



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Third-Party Request  
for Opinion Concerning the Conduct of  
**Gerald Antinoro**, Sheriff, County of  
Storey, State of Nevada,

Request for Opinion No. **16-54C**

Subject. /

**ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

On June 2, 2016, the Nevada Commission on Ethics (“Commission”) received Third-Party Request for Opinion No. 16-54C (“RFO”) from a member of the public pursuant to NRS 281A.440(2) concerning the conduct of Storey County Sheriff Gerald Antinoro (“Subject” or “Antinoro”) alleging violations of certain provisions of the Nevada Ethics in Government Law (“Ethics Law”) set forth in NRS Chapter 281A.

**INTRODUCTION AND PROCEDURAL HISTORY**

On October 27, 2016, a *Panel Determination* was issued, finding just and sufficient cause for the Commission to conduct a public hearing and render an opinion regarding whether Antinoro’s conduct in using official letterhead to endorse a political candidate violated the provisions of NRS 281A.400(7), associated with a use of governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest.

On November 3, 2016, the Commission issued a *Notice of Hearing and Scheduling Order*, setting an evidentiary hearing for February 15, 2017. On December 15, 2017, the parties filed an executed *Stipulated Facts* and requested the Commission to set aside the noticed evidentiary hearing and instead hold a hearing in April to consider Motions for Summary Judgment to be filed by the parties. A *First-Amended Notice of Hearing and Scheduling Order* was issued on January 5, 2017 to reschedule the hearing to April 19, 2017. Thereafter, each party filed a Motion for Summary Judgment (collectively the “Motions”) which were fully briefed and submitted for consideration of the Commission.

**HEARING ON THE MOTIONS AND STANDARD OF REVIEW**

On April 19, 2017, the Commission duly called the matter to order and considered the Motions, the *Stipulated Facts*, the record of proceedings and oral arguments presented by the parties. Consistent with the definition of a “party” set forth in NAC 281A.060, Ms. Judy A. Prutzman, Esq. appeared in representation of Ms. Yvonne M. Nevarez-Goodson, Esq. and Ms. Katherine F. Parks, Esq. appeared in representation of Subject Antinoro.

The rules governing practice before the Commission are set forth in NRS Chapter 281A and NAC 281A.250 to NAC 281A.310. A Motion for Summary Judgment is a dispositive motion which is permitted to be made after the issuance of a Panel Determination. See NAC 281A.265. NRS 281A.480(9) establishes the burden of proof for finding a violation of NRS Chapter 281A as a preponderance of the evidence unless a greater burden is otherwise prescribed by law. See *also* NRS 233B.121. In prior opinions, the Commission has granted a motion for summary judgment based upon the preponderance of evidence standard. See *In re Gammick*, Comm’n Op. No. 10-71C (2010) and in *In re Matson*, Comm’n Op. No. 14-70C (2016).

The Commission is not required to follow the standards applicable to a Motion for Summary Judgment contained in the Nevada Rules of Civil Procedure (“NRCP”), but it is not prejudicial error for the Commission to do so. The Nevada Supreme Court has opined that such rules “are not binding on a state agency in an adjudicatory proceeding, unless expressly adopted by the agency.” *Dutchess Bus. Servs. v. Nev. State Bd. of Pharm*, 124 Nev. 701, 710, 191 P.3d. 1159 (2008). The Commission has not expressly adopted the provisions of NRCP 56(c), which establish the standard for granting a Motion for Summary Judgment in a judicial proceeding as “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Accordingly, the Commission bases its determination on a preponderance of evidence standard and confirms that the provisions of NRCP 56 are instructive, but not mandatory.

### **DISCUSSION AND ORDER**

The Commission has jurisdiction over this matter pursuant to NRS 281A.280. Subject Antinoro is the elected Sheriff of Storey County, a public officer as defined in NRS 281A.160. The issue presented is whether Subject violated the provisions of NRS 281A.400(7) by using public time, property, equipment or other facilities when he used the official letterhead of the Storey County Sheriff’s Office to endorse a political candidate. In application of the Ethics Law, the Commission recognizes, that as a public officer, Antinoro must commit himself to avoid both actual and perceived conflicts between his private interests and those of the public he serves, including a duty to avoid using his public office or position for personal benefit. NRS 281A.020(1).

Antinoro contends he did not use government time, staff or resources as prohibited by NRS 281A.400(7) when he made a private endorsement of a political candidate since the endorsement, even though issued on official letterhead, was sent on his private computer during his lunch hour. Further, he asserts that the Executive Director has not produced evidence of a pecuniary interest or significant personal interest, a required element of NRS 281A.400(7).

#### **1. Use of Official Government Letterhead for Private Purpose**

Antinoro seeks to distinguish his circumstances from precedential opinions issued by the Commission.<sup>1</sup> Among other assertions, Antinoro indicates that the version of the endorsement letter published on social media by the candidate was done without his assistance or knowledge.<sup>2</sup> Also, he indicates that the image posted on social media did not contain certain attributes of an official letterhead such as address, phone and other contact information of the Storey County Sheriff’s Office. The version posted on social media had the Sheriff’s office logo and Antinoro’s name and title of Sheriff at the top of the page.<sup>3</sup> Antinoro asserts his circumstances are similar to and requests the Commission follow an advisory opinion dated February 29, 2012, issued by the U.S. Office of Special Counsel (“OSC”) discussing the application of the Federal Hatch Act to an incumbent partisan sheriff opining that the sheriff’s use of a title and uniform in political correspondence, even if the correspondence is in support of another partisan office, would not violate the Hatch Act.

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<sup>1</sup> Without limitation, these opinions include: *In re Hammargren*, Comm’n Op. No. 95-35C (1996); *In re Kirkland*, Comm’n Op. No. 98-41A (1999); *In re Hettrick*, Comm’n Op. No. 01-10A (2001); *In re Tiffany*, Comm’n Op. No. 05-21C (2007); and *In re Kuzanek*, Comm’n Op. No. 14-61C (2015).

<sup>2</sup> The *Stipulated Facts* confirm that Antinoro did not produce or otherwise assist with the YouTube Video. Antinoro did not supply any of the other images used in the video and candidate Michelle Fiore did not contact the Sheriff to inform him about the endorsement video.

<sup>3</sup> Although the endorsement posted on social media was not a full reproduction, Antinoro provided the Commission with an endorsement on full letterhead containing attributes of official address and contact information. See Antinoro’s July 26, 2016, response to the RFO allegations, which attached the complete letter as an exhibit. Consequently, any distinctions asserted based upon a lack of address or contact information are not supported by the full record.

The Commission does not find the OSC letter or the Federal Hatch Act to be direct precedent, instructive or determinative of the matter before the Commission. The guidance issued by the U.S. Office of Special Counsel applies to an incumbent “partisan” sheriff. NRS 293.195 designates the office of sheriff in Nevada as a nonpartisan rather than a partisan office. Particularly, the OSC guidance did not relate to the use of official letterhead for a private political endorsement and did not discuss whether or not the use of an official letterhead would be restricted by the Hatch Act or established governmental policy.

The Commission has and continues to view the use of official letterhead of a government office or agency as use of governmental property. See *In re Hammargren*, Comm’n Op. No. 95-35A (1996); *In re Hettrick*, Comm’n Op. No. 01-10 (2001); and *In re Tiffany*, Comm’n Op. No. 05-21C (2007). The use of official letterhead demonstrates a wielding or exertion of the official authority of public office. It also creates the impression that the Sheriff’s Office, as a law enforcement department, endorses the contents of the letter. An endorsement on private letterhead does not carry the same weight as one issued on official letterhead. Certainly, “all individuals enjoy a constitutional right to speak out on political concerns.” *Hettrick at p. 2*. However, the Ethics Law prohibits the use of governmental property, including its official letterhead, for a significant personal interest, especially when such use creates an appearance of impropriety or the impression that the government sanctions the activity. *Id.*

The record establishes that Antinoro used the official letterhead of the Storey County Sheriff to provide a private political endorsement and such use was not permitted by established policy of the affected agencies, nor was it permitted under the limited use exception set forth in NRS 281A.400(7)(a). Furthermore, the right of a private citizen to endorse a candidate of his selection is of such significance as to be provided constitutional protection under the First Amendment. See *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976). Consequently, the private endorsement of a candidate is a significant personal interest for purposes of application of the Ethics Law. Therefore, based upon a preponderance of evidence standard, the Commission determines that Antinoro improperly used the Storey County official letterhead to provide a private endorsement for a political candidate in violation of NRS 281A.400(7).

## **2. Constitutionality of NRS 281A.400(7) is Presumed**

Antinoro contends that NRS 281A.400(7) is unconstitutional under the void-for-vagueness doctrine. Antinoro’s position is that the terms “appearance of impropriety,” “significant” and “personal,” all applied under the provisions of NRS 281A.400(7), are not specifically defined in NRS Chapter 281A and therefore are vague.

However, the Commission, as an administrative agency, must presume the statute to be valid, especially since there has not been a sufficient showing that the statute is unconstitutional. Although fact finding is left to the administrative agency, determination of constitutionality is for the courts. See *Malecon Tobacco, LLC v. State ex rel. Dep’t of Taxation*, 118 Nev. 837, 59 P.3d. 474 (2002). Also, in application of statutory directives, “[a] statute should be given [its] plain meaning and must be construed as a whole and not read in any way that would render words or phrases superfluous or make a provision nugatory,” *Managarella v. State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) (internal quotations omitted).

No court has determined the provisions of NRS 281A.400(7) to be unconstitutional under the void-for-vagueness doctrine or other constitutional challenge. The challenged statute is content-neutral, applies to all public officers and employees and does not preclude or chill the private support of any political candidate. There is no evidence supporting that NRS 281A.400(7) has been or is discriminatorily applied, especially given the prior opinions rendered by the Commission. Further supporting the constitutionality of NRS 281A.400(7) are two notable opinions issued by the Supreme Court of the United States and the Nevada Supreme Court holding comparable provisions of the Ethics Law to be constitutional in the context of the *First Amendment*. See *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 131 S. Ct. 2343 (2011)

("Carrigan I") and *Carrigan v. Comm'n on Ethics of Nev.*, 129 Nev. Adv. Op. 95, 313 P.3d 880 (2013) ("Carrigan II").

These opinions are direct precedent for the administrative proceedings conducted by the Commission. The U.S. Supreme Court's decision in *Carrigan I* "...rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message." *Carrigan I*, 564 U.S. 117, 127. Further, in *Carrigan II*, the Nevada Supreme Court validated the conflict of interest standards as established under civil statutes, including the Ethics Law's utilization of an "appearance of impropriety" utilized with regard to a conflict of interest, stating that such "rules have been commonplace for over 200 years." *Carrigan II*, 313 P.3d 880, 885. The Nevada Supreme Court further instructed that "...where the conduct gives an 'appearance of impropriety' it may be prohibited." *Id.*

The Court recognized the important public interest implications that the State of Nevada has in regulating governmental ethics when it determined that the restraints placed by the Ethics Law on public officials and employees relating to private conflicts of interest and recusal statutes is "scant when compared to the state's important interest in avoiding conflicts of interest and self-dealing by public officials entrusted with making decisions affecting our citizens. *Carrigan II*, 313 P.3d 880, 887, citing *Clingman v. Beaver*, 544 U.S. 581, 586-87, 125 S. Ct. 2029, 161 L.Ed 2d 920 (2005) (a reasonable, nondiscriminatory regulation that imposes an incidental burden on associational rights is acceptable when justified by a state's important regulatory concerns). Accordingly, given the precedential *Carrigan* decisions, the Commission does not perceive the term "appearance of impropriety" to be vague or its use to establish a conflict of interest to be inappropriate.

In addition, the terms "significant" and "personal" are common qualifying terms found in numerous statutes and the words have plain meanings. Both terms are defined in the latest on-line version of the *Merriam-Webster Dictionary*. "Personal" is defined to be a matter "pertaining to or relating to the person." "Significant" is defined as "having or likely to have influence or effect" such as "a significant piece of legislation" or a matter having "a noticeably or measurably large amount such as a significant number of layoffs or producing significant profits." With respect to this RFO, the private endorsement of a candidate is a significant right belonging to the person (Antinoro) and endorsements are sought because they are likely to have an influence or effect on getting the candidate elected.

Moreover, in *Carrigan II*, the Nevada Supreme Court upheld the constitutionality of the considered provisions of the Ethics Law because a public officer/employee "in doubt of the validity of a proposed conduct [under the Ethics Law] may obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law..." *Id.*, 313 P.3d at 886. Here, Antinoro did not comply with the requirements of NRS 281A.400(7) or opinions issued by the Commission and did not utilize the Commission's advisory opinion process for guidance. If Antinoro had any doubt or question about the application of NRS 281A.400(7) to his circumstances, NRS 281A.440(1) provided him the ability to seek an advisory opinion from the Commission.

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Accordingly, based upon the entire record and the Commission's consideration of the Motions, *Stipulated Facts*, and presentations of the parties, the Commission finds good cause to enter following order:

1. The Executive Director's Motion for Summary Judgment is granted, in that, it is determined by a preponderance of evidence that Antinoro's conduct violates the provisions of NRS 281A.400(7).<sup>4</sup>
2. Subject Antinoro's Motion for Summary Judgment is denied.
3. In order to issue a final decision in this matter, the Commission directs Commission Counsel to issue a Notice and Scheduling Order for purposes of scheduling a hearing on May 15, 2017, for the Commission to consider briefs submitted by the parties addressing the willfulness of the violation of NRS 281A.400(7) under the requirements of NRS 281A.475 and whether any penalties or fines should be imposed by the Commission pursuant to the provisions of NRS 281A.480.

DATED: May 3, 2017

/s/ Cheryl A. Lau  
Cheryl A. Lau, Esq.  
Chair, Nevada Commission on Ethics

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<sup>4</sup> The provisions of the Ethics Law are interpreted utilizing the provisions of NRS 281A.020.

**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Nevada Commission on Ethics and that on this day in Carson City, Nevada, I transmitted a true and correct copy of the **ORDER ON MOTIONS FOR SUMMARY JUDGMENT** in Request for Opinion No. 16-54C, via email, to the Parties and the Requester, as an interested person, addressed as follows:

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DATED: May 3, 2017

  
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