

Abstract of Opinion No. 90-2

BEFORE THE NEVADA COMMISSION ON ETHICS

The subject matter of this opinion is whether a legislator, as a full-time employee of the University System, may participate and vote on budgetary matters affecting the University System as a whole and the school for which the legislator works directly.

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

This matter came before the Commission, meeting in open session, in Reno on November 19, 1990, at which time the commission heard testimony from the legislator. The legislator waived the confidentiality of the hearing, as well as the opinion. (See NRS 281.511) .The Commission thereafter met for deliberations. Based upon the foregoing, the Commission makes these Findings of Fact and issues the opinion that follows.

FINDINGS OF FACT

1. The individual who is the subject matter of this opinion is a legislator. As a legislator, this individual is required to sit on several committees and subcommittees.

2. As a member of these various committees, the legislator has the responsibility to review budgets for recommendation to the full committee.

The legislator does not sit on the committee that reviews the budget for the university system; however, as a member of the full committee and the Assembly as a body, the legislator votes upon these appropriation requests. Further, this individual is called upon to vote as a member of the committee which oversees revenue requests made by state agencies in the interim between legislative sessions.

3. The legislator is a full-time unclassified employee of the state University. The salary paid to this individual for the position is the legislator's principal source of income. The State University is a part of the University System. While serving in the legislature, the legislator is on leave from the University, and does not receive compensation from the University.

4. The legislator is employed in what is referred to as a 'soft money' position, i.e., a position which is not funded by regular legislative appropriation, but nevertheless is a part of the state budget. 'Soft dollar' moneys are those funds raised by grant or gift to the University System. Despite the origin of these funds used for the compensation of this position, the legislator is eligible for and receives salary increases in the same manner as other University employees whose salaries are funded by legislative appropriation.

5. The responsibilities of the legislator at the school for which the legislator works, directly relate to the school's development. Specifically, the legislator obtains grants and gifts for the school. The amount of grants and gifts obtained do not impact the salary paid this individual.

6. The school for which the legislator works directly is a part of the University of Nevada, Reno, budget, together with other colleges and schools physically located at the northern campus. The University of Nevada, Reno, budget is part of the University of Nevada System budget. The University of Nevada, Reno, budget, together with those of the University of Nevada, Las Vegas, the community colleges, and the Desert Research Institute, are component parts of the University of Nevada System budget, which is ultimately part of the general appropriations bill for the entire state budget and is voted on after concurrent approval is reached by both money committees of the legislature. The

budget, and its component parts, are reviewed and heard independently by the finance committees of both houses. Thereafter, between the committees, differences over the respective budgets are reviewed and resolved concurrently by the two committees. In response specifically to the legislator's opinion request, this opinion concerns the Assembly's consideration of the state budget of which the University System budget is a part.

The same general legislative process applies to the capital improvements appropriations bill. The school for which the legislator works competes with the other schools and colleges of the University of Nevada, Reno, for priority for available funding.

The University System then competes with all other state agencies for the priority of capital improvement projects and funding.

7. The state budget is divided by subjects which are assigned to subcommittees of the finance committee for review and analysis. After subcommittee review and recommendation, the budgets of the University of Nevada, Reno, and of the University System are reviewed and may be modified by the full committee which oversees finance.

8. In the school budget, the legislators salary appears as a line item. It is not referred to specifically in the University of Nevada, Reno, budget, the University System budget, or the state budget.

OPINION

I. Generally

Based on the Findings of Fact, the commission concludes that the legislator is a public officer as defined by NRS 281.4365(1) and is a member of the legislative branch of government as defined in NRS 281.4355.

The subject of this opinion is whether the legislator has a duty to disclose, in addition to abstain from, voting on matters affecting her employment at the University System as an agency of the State of Nevada, the University of Nevada, Reno, and the particular school for which the legislator works directly.

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 life and 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 Standards (NRS 281.481- 281.511, inclusive), the opinions 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 a public officer or employee on questions of 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.

II. DISCLOSURE

The standards to which public officers and employees must conform their conduct to are found at NRS 281.481.

NRS 281.481 General Requirements

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. Such disclosure must be made before the time when he is to perform his duty or concurrently with that performance. If the officer or employee is a member of a body which makes decisions, he shall make disclosure to the chairman and other members of the body. If the officer or employee is not a member of such a body and holds appointive office, he shall make disclosure to the supervisory head of his organization or if he holds an elective office, to the general public in the area from which he is elected [emphasis added].

The first issue for consideration is whether the legislator's employment by the University of Nevada, Reno, constitutes a significant pecuniary interest which requires disclosure of the full nature and extent of her interest in matters affecting her employer which may come before her as a legislator. The salary paid to the legislator by the school is the principal source of her income. Accordingly, the legislator has a significant pecuniary interest in the budget of her employer.

The school is a part of the University of Nevada, Reno. Its budget is a separate component of the budget of the University of Nevada, Reno, along with the respective budgets of colleges and other schools of the University of Nevada, Reno. The operational and capital improvements budgets of the University of Nevada, Reno, are a component of the University of Nevada System budget, which also includes the budgets of the University of Nevada, Las Vegas, the Community College System and the Desert Research Institute. At each level of the budgetary process the schools and colleges which make up the University System compete for available funding. Ultimately, the University of Nevada System budget competes with all other state agency budgets for available funding.

Accordingly, the requirement that the legislator "disclose the full nature and extent of his or her interest" as a public employee employed by a school which is a part of the University of Nevada, Reno, should apply at all levels of consideration (in subcommittee, full committee and the Assembly as a body when acting on budgets of the school, the University of Nevada, Reno, and the University of Nevada System) of the general appropriations bill. Adequate disclosure of "the full nature and extent of her interest," requires that he or she is employed in a full-time position with a school which is a part of the University of Nevada, Reno, and the nature of his or her position at the school. Disclosure is required not only prior to voting or abstaining in accordance with the discussion below, but at all times the matter is discussed or considered. At all levels of consideration the legislator has a significant pecuniary interest because his or her livelihood is directly affected by the measure which is before her for consideration.

III. Abstention

NRS 281.501 states in pertinent additional standards for members of the legislative branch who vote on matters pending before them.

1. In addition to the general requirements of the code of ethical standards, a member of the legislative branch should not vote upon but may otherwise participate in the consideration of the matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
 - a.
 - b. his pecuniary interest; or
 - c. his commitment in a private capacity to the interest of others.

The foregoing standards raise the question of whether a reasonable person's independence of judgment would be materially affected by such pecuniary interest or private commitment, requiring the legislator to abstain from voting in subcommittee and full committee, and ultimately in the Assembly as a body when acting upon the budget of the school for which the legislator works directly, the University of Nevada, Reno, and the University of Nevada System. A member of the legislative branch of government is required to abstain from voting when (i) their pecuniary interest, or (ii) their commitment in a private capacity to the interest of others materially affects the independence of judgment of a reasonable person in her circumstance. The test is an objective test, not one which is personal or subjective to the individual.

With respect to each of the components of the University System budget, including the budget of the school for which the legislator works directly, the (i) pecuniary interest of the legislator in her salary which is funded by a component of this budget, as well as (ii) her commitment in a private capacity to the interest of the school for which he or she works directly ("others") would "materially affect the independence of judgment of a reasonable person in her position in consideration of those matters," therefore imposing the duty to abstain from voting.

The standards set forth above and the facts of this matter would require abstention when considering the budget for the school for which the legislator works directly, the University of Nevada, Reno, as well as the University of Nevada System. It would not, however, require abstention from voting on the general appropriations bill of which they are a part, or any other budgets or related issues. The nexus between the legislator's position with the University system by virtue of the legislator's employment with the school and a pecuniary interest in the legislator's own salary, as well as the legislator's commitment in a private capacity to the interest of the particular school, is too close for it not materially to affect the independence of judgment of a reasonable person in like circumstances when voting on the budgets of the particular school, the University of Nevada, Reno, and the University System. A reasonable person would feel loyalty and commitment toward and employer such that it would influence his or her judgment in the consideration of matters which affect the funding or interests of the employer.

The foregoing does not require abstention from voting on the general appropriations bill which includes these and other budgets and the entire state budget. The legislators' relationship with the school is of less influence upon the state budget and therefore would not materially affect the independence of judgment of a reasonable person where the general appropriations bill is concerned.

The same analysis described above should apply when the capital improvements budgets are considered for the school for which the legislator works directly, the University of Nevada, Reno, or the University of Nevada system.

IV. Participation

While one should abstain from voting as provided herein under these circumstances, the legislator may otherwise participate in the consideration of the matter pursuant to NRS 281.501(1).

COMMENT

It is specifically noted, as footnoted on page 1 of this opinion, that the foregoing opinion only applies to these specific circumstances, and may not apply to other circumstances. The principals of NRS ch. 281 quoted and discussed must be applied on a case-by-case basis, with results which will vary depending upon the specific facts and circumstances involved.

NEVADA COMMISSION ON ETHICS

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