



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for
Advisory Opinion Concerning the
Conduct of PUBLIC OFFICERS,
Members, State Board,
State of Nevada,

Advisory Opinion
Nos. 08-64A & 08-67A

Public Officers.

OPINION

Pursuant to NRS 281A.440.1, this request for a confidential advisory opinion by two members (Public Officers) of a State board (Board) came before a quorum¹ of the Nevada Commission on Ethics (Commission) for a hearing on January 8, 2009. The Public Officers appeared in person and provided sworn testimony.

The Public Officers sought an opinion from the Commission on the propriety of their future conduct as it relates to the Ethics in Government Law (Ethics Law).

The Public Officers sought guidance on whether simultaneously serving on a private Tax Exempt Entity No. 1 (Entity 1), and on Tax Exempt Entity No. 2 (Entity 2) and members of the Board would violate the Ethics Law.

¹ The following Commissioners participated in this opinion: Chairman Hutchison and Commissioners Beyer, Cashman, Keele, Lamboley, Marvel, Moran and Shaw.

After fully considering the request for advisory opinion and analyzing the facts and circumstances and testimony presented, the Commission deliberated and orally advised Public Officers of its decision in the matter. The Commission now renders this written Opinion.

FINDINGS OF FACT

1. In their public capacity, Public Officers are members of the Board. Members of the Board are appointed.
2. In their private capacity, Public Officers serve on Entity 1 and Entity 2.
3. The Entity 1:
 - Both Entity 1 and Entity 2 are tax exempt 501(c)(3) qualified organizations.
 - Entity 1 maintains certain historical records and information on matters pertaining to the State.

▪ The records and information are updated annually and published. Proceeds from such publications are used to maintain the records and information and for scholarships to students through the State.

▪ Entity 1 also donates books and artwork to other organizations for fundraising purposes.

5. Entity 2:

▪ Entity 2 was established for the benefit of Nevada.

▪ Entity 2 receives revenue from a certain program of the Department of Motor Vehicles. Revenues are used to provide grants for projects through a department of the State.

6. Both Public Officers testified that they have no recollection of any matter affecting Entity 1 and/or Entity 2 coming before the Board for action during the time they have been serving on the Board.

7. The Board has no authority over Entity 1 or Entity 2. Similarly, neither Entity 1 nor Entity 2 has any authority over the Board.

CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Public Officers were "public officers", as defined by NRS 281A.160.

2. The Commission has jurisdiction to render an advisory opinion in this matter, pursuant to NRS 281A.440.1 and NRS 281A.460.

3. Nothing in the testimony received from the Public Officers or in their request for an advisory opinion demonstrates that a conflict exists between their private

interests with Entity 1 and Entity 2 and their public duties with the Board.

4. Whenever a matter comes before the Board affecting Entity 1 and/or Entity 2, the Public Officers must disclose their private commitment and abstain as necessary, pursuant to subsections 2 and 4 of NRS 281A.420 and as this statute has been interpreted by the Commission in its *Woodbury*² opinion.

5. Whenever the Public Officers are legally conflicted and must abstain because of their private commitment to Entity 1 and/or Entity 2, they may otherwise participate as providers of factual information without advocating, pursuant to NRS 281A.420.2 and as this statute has been interpreted by the Commission in its *Kubichek*³ opinion.

DISCUSSION

The facts in this matter were provided by the Public Officers. Facts and circumstances that differ from those used by the Commission in this advisory opinion may result in an opinion different from this opinion.

The issue before the Commission is whether simultaneously serving on Entity 1, Entity 2 and as members of the Board, the Public Officers would violate the Ethics Law.

The Public Officers must commit themselves to avoid conflicts between their private interests and those of the general public whom they serve. To that end, the

² *In re Woodbury*, Comm'n on Ethics Opinion No. 99-56 (1999).

³ *In re Kubichek*, Comm'n on Ethics Opinion No. 97-07 (1998).

Public Officers must make detailed disclosures that satisfy the requirements of NRS 281A.420.4. Such disclosures must be made whenever a matter comes before the Board affecting Entity 1 and/or Entity 2.

NRS 281A.420.4 provides in relevant part:

A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(a) Regarding which he has accepted a gift or loan;

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others;⁴ or

(c) In which he has a pecuniary interest, without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the

Chairman and other members of the body.

In addition to proper disclosure, the Public Officers would need to abstain from acting on a matter in which they have a legal conflict, pursuant to NRS 281A.420.8 and NRS 281A.420.2.

NRS 281A.420.2 provides in relevant part:

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 his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group.

The Commission advises the Public Officers that, before they act on any matter before the Board affecting Entity 1 and/or Entity 2, they seek the advice of counsel for the Board, review this opinion, the Ethics Law and the Commission's interpretation of

⁴ "Commitment in a private capacity to the interests of others" means a commitment to a person:

(a) Who is a member of his household; (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (c) Who employs him or a member of his household; (d) With whom he has a substantial and continuing business relationship; or (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection. NRS 281A.420.8.

subsections 2 and 4 of NRS 281A.420 in its *Woodbury* and *Kubichek* opinions.

The *Woodbury* and *Kubichek* opinions serve as road maps for public officers dealing with disclosure and abstention. This is especially true when determining whether abstention is necessary, as the analysis involved with abstention is far more subjective than that involved with the issue of disclosure.

In *Woodbury*, the Commission set out the steps that a public officer must take whenever a matter that may affect his independence of judgment comes before the public body in which he sits. First, disclosure is required whenever a public officer's actions would "*reasonably* be affected by his private commitment." Second, before abstention is also required, a reasonable person's independence of judgment "must be *materially* affected" by that private commitment.

In *Kubichek*, the Commission opined that a legally conflicted official may otherwise participate in a matter as a provider of factual information but warned that, "the line between a statement of fact and a statement of advocacy will often be razor thin" and that "[p]rudential forethought, common sense, and concern for appearances of impropriety will be the best prophylaxis."

CONCLUSION

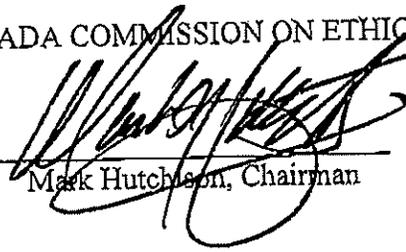
Therefore, by a unanimous vote, the Commission concluded that the Public Officers may simultaneously serve on Entity 1, Entity 2 and the Board. However, whenever a matter comes before the Board affecting Entity 1 and/or Entity 2, the Public Officers must disclose their private

commitment and abstain as necessary, pursuant to subsections 2 and 4 of NRS 281A.420 and as this statute has been interpreted by the Commission in its *Woodbury* opinion.

Additionally, whenever the Public Officers are legally conflicted and must abstain because of their private commitment to Entity 1 and/or Entity 2, they may otherwise participate as providers of factual information without advocating, pursuant to NRS 281A.420.2 and as this statute has been interpreted by the Commission in its *Kubichek* opinion.

Dated this 4th day of March, 2009.

NEVADA COMMISSION ON ETHICS

By: 

Mark Hutchinson, Chairman