was on paid administrative leave, she approached the public counter at the Clerk's office to request voter registration applications. Malone denied her request for such applications citing the office memorandum which restricted Malone and Burleigh from receiving such forms. After being advised by the Secretary of State that she was entitled to the applications pursuant to State law (NRS 293.509), Burleigh again approached the public counter at the Clerk's office while on administrative leave and received the applications from a

Deputy Clerk while Malone was not present in the office. Malone learned of this transaction on the same day and verbally counseled the Deputy Clerk who provided the forms to Burleigh that her actions violated the office memo (no formal disciplinary action was taken).

(7) The next day, Malone contacted the Human Resource Director outlining the circumstances under which Burleigh requested and received voter registration applications in violation of Malone's policy and asked that the Human Resource Director terminate Burleigh's employment for violation of the office policy as insubordination. The Human Resource Director consulted with the District Attorney and issued a letter of termination to Burleigh to carry out Malone's decision to terminate Burleigh citing Malone's reasons. The District Attorney deferred to the Human Resource Director and advised that any letter of termination should originate from the Human Resource Department. The Human Resource Director did not conduct an investigation of the alleged insubordination, did not make an independent determination regarding whether Burleigh's actions constituted a violation of the office policy or determine whether the policy could be interpreted to prohibit Burleigh's receipt of voter registration forms as a private citizen or serve as proper grounds for termination. Rather, the Human Resource Director's only involvement was drafting the letter carrying out Malone's decision to terminate Burleigh.

(8) NRS 293.509 authorizes any private citizen or candidate for elected public office to request and receive voter registration applications from the Clerk of any County.

6. **TERMS:** Based on the foregoing, Malone and the Commission agree as follows:

- a. Each of the findings/facts enumerated in section 5 is deemed to be true and correct.
- b. Malone held a public office which constitutes a public trust to be held for the sole benefit of the people of the State of Nevada.
- c. Malone's acts of authoring the memo and later utilizing it as a means to terminate Burleigh's employment constitute the use of her official position as County Clerk to seek an unwarranted advantage for her private interests in campaigning for the position as Clerk during the November 2010 general election and use of government time and resources. These acts constitute a course of conduct establishing a single violation of the Ethics in Government Law, implicating the provisions of NRS 281A.020 and NRS 281A.400(2) and (7). While Malone's policy may have been appropriate to restrict access to such forms while serving in their official capacities as officers and employees of the Clerk's office, it would not have been legal to interpret such policy to restrict a candidate's access to such forms as a private citizen. Such interpretation and enforcement of the policy to terminate her subordinate for such access served as an unwarranted advantage to Malone in the pursuit of her candidacy for office.
- d. Malone's violation of NRS 281A was willful under NRS 281A.170. Malone acted intentionally and knowingly, as these terms are defined in NRS 281A.105 and 281A.115, respectively.

- e. For an act to be intentional, NRS 281A.105 requires that Malone acted voluntarily and deliberately. Malone's acts in establishing and enforcing the office policy were not accidental or inadvertent. *See also In re Fine v. Nevada Commission on Judicial Discipline*, 116 Nev. 1001 (2000) ("the relevant inquiry regarding willful misconduct is an inquiry into the intentional nature of the actor's conduct."). Malone deliberately drafted a policy as the County Clerk which had the effect of restricting her opponent's (and subordinate's) access to voter registration forms and involvement in election matters in her private capacity as a citizen.
- f. NRS 281A.115 imports a knowledge that the facts exist which constitute an act or omission. Malone knew she was establishing a policy and interpreting it in a manner that would restrict access to voter registration forms and change office duties regarding elections. NRS 281A does not require that Malone had actual knowledge that her conduct violated NRS 281A but it does impose constructive knowledge on a public officer when there are other facts that should put an ordinarily prudent person upon inquiry. *See also Garcia v. The Sixth Judicial District Court of Nevada*, 117 Nev. 697 (2001) ("constructive knowledge fulfills a statutory requirement that an act be done 'knowingly.' State of mind need not be proved by positive or direct evidence but may be inferred from conduct and the facts and circumstances disclosed by the evidence.") and *State v. Rhodig*, 101 Nev. 608 (1985) ("... the law does not require knowledge that such an act or omission is unlawful."). While the evidence reflects that Malone did not understand that the effect of her policy would implicate the Ethics in Government Law (and therefore had no actual knowledge that her conduct violated the provisions of NRS 281A), the record does reflect Malone's career

including years of professional experience in the private sector as well as her years serving as County Clerk, Mayor of Ely, Nevada and Deputy Secretary of State. As such, she was aware of and relied upon the statutes and regulations governing the responsibilities of public officers and employees under the provisions of NRS 281A as well as the provisions of law concerning elections and campaign practices set forth in Chapters 293 and 294A of NRS and NAC. These facts would or are deemed to put an ordinarily prudent person upon inquiry that a County Clerk is subject to the provisions of NRS 281A and that any voluntary acts will likewise be subject to the provisions of NRS 281A. *See In re Keene*, RFO 00-11 (2000).

- g. For the willful violation set forth in this section, Malone will pay a total civil penalty (sanction) of \$2,000.00 pursuant to NRS 281A.480 on or before December 31, 2012, in one lump sum payment or in monthly installment payments as negotiated with the Commission's Executive Director.
- h. This agreement applies only to the specific facts, circumstances and law related to this RFO. Any facts or circumstances that are in addition to or differ from those contained in this agreement may create a different resolution of this matter.
- i. This agreement applies only to these matters before the Commission and is not intended to be applicable to or create any admission of liability for any other proceeding, including administrative, civil or criminal.

7. **WAIVER:**

- a. Malone knowingly and voluntarily waives a full hearing before the Commission on the allegations against her and of any and all rights she may be accorded pursuant to NRS Chapter 281A, the regulations of the Commission (NAC Chapter 281A), the Nevada Administrative Procedures Act (NRS Chapter 233B), and the laws of the State of Nevada.
- b. Malone knowingly and voluntarily waives her right to any judicial review of this matter as provided in NRS 281A, 233B or any other provision of Nevada law.

8. **ACCEPTANCE:** We, the undersigned parties, have read this agreement, understand each and every provision therein, and agree to be bound thereby. The parties orally agreed to be bound by the terms of this agreement during the regular meeting of the Commission on January 18, 2012.

DATED this 10th day of February, 2012.



JoAnn Malone

DATED this 15 day of February 2012.



Erik Beyer, Chair
Nevada Commission on Ethics

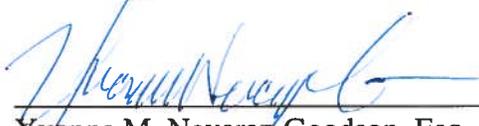
The above Stipulated Agreement is approved by:

DATED this 2nd day of February, 2012.



Rebecca Bruch, Esq.
Counsel for JoAnn Malone

DATED this 25th day of January, 2012.



Yvonne M. Nevarez-Goodson, Esq.
Commission Counsel