



**In the Matter of the Request for Opinion
Concerning the Conduct of
RICHARD MARSHALL, Assistant Sheriff,
Nye County Sheriff's Office,
State of Nevada,**

Request for Opinion No.: 10-90C

Subject.

EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION

The following report and recommendation is based on the Commission staff's consideration and investigation of the Third-Party Request for Opinion (RFO) filed against Assistant Nye County Sheriff Richard Marshall ("Subject"), a public employee, and on the Subject's written response to the RFO, both attached as exhibits to this report and recommendation, and the other exhibits attached hereto. This Executive Director's Report and Recommendation and its exhibits are provided for the consideration of the two-commissioner investigatory panel, pursuant to NRS 281A.240.

Facts:

Assistant Nye County Sheriff Rick Marshall became very involved in the 2010 race for Nye County Sheriff and supported the candidacy of the incumbent Sheriff, Tony DeMeo. Mr. Marshall is an active user of Facebook and is a regular blogger on a website called "Positively Pahrump." Utilizing this social media, instead of posting his own photo to identify his posts, Marshall selected a photo of a DeMeo campaign poster.

As part of his duties, Marshall is tasked with following Facebook, Positively Pahrump and other social networks and other media sources to identify topics of interest to the Sheriff's office, to answer public concerns and to provide accurate information about Nye County to the public via the internet.

All of the posts referenced in the RFO were made on Marshall's personal account under his own name. Marshall admits making 6 of the 80 posts from his office computer. He denies that any of the posts were made during his work time or that the county incurred any "charge" for the posts.

Allegations:

The main allegation is that, by posting to the web using a county-owned computer and network, Mr. Marshall caused a governmental entity to incur an expense to support

Sheriff DeMeo's candidacy for re-election in violation of NRS 281A.520. The RFO also alleges that Mr. Marshall violated NRS 281A.400(2), (5) and (7) - used his position to secure or grant unwarranted privileges, preferences or advantages for himself or another; used non-public information to further a pecuniary interest; and improperly used government resources to further a personal or financial interest.

Analysis:

1. **NRS 281A.400(2) states:**

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.

The request provides no basis for or evidence that Marshall used his position in government to grant or secure any "unwarranted privileges, preferences, exemptions or advantages" to Marshall or to his choice for Sheriff by posting his opinion on the various social media sites. It merely alleges that the posts were made, and presumes that Marshall made them from his work computer or that his posts carried more weight due to his position as Assistant Sheriff. No credible evidence exists that Marshall used his position or that any unwarranted benefits were sought or granted.

2. **NRS 281A.400(5) provides:**

If a public officer or employee acquires, through the public officer's or employee's public duties or relationships, any information which by law or practice is not at the time available to people generally, the public officer or employee shall not use the information to further the pecuniary interests of the public officer or employee or any other person or business entity.

The request fails to state what non-public information Marshall used to further anyone's interests. The marked posts do not reveal the non-public information alleged to be used. Therefore, this allegation appears to fall short of the specific information and the credible evidence required to move forward to a hearing.

3. **NRS 281A.400(7) provides:**

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

Mr. Marshall claims that his schedule is such that his personal and work time often overlap, and that breaks are taken in a flexible manner. Therefore, it is reasonable to accept that posts of a personal nature made during a work shift may have been made on Marshall's own time. Further, since use of his County-issued computer may fall into the exception outlined in subsection (c), NRS 281A.400(7) appears to be inapplicable to the facts and circumstances presented in this request, and no credible evidence is provided to rebut this conclusion.

4. NRS 281A.520(2) provides.

2. For the purposes of paragraph (b) of subsection 1, an expense incurred or an expenditure made by a governmental entity shall be considered an expense incurred or an expenditure made in support of a candidate if:

(a) The expense is incurred or the expenditure is made for the creation or dissemination of a pamphlet, brochure, publication, advertisement or television programming that prominently features the activities of a current public officer of the governmental entity who is a candidate for a state, local or federal elective office; and

(b) The pamphlet, brochure, publication, advertisement or television programming described in paragraph (a) is created or disseminated during the period specified in subsection 3.

Mr. Marshall's 6 posts from his office computer do not appear to be the type of activity contemplated by NRS 281A.520(2).

NAC 281A.435 Basis for finding by panel; unanimous finding required for determination that no just and sufficient cause exists. (NRS 281A.290)

1. A finding by a panel as to whether **just and sufficient cause** exists for the Commission to render an opinion on an ethics complaint **must be based on credible evidence.**

2. A finding by a panel that no just and sufficient cause exists for the Commission to render an opinion on an ethics complaint must be unanimous.

3. As used in this section, **"credible evidence" means the minimal level of any reliable and competent form of proof** provided by witnesses, records, documents, exhibits, concrete objects, and other such similar means, **that supports a reasonable belief by a panel that the Commission should hear the matter and render an opinion.** The term does not include a newspaper article or other media report if the article or report is offered by itself.

Conclusion and Recommendation:

I recommend that the Panel find just and sufficient cause **DOES NOT EXIST** for the Commission render an opinion on all of the above allegations against Assistant Sheriff Richard Marshall including the alleged violations of NRS 281A.400(2), (5) and (7) and NRS 281A.520.

I hereby provide this, my recommendation, to this honorable panel.

 _____ Date: 2/28/11
Caren Jenkins, Esq.
Executive Director