

## Hypothetical Opinion No. 89-8

### BEFORE THE NEVADA COMMISSION ON ETHICS

The subject matter of this opinion is whether certain members of a local school board violated the ethical standards set forth in NRS 281.481 by voting to reimburse themselves for out-of-pocket legal expenses in the amount of \$341.63, at a meeting of the school board.

The Nevada Commission on Ethics takes jurisdiction in this matter pursuant to NRS 281.511.

This matter came before the commission, meeting in executive session, in Las Vegas on June 27, 1990, at which time the commission heard the report of the investigation by the deputy attorney general representing the commission. The commission also received documentary evidence regarding the subject matter of this opinion. The commission met again in executive session on Monday, November 19, 1990, in Reno, Nevada, at which time the opinion of the commission was reviewed and approved.

Based upon the foregoing, the commission makes these Findings of Fact and issues the Opinion that follows.

#### Findings of Fact

1. During a meeting of the school board, a vote was taken on a properly noticed agenda item regarding reimbursement for out-of-pocket legal expenses for certain individual board members in a suit filed by two teachers' associations and one private citizen. The suit itself is not the subject matter of this opinion. No disclosure of interest regarding the agenda item was made on the record by the individual board members who were to be reimbursed. All members present voted on the matter.
2. The above-described lawsuit was filed against the members of the board, the school superintendent, and various school district employees in 1989, alleging various causes of action.
3. The school district had an insurance policy which could have provided them with defense counsel, and steps were taken to notify the insurance company of the suit. Due to the difficulty in notifying the insurance company, and the short period of time in which the defendants had to answer the complaint, private counsel was hired with the private funds pooled by the defendants to provide a defense in a timely manner. Each of the individual board members who were defendants in the lawsuit paid a certain amount of money for the purpose of securing private defense counsel. The school district's retained attorney was retained in his private capacity until the insurance company could be given proper notice and opportunity to tender a defense to the members of the school board. This attorney was retained in mid-April 1989, and the insurance company was contacted.
4. Correspondence from a private law office indicates that the insurance company tendered a defense to the individual defendants. The representation of these defendants was shared by the law firm and the school district's privately retained attorney. The record indicates that the school district's attorney was associated as counsel to the law firm for purposes of billing, thus the retainer paid by the individual defendants ceased to be billed against.
5. The insurance company paid a certain amount for the school district's retained counsel's services. After billing the interim defense of the board members against the retainer paid by the individual defendants, the funds remaining in his attorney's trust account totaled several thousand dollars. That sum was divided between the six defendants and refunded to each defendant. This money was repaid to the individual defendants due to the insurance company's tender of defense in this matter.

6. The remaining amount to be reimbursed, and that which is actually in question in this matter, is the difference between the amount reimbursed to the individual defendants and the amount actually tendered by the defendants to the school district's attorney for his retainer. This amount represents payment for services rendered prior to the tender of defense by the insurance company in late April 1989.

7. Had there been no delay in requesting and obtaining the insurance company tender of defense, no individual board member would have incurred any debt for legal fees. The amount was advanced for purposes of securing a legal defense of the board members.

## OPINION

### I. Generally

Based upon the Findings of Fact, the commission concludes that the members of the school board are public officers as defined in NRS 281.4365(1), and members of the legislative branch of government as defined by NRS 281.4355.

The legislative declaration and findings which express the public policy of the Nevada Ethics in Government law appear at NRS 281.421:

#### **281.421 Legislative declaration and findings.**

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 to avoid conflicts between his private interests and those of the general public whom he serves.

2. The legislature finds that:

- (a) The increasing complexity of state and local government, more and more closely related to private enterprise, enlarges the potentiality for conflict of interest.
- (b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

Consistent with that policy and the specific provisions of the Code of Ethical Standard (NRS 281.481- 281.511, inclusive), the opinion of the commission may include guidance to the public official pursuant to NRS 281.521(1):

1. The commission's opinions may include guidance to the public officer or employee on questions whether:

- (a) A conflict exists between his personal interest and his official duty.
- (b) His official duties involve the use of discretionary judgment whose exercise in the particular matter would have a significant effect upon the disposition of the matter.
- (c) The conflict would materially affect the independence of the judgment of a reasonable person in his situation.
- (d) He possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision.
- (e) It would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest or pursue some other designated course of action in the matter.

## DISCUSSION

This opinion does not address the appropriateness of the decision by the school board to reimburse some of its individual members for legal expenses incurred. Rather, the commission reviews the conduct of the individual board members in voting on the agenda item absent disclosure. NRS 281.481 states in pertinent part:

**281.481 General Requirements.** A code of ethical standards is hereby established as a guide for the conduct of public officers and employees:

3. No public officer or employee may approve, disapprove, vote, abstain from voting or otherwise act upon any matter **in which he has a significant pecuniary interest without disclosing the full nature and extent of his interest.** ..[emphasis added].

A significant pecuniary interest must be measured by its impact upon the individual public official. The commission determines that the amount of money involved in the vote which is the subject matter of this opinion request (less than \$500.00) is not a significant pecuniary interest which would trigger the required disclosure under the above-related provision.<sup>[1]</sup> Further, the commission notes the agenda item itself discloses the board members individual interest in the matter. No attempt at withholding information from the public was made by these individual board members in order to benefit personally from this agenda item. The public received notice that the matter would concern reimbursement for the board members. The amount in question does not rise to the level of a significant pecuniary interest, therefore there was no duty on the part of the board members to disclose beyond that which was in the agenda item itself.

The Ethics In Government Law should not be construed to prohibit the exercise of discretion by public officials in the discharge of their public duties. The chapter merely offers guidelines under which that discretion should be exercised. It was discretionary with the board whether reimbursement was appropriate. Nothing in Chapter 281 of the Nevada Revised statutes would preclude these individuals from exercising that discretion, given the nature of the interest in the agenda item.

## CONCLUSION

Under the facts related to the commission in this matter, no duty to disclose the personal interests of the individual board members in agenda item existed. The amount in question did not amount to a significant pecuniary interest, which is required prior to the existence of a duty to disclose for a public official.

DATED:

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R.C. WILSON, II, Chairman

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<sup>[1]</sup> Even if it should be found that the amount of reimbursement represents a significant pecuniary interest, it appears that by virtue of the posted agenda item, and the motion made at the meeting, in conjunction with public knowledge of the issue, adequate disclosure was made by the public officials.