



**STATE OF NEVADA
BEFORE THE NEVADA COMMISSION ON ETHICS**

**In the Matter of the Request for Opinion
Concerning the Conduct of ROGER TOBLER,
Mayor, Boulder City,
State of Nevada**

Request for Opinion No.: 11-76C

Subject. /

EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION

The Executive Director bases the following report and recommendation on the staff's consideration and investigation of the Third-Party Request for Opinion ("RFO") filed regarding the conduct of Roger Tobler, a public officer, and on his written response to the RFO, attached as exhibits to this report and recommendation, and the other materials attached hereto. The Executive Director provides her Report and Recommendation and its exhibits for the consideration of the two-commissioner investigatory panel ("Panel"), pursuant to the requirements of NRS 281A.240.

Facts:

The main party is Roger Tobler, the Mayor of Boulder City since 2007. Tobler was first elected to the City Council in 2003 and has served the City ever since. Tobler owns a portion (3%) of the family's business, True Value Home Hardware and Variety, (his father owns 48%), and serves as manager of the stores in Boulder City and in Overton. (Exhibits 1 and 3). It appears that the Boulder City store has maintained a business relationship with the City for nearly 40 years.

Allegations:

The allegations center on Tobler's business relationship with the City and his conduct related to that pecuniary interest.

1. NRS 281A.020

The RFO alleges that Tobler has failed to properly commit himself to avoid conflicts between his private interests and his duty to the public.

NRS 281A.020 Legislative findings and declarations.

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.

The Commission has not developed a consistent practice of acknowledging alleged violations of this statute separately from the specific conduct in other sections. However, I recommend that, in light of this articulated directive occupying its own section of statute, it should be addressed separately.

Credible evidence of Mr. Tobler's access to and inquiries of the City Manager regarding City purchases at his store; the common perception by local citizens and City employees of his authority over department heads and City employees, and his failure to keep the City's payments to his store for purchases in the public light when they came before the Council for approval became evident in the investigation. Whether these facts form a sufficient basis for a violation of another section of NRS or not, they provide sufficient credible evidence that the conflicts between Mr. Tobler's private interests and those of the general public were not well separated, and that Mr. Tobler had not properly committed himself to avoid such conflicts. In particular, by requesting an equal distribution of spending between his and the other local hardware store, Tobler acted against the interest of the public which he serves, since no consideration was given to having City purchases made based on convenience or pricing.

Due to the existence of credible evidence to support a finding of just and sufficient cause, I recommend that this allegation regarding NRS 281A.020 be forwarded to the full Commission for hearing.

2. NRS 281A.400

The RFO alleges that Mayor Tobler sought and obtained agreement to implement an unofficial policy that the City would equally distribute its hardware purchases between his store and the other hardware store in Boulder City. When it became evident that his store's purchases from the City had declined, he approached the City Manager to inquire whether the policy was being followed. While the City Manager's official "boss" is the entire City Council, the relationship between the Mayor and the Manager historically is that of supervisor/subordinate. The investigation revealed that Mayes and Tobler have worked extremely closely and extremely well together for many years. A perception exists that he is her supervisor, whether that relationship exists formally or not.

NRS 281A.400 General requirements; exceptions. A code of ethical standards is hereby established to govern the conduct of public officers and employees:

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.

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. . . .

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

By requesting an equal distribution of spending between his and the other Boulder City hardware store, Tobler sought an unwarranted privilege. No consideration was given for having the City make purchases at the store that was most convenient or had better prices for the desired item. This policy may result in purchases being made without adequate reason, and may have resulted in an unwarranted benefit to Mr. Tobler.

Mr. Tobler approached Boulder City Manager Mayes at City Hall when he noticed that the City's purchases had declined at his store. Presumably, Mayes was acting in her official capacity during work-related time. He asked her whether the City's purchases were being divided equally, and she looked into the matter using the City's time. She even reminded the Public Works Department of the policy shortly after Tobler's inquiry. This conduct provided credible evidence that Tobler may have used governmental time to benefit his personal or financial interest, and he attempted to benefit that interest by influencing a subordinate, specifically City Manager Mayes.

Based on these facts and the credible evidence related thereto, I recommend that the Panel find that just and sufficient cause exists to forward the allegations related to NRS 281A.400(2), (7), and (9) to the full Commission for a hearing.

3. NRS 281A.420

The RFO alleges that Tobler failed to publicly disclose his pecuniary interest and failed to undertake the abstention analysis on the record at 23 meetings prior to the filing date of the RFO when payments for purchases made at his store came before the City Council on its consent agenda for approval. (Exhibit 1).

NRS 281A.420 Requirements regarding disclosure of conflicts of interest and abstention from voting because of certain types of conflicts; effect of abstention on quorum and voting requirements; exceptions.

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Which would reasonably be affected by a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,

without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the persons to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the

public officer or employee shall make the disclosure in public to the chair and other Members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

- (a) The public officer's acceptance of a gift or loan;
- (b) The public officer's pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of others.

The records of the Boulder City Council meetings show that Tobler disclosed his interest in the Hardware store on two occasions during his tenure, despite his testimony that he had "made those full disclosures in the past." On September 23, 2003 and eight years later, on September 27, 2011 (just after this RFO was filed), Tobler made a disclosure on the record. From that, one might conclude that he recognized his duty to disclose. (Exhibit 1).

The minutes also show that Tobler has never abstained from participating on agenda items related to "Claims Paid" and voted to approve payments to his business in every instance. Whether Tobler was required to abstain from voting is not the issue here, but he did not undertake the abstention analysis required by NRS 281A.420 on the record or disclose his pecuniary interest or his commitment in a private capacity to the interest of his father before voting to approve the claims paid by the City of Boulder City.

As a result, I recommend that sufficient credible evidence is present and just and sufficient cause exists to refer the allegations related to NRS 281A.420(1) and (3) to the full Commission for hearing.

4. Other allegations

The RFO alleges several matters either unrelated to the jurisdiction of the Commission or without any evidentiary basis. The Commission has no ability to enforce Boulder City's Code or Chapter 332 of NRS, for example. The RFO's allegations related to NRS 281A.530, which regulates purchases made by local governments, regulates government, and not public officers. As a result, **I recommend that just and sufficient cause does not exist to forward these matters to the full Commission, based on a lack of credible evidence or jurisdiction, and that the Panel should dismiss the remaining allegations in the RFO in their entirety.**

Conclusion and Recommendation:

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 RFO **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 RFO 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.

I recommend that the Panel find that sufficient credible evidence is present to support a reasonable belief that **just and sufficient cause exists** for the Commission to hear this matter and render an opinion regarding Roger Tobler's alleged violations of NRS 281A.020, NRS 281A.400 (2), (7) and (9) and NRS 281A.420(1) and (3).

I respectfully provide my recommendation to this honorable panel.



Caren Jenkins, Esq.
Executive Director

Date: October 26, 2011