



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Public Officer**, Public Entity,
State of Nevada,

Advisory Opinion No.19-124A

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer (“Public Officer”) is employed by Public Entity (“Public Entity”), State of Nevada, and requested this confidential advisory opinion from the Nevada Commission on Ethics (“Commission”) pursuant to NRS 281A.675 regarding the propriety of Public Officer’s conduct as it relates to the Ethics in Government Law (“Ethics Law”) set forth in NRS Chapter 281A. Pursuant to NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.¹ The Commission considered the request for an advisory opinion, information provided by Public Officer that Public Officer affirmed as true, and publicly available information.

Public Officer sought an opinion from the Commission regarding the applicability of the Ethics Law to Public Officer’s issuance of a private political endorsement of a candidate using Public Officer’s official title. After fully considering Public Officer’s request and analyzing the facts and circumstances presented by Public Officer, the Commission deliberated and advised Public Officer of its decision that so long as Public Officer fully complies with the Code of Ethical Standards set forth in NRS 281A.400 and any other applicable Ethics Laws, Public Officer may reference Public Officer’s official title in a private political endorsement. However, Public Officer must protect the public trust by ensuring the political endorsement does not utilize government resources, property, equipment or other facility or otherwise appear to be government sanctioned, which could constitute a misuse of public office under the Ethics Law. To protect the public trust and to avoid a misuse of public office, the Commission recommends proper disclaimers be included in any private political endorsement that references an official title, which disclaimer must confirm that the endorsement is not sanctioned by the government. Further, public officer should confirm the endorsement is not otherwise prohibited by other applicable government laws or policies apart from those set forth in the Ethics Law.

The Commission now renders this abstract opinion stating its formal findings of fact and conclusions of law. The facts in this matter were obtained from documentary and other evidence provided by Public Officer. For the purposes of the conclusions offered in this opinion, the Commission’s findings of fact set forth below are either based upon or accept as true the facts Public Officer presented. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this opinion. Although the full written opinion was served on Public Officer, for confidentiality reasons, this Abstract Opinion redacts

¹ The following Commissioners participated in this opinion: Chair Lau and Commissioners Duffrin, Gruenewald, Lowry, O’Neill, Wallin and Yen.

certain Findings of Fact, provides a summary of issues, and removes other identifying information to protect the confidentiality of the requester.²

II. QUESTION PRESENTED

Public Officer questions whether the Ethics Law restricts Public Officer from using Public Officer's official title to endorse a political candidate in an election campaign.

III. FINDING OF FACTS

1. Public Officer is an elected officer for Public Entity.
2. Public Officer wishes to support and endorse a political candidate.
3. Public Officer confirms that no government property, time, resources or public tax dollars would be used to accomplish the endorsement.
4. Public Officer also confirms that no references to the Public Entity or Public Entity logos would be used in the endorsement and no permission would be provided for their use on any campaign literature.
5. Public Entity does not have a specific restriction precluding political endorsements by this particular public officer; however, it has other restrictions on political activity conducted on the job, restrictions applicable to certain public officers and public employees, which in part preclude identification of the public officer/employee as an employee of the Public Entity in political matters, with an exception for candidates seeking political office.
6. The policies of Public Entity confirm that its public officers/employees are encouraged to exercise their rights as a citizen to vote and become involved in political campaigns outside of work hours and they must exercise extreme diligence in separating personal political views from official duties.

IV. STATEMENT AND DISCUSSION OF RELEVANT ISSUES AND STATUTES

A. OVERVIEW OF ISSUES

The Ethics Law promotes public integrity through the appropriate separation between public duties and private interests by Nevada's public officers and employees. Public officers and employees have a duty to avoid conflicts of interest between private interests and public duties. NRS 281A.020. Campaigns and political support are private interests that often converge with public duties. See *In re Antinoro*, Comm'n Op. Nos. 18-031C and 18-052C (2019).

As a general precept, public officers and public employees may privately support or oppose a political campaign and political candidates provided they do not use governmental owned property, equipment, email, or resources, including time. See NRS 281A.400(7) (prohibitions on use of government property, equipment and resources for

² The Commission reserves its statutory authority should an ethics complaint be filed presenting contrary circumstances. See *In re Howard*, Comm'n Op. No. 01-36 (2002) (notwithstanding first-party opinion, public is not precluded from bringing ethics complaint) and *In re Rock*, Comm'n Op. No. 94-53 (1995) (reservation of right to review until time issue is raised).

personal purpose or to benefit a person to whom there is a private commitment). In addition, in ascertaining whether NRS 281A.400(2) (use of public position to provide or receive an unwarranted privilege, preference or advantage (“campaign advantages”), the Commission reviews the facts on a case-by-case basis. In doing so, the Commission can take into consideration agency policies, and “the starting point of the analysis is an incontrovertible premise that it would never be proper for a governmental agency to endorse a political candidate.” *In re Kirkland*, Comm’n Op. No. 98-41 (1999), at p. 4.

B. RELEVANT STATUTES

1. Duty to Avoid Conflicts of Interest

NRS 281A.020(1) provides:

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.

2. Code of Ethical Conduct

NRS 281A.400(2) and (7) provides:

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. As used in this subsection, “unwarranted” means without justification or adequate reason.

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 a significant personal or pecuniary interest of the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity. This subsection does not prohibit:

- (a) A limited use of governmental property, equipment or other facility for personal purposes if:
 - (1) The public officer or employee 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.

V. DECISION

The jurisdiction of the Ethics Commission governs the conduct of public officers and employees, as those persons are defined in NRS 281A.160, 281A.182 and 281A.150, respectively. This jurisdictional boundary is referenced at the outset of this opinion because the Commission does not have authority to interpret or apply other applicable policies or State laws, including those pertaining to campaign finance reporting requirements. Therefore, this opinion is limited to providing guidance to Public Officer on Public Officer's compliance obligations under the Ethics Law pertaining to the use of Public Officer's official title to provide a private political endorsement.

Public officers and employees have "a significant personal interest in endorsing a political candidate, which private interest is of such importance as to be protected by the *First Amendment of the U.S. Constitution*." *In re Antinoro*, Comm'n Op. No. 16-54C (2017), at p. 4.³ In addition, incumbent Public Officers seeking re-election have significant personal and financial interests in maintaining the elected position. *In re Antinoro*, Comm'n Op. Nos. 18-031C/18.052C (2019), at p. 5.

Significant personal and financial interests relating to campaigns and political support converge with the Ethics Law when public officers and employees do not maintain proper separation between their private interests and public duties. Public officers and employees have a responsibility to avoid conflicts between their private interests and public they serve. NRS 281A.020. In particular, a public officer or employee must not use a public position in government to secure unwarranted campaign advantages for themselves or others to whom they have a commitment. In addition, public officers and employees must not use government time, property or resources to benefit their own campaigns or their significant personal interest in endorsements and supporting the campaigns of other persons. *Id.* Simply, public officers and employees are not entitled to take advantage of public resources to support their own campaign or other political campaigns. *Id.* (referencing application of NRS 281A.400(7)); *See also In re Matson*, Comm'n Op. No. 11-67C (2014).

Public Officer confirms that if the Ethics Law allows Public Officer to provide the private endorsement, Public Officer would like to use Public Officer's official title, but would not otherwise use government property, time, resources or public tax dollars in furtherance thereof. Further, Public Officer confirms that the policies of the Public Entity do not preclude the specific endorsement, although such policies preclude other conduct associated with supporting political campaigns including precluding any use of any Public Entity logos, and no permission would be provided for their use on any campaign literature. Further, Public Officer recognizes the policies instituted by Public Entity must be complied with to assure Public Officer does not grant an "unwarranted" campaign

³ On October 30, 2019, the First Judicial District Court of the State of Nevada, Case No. 17 OC 001381B, affirmed the final decision of the Commission and denied judicial review in *In re Antinoro*, Comm'n Op. No. 16-54C (2017).

advantage by Public Officer's conduct, implicating various provisions of the Code of Ethical Standards set forth in NRS 281A.400.

In review of Public Officer's circumstances, the Commission in particular focuses on the requirements of NRS 281A.400(2) and (7) to determine whether Public Officer will be: (1) improperly using Public Officer's public position to provide an unwarranted privilege, preference, exemption or advantage for the Public Officer or any person to whom Public Officer has a private commitment, by the issuance of a private political endorsement (NRS 281A.400(2)); or (2) improperly using public property, equipment, and resources to further a significant personal or pecuniary interest (NRS 281A.400(7)). Private interests relating to political campaigns and endorsements include constitutional rights and interests in supporting candidates, financial interests in holding or retaining an elected position, or furthering the interests of a person to whom there is a private commitment.⁴

Applicability of other provisions of the Ethics Law are dependent upon the factual circumstances, which include: other provisions of NRS 281A.400 (the Code of Ethical Standards), NRS 281A.420 (disclosure and abstention requirements) and NRS 281A.520 (restrictions pertaining to supporting or opposing a candidate or ballot measure). Here, the factual circumstances provided are narrow and only apply to Public Officer's proposed use of an official title for a private political endorsement. Varied facts could certainly change the analysis. For example, of particular note is that Public Officer seeks to endorse a candidate and the policies of Public Entity do not preclude the use of the title for this Public Officer. Nevertheless, any public officer that uses an official title must recognize the potential for such use to violate the Ethics Law.

Although the expanse of this issue is not defined in this opinion for all public officers, some examples are provided. If the facts demonstrated that the political candidate would have authority or control over Public Officer's public duties and that a favor in the form of a private endorsement is provided in exchange for future or existing benefits, that would constitute an unfaithful and partial discharge of Public Officer's public duties and the provisions of NRS 281A.400, in particular NRS 281A.400(1), would be implicated. Exchange of favors or *quid pro quo* includes favors in performing public duties associated with pending matters before or matters under the authority of Public Entity. Here, Public Officer should take special care with any political endorsement and fully appreciate the implications of the appearance of impropriety under the Ethics Law.

A. NRS 281A.400(2) – IMPROPER USE OF PUBLIC POSITION

NRS 281A.400(2) mandates that a public officer or employee shall not use a public position 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. The statute defines "unwarranted" to mean without justification or adequate reason. The relationships constituting a commitment in a private capacity are listed in NRS 281A.065.

In *In re Kirkland*, Comm'n Op. No. 98-041 (1999), the Commission reviewed whether an elected public officer's use of an official title, uniform and badge to provide a

⁴ Public Officer does not indicate whether the proposed political endorsement pertains to any person to whom Public Officer has a private commitment under NRS 281A.065. Accordingly, the Commission does not specifically address issues associated with private commitments in this opinion.

private political endorsement was unwarranted. The Commission found that an elected public officer's use of only a name and title were not precluded by the Ethics Law. However, any use of an official position including any accouterments of public office to bolster the political endorsement was inappropriate because it creates the impression of government sanction. A hard line was established to guide elected public officers to assure compliance with the Ethics Law and opinion precedent. "The power and prestige of the [public] office" may not be used to bolster private political endorsements." *In re Antinoro*, Comm'n Op. No. 18-031C/18-052C (2019), at p. 6, citing *In re Kuzanek*, Comm'n Op. No. 14-61C (2014).⁵

The Commission continues to caution against any attempt, even an incidental one, to bolster a political endorsement by the use of a public office and associated accouterments or any governmental property, equipment or resources.⁶ Such uses provide the impression that the public officer is acting in an official capacity implicating NRS 281A.400(2). Likewise, the use of official authority to excuse a public officer's own compliance or to create or manipulate established policies in order to secure private campaign advantages will be considered by the Commission to determine whether there is compliance with NRS 281A.400, the Code of Ethical Standards. See *In re Antinoro*, Comm'n Op. No. 16-54C (2017). It is a fundamental principle of law that established local governmental policies may not be violative of or materially inconsistent with State Law. See *Clark County Social Serv. Dep't v. Newkirk*, 106 Nev. 177, 789 P.2d 227 (1990).

Based upon Commission precedent and Public Officer's circumstances, the Commission does not find that Public Officer's use of his/her official title to provide a private political endorsement to be unwarranted under NRS 281A.400(2) because the Public Entity's associated policies do not preclude this particular Public Officer from using the title for a political endorsement. Public Officer will comply with the established written policies of Public Entity, and there is no indication that Public Officer will improperly use his/her authority to dictate or manipulate policy to favor a private purpose. Nevertheless, to assure that there is no associated use of a public office and related accoutrements or government property, equipment and resources, Public Officer must be vigilant to fully separate private interests from public duties. One suggested measure to assist in this endeavor is for Public Officer to include a disclaimer in the endorsement to assure that the political endorsement is not perceived to be an official endorsement of Public Entity. The disclaimer would serve to confirm that the endorsement is issued only in Public Officer's private capacity and is not an official endorsement from Public Entity. The disclaimer could also detail use restrictions, so the endorsement is not in any way utilized to suggest it was issued pursuant to or sanctioned by the official government authority, including prohibitions against any depictions of or references to the accoutrements of public office or governmental property, equipment and resources.

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⁵ The federal Hatch Act (5 U.S.C. §§ 1501-1508) may separately apply to political activity of certain state and local government officers and employees, but the act does not preempt application of the Ethics Law or preclude the State of Nevada or local government employers/agencies from creating laws or internal policies governing political activities of governmental officers and employees. See *In re Antinoro*, Comm'n Op. No. 18-031C/18-052C (2019), which clarified any contraindication set forth in *In re Pitts*, Comm'n Op. No. 14-71C (2016).

⁶ Examples of accouterments of public office could include uniforms, badges, official stationery, address, photographs of public offices and other indicia of government property.

B. NRS 281A.400(7) – IMPROPER USE OF GOVERNMENT PROPERTY, EQUIPMENT AND RESOURCES

NRS 281A.400(7) restricts the use of governmental property, equipment and resources (including work time, computers, email systems, letterhead, badges, uniforms or physical accoutrements of public office) to benefit a significant personal or pecuniary interest of the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity.⁷ However, the statute does not prohibit the limited use of governmental property, equipment or other facility for personal purposes if: (1) the public officer or employee 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.

Notably, the Legislature intended NRS 281A.400(7) to reach beyond financial interests by referring also to “personal” interests. See *In re Bowles*, Comm'n Op. No. 96-49 (1996) (discussing application of NRS 281A.400(7) - formerly NRS 281.481(7) - to a public officer's personal use of public money when Public Officer “borrowed” \$100 from a public cash drawer to pay for food at a political party picnic). In *Bowles*, the Commission acknowledged that the appropriate inquiry is “whether the public officer used the public's resources to benefit himself *in any way*.” *Id.* (emphasis in original). Quite simply, NRS 281A.400(7) draws a “clear and bright line” that public property belongs to the public and cannot be used for personal benefit or gain. *Id.*

Here, Public Entity's established governmental written policies do not provide for a limited use of governmental property for political endeavors, nor should they, since governments have a right to enact content-neutral policies and laws assuring the use of its property for official governmental purposes without violation of the *First Amendment*. See *Ysura v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355, 129 S.Ct. 1093, 1096, 172 L.Ed.2d 770, 775 (2009). Further, the application of the limited use exception to excuse a public officer's or employee's use of government property, equipment or resources to support private political activities is difficult to establish because each of the four requirements of the limited use exception must be present for the exception to apply.

In particular, a public officer or employee will have difficulty establishing that the use of government property for political endeavors did not create an “appearance of impropriety” given the government's legitimate purpose in regulating the misuse of government property by its public officers and employees. The courts have determined that the phrase “appearance of impropriety” set forth in NRS 281A.400(7) is not vague and is constitutional. See *Comm'n of Ethics v. Carrigan*, 564 U.S. 117, 131 S.Ct. 2343 (2011) and *Carrigan v. Comm'n on Ethics of Nev.*, 129 Nev. 894, 313 P.3d 880 (2013). An “appearance of impropriety” is defined as “conduct or status that would lead a reasonable person to think that the actor is behaving or will behave inappropriately or wrongfully.” *Black's Law Dictionary* (10th ed. 2014), p. 875.

⁷ NRS 281A.400(7) references the term “property,” which plain meaning encompasses all forms of property owned or controlled by the government, including personal property, real property and intellectual property rights. Likewise, the descriptive terms of “significant” and “personal” interest are defined by their plain meaning to be a personal interest that is important rather than incidental, trivial or *de minimus*. See *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003), p. 1159, *Black's Law Dictionary* (10th ed. 2014), p. 1325, and supportive legislative history found at Exhibit C, Hearing on Senate Bill 228, Assembly Legislative Operations & Elections Comm., 77th Leg. (Nev. May 14, 2013).

The use of government property is essential to government operations and is vital to the identification of official matters. For example, the Commission has issued opinions that it is inappropriate for public officers and public employees to use official letterhead, email systems, equipment, facilities, and other government resources for private campaigns or political endorsements. In the letterhead opinions, the Commission has consistently viewed the official letterhead of a government office or agency as governmental property. See *In re Hammargren*, Comm'n Op. No. 95-35A (1996); *In re Tiffany*, Comm'n Op. No. 15-21C (2007); *In re Hettrick*, Comm'n Op. No. 01-10A (2001); and *In re Antinoro*, Comm'n Op. No. 16-54C (2017). As the Commission explained:

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.

Id., at pg. 7.

Likewise, the Commission has found that public email systems, emails and associated contact lists are governmental property and improper use of such property for political purposes violated NRS 281A.400(7). See *In re Cranor*, Comm'n Op. No. 13-82C (2014). Use of government properties and equipment (computers) to support a re-election campaign was found to constitute three willful violations of the Ethics Law resulting in a referral to the Nevada Legislature for removal from office. See *In re Augustine*, Comm'n Op. No. 04-47C (2004). The Commission determined that the use of government resources to prepare signs during work hours, the use of public vehicles to promote campaign messaging and the placement of campaign signage on public vehicles to be an improper use of government property. See *In re Matson*, Comm'n Op. No. 11-67C (2014). Also, of note is the application of NRS 281A.520 to campaigns. This statute restricts a public officer or employee from requesting or causing a governmental entity to incur an expense to support or oppose a candidate or ballot measure, including dissemination of pamphlets, brochures, publications, advertisements or television programs that prominently feature the activities of a current public officer who is a candidate for a state, local or federal elective office.

VI. CONCLUSIONS OF LAW

1. Public Officer is a public officer as that term is defined in NRS 281A.160.
2. Pursuant to NRS 281A.675, the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to Public Officer under NRS 281A.665.
3. Based upon Public Officer's particular position and the presented circumstances, NRS 281A.400(2) and (7) do not prohibit Public Officer from using Public Officer's official title to privately endorse a political candidate provided that Public Officer does not utilize government resources, property, equipment or other facility or otherwise conduct himself/herself in a manner to bolster the political endorsement by even an incidental appearance that it is government sanctioned.
4. Pursuant to NRS 281A.020 and the Code of Ethical Standards set forth in NRS 281A.400, Public Officer has a duty under the Ethics Law to comply with its restrictions and maintain proper separation between Public Officer's public duties

and private campaign interests; therefore, the Commission provides guidance to Public Officer in protection of the public trust, as set forth in this opinion.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

Dated this 1st day of June, 2020.

NEVADA COMMISSION ON ETHICS

By: /s/ Cheryl A. Lau
Cheryl A. Lau, Esq.
Chair

By: /s/ Philip K. O'Neill
Philip K. O'Neill
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

By: /s/ Kim Wallin
Kim Wallin
Commissioner

By: /s/ Barbara Gruenewald
Barbara Gruenewald, Esq.
Commissioner

By: /s/ Amanda Yen
Amanda Yen, Esq.
Commissioner

By: /s/ Teresa Lowry
Teresa Lowry, Esq.
Commissioner